Minnesota Wetland Conservation Act Rulemaking
MN Rules Chapter 8420

Wetland Bankers Meeting

November 15, 2023

BOARD OF WATER AND SOIL RESOURCES

www.bwsr.state.mn.us/wetlands

Meeting Protocol

- ❖ We plan to record this meeting and may post it on the agency's rulemaking website.
- ✓ Keep your microphone muted (except when you are speaking) and keep your camera off.
- ✓ Opportunities will be provided at the end of each topic to ask questions or provide comments. Please "raise your hand" if you have a question or comment.
- ✓ We will remain available after the meeting ends in case any of you have some questions/comments that you would prefer to discuss "offline." We also will be available to meet with you individually to bring you up to speed on any given topic.
- ✓ If you want to think about the topics more before commenting, you are welcome to contact us later with your comments or questions – we will provide our contact information at the end of the meeting.
- ✓ Please be respectful - all perspectives are legitimate. In the end, the WCA policy goal is to consider all perspectives in improving outcomes for the public as a whole.

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1) Rulemaking background.
2) Topics likely to be held for a future rulemaking.
3) Wetland Typing for Mitigation.
4) Presettlement Areas for Wetland Replacement and Bank Service Areas.
5) Implementation of statute changes relating to wetland mitigation siting.
6) Misc. topics.
7) Next steps.

Rulemaking Background

Refresher - Statute vs. Rule

Statutes are the permanent laws of the state, incorporating new laws, amendments, or repeals of old law. They originate as bills passed by the legislature that are signed into law by the governor.

Administrative Rules are adopted by an agency to make the law it administers more specific or to govern the agency's organization or procedure. Authority must first be granted by the legislature. Rules have the effect of law.

Wetland Conservation Act Statutes

- BWSR's authority stems from State Statute.
- Wetland Conservation Act statutes are primarily contained in:
    - Minn. Stat. Chapter 103G (Waters of the State)
- Relevant statutes also contained in Chapters:
    - 103A
    - 103B
    - 103F
    - 15
    - and others
- ***BWSR's rulemaking authority is limited by what statute allows or prescribes.***

Rulemaking Authority - Statute vs. Rule

When do statute changes take effect?

1) Statute Prescribes Standard: Statute is specific and takes effect regardless of what is in rule (like the 2011 & 2012 WCA statute changes).

2) Statute Grants Authority: Statute provides an agency with authority or a directive, but does not take effect until action is taken by the agency in rule or otherwise (many of the 2015 WCA statute changes).

Scope of WCA Rulemaking

2011, 2012, 2015, & 2017 statute changes:

- Some of the statute changes can be incorporated into rule as-is, or with a realistic amount of work.
- Several of the statute changes require substantial additional program development work to implement – these items will be held for a future rulemaking.

Other misc. changes to improve the efficiency, effectiveness, and/or outcomes of the rule, particularly relating to replacement wetlands.

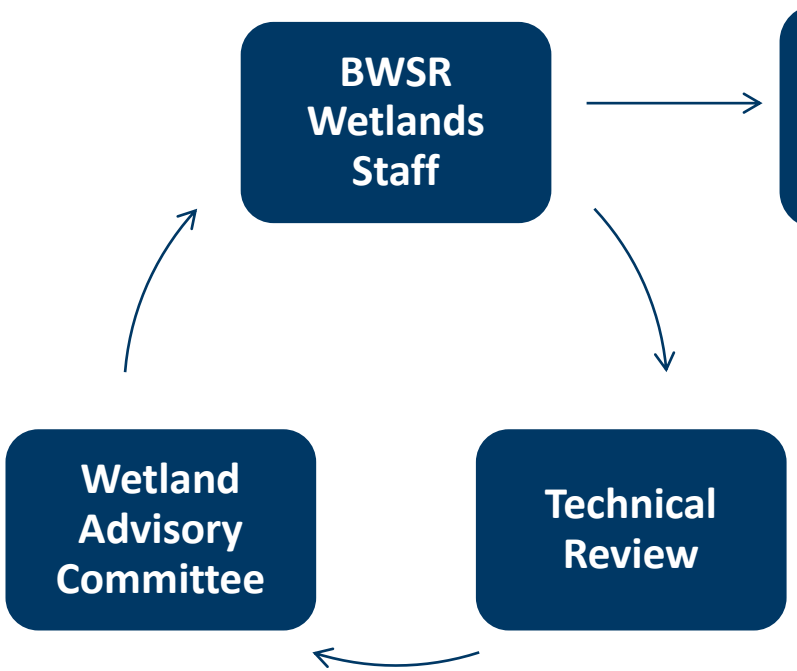
- Such changes will be assessed on a case-by-case basis.

Guiding Principles of Rulemaking

BWSR will adhere to the following principles as we consider input and develop rule language:

- Consistency with statutory intent and the purpose of WCA
- Simplification and clarification
- Implementable
- Have a tangible result or outcome
- Improve accountability
- Minimize negative impacts to LGU workload
- Limit unintended consequences
- Balance public costs and benefits
- Seek stakeholder support
- Fairness and consistency

Rule Development Process



1) BWSR staff develop proposals for review by LGU/technical staff and Advisory Committee.
2) Staff make revisions, repeat process as necessary.
3) Final draft rule and SONAR reviewed by BWSR Wetland Committee with recommendation to full board.

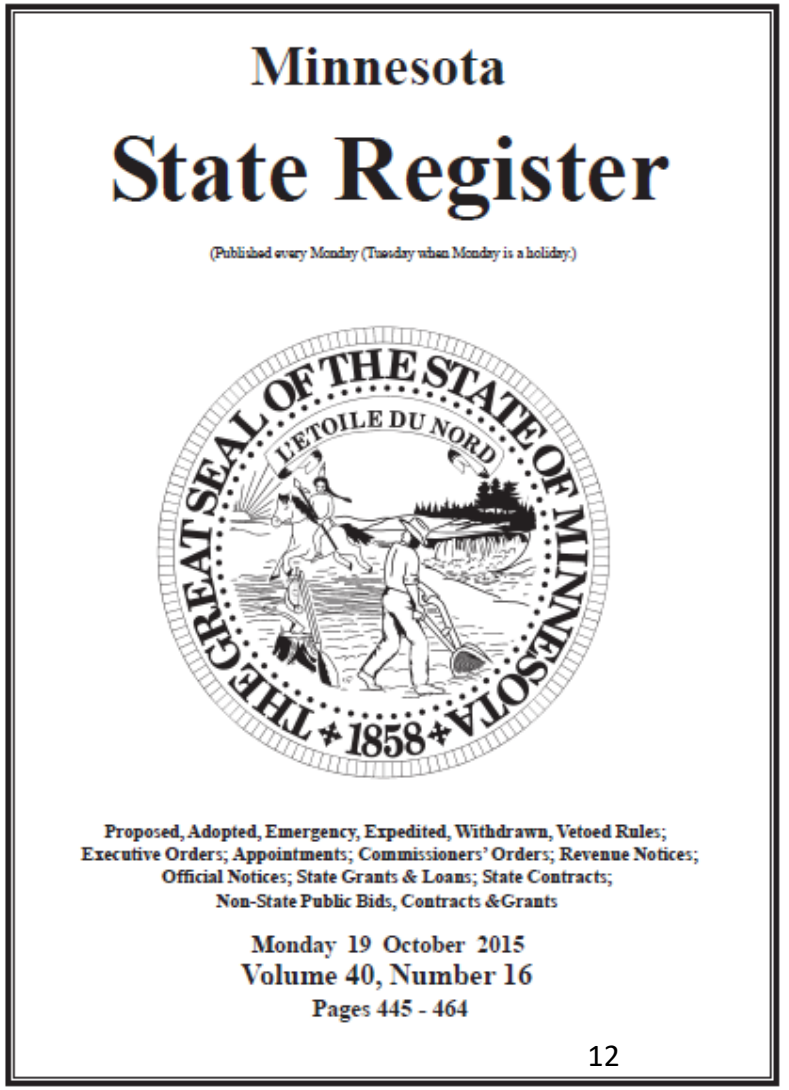
Note: All information will be shared publicly and other stakeholders & interested individuals will be provided ongoing opportunity throughout the rule development process to provide input.

WCA Rulemaking Requests for Comments

1) Initial Request for Comments (10/19/15).
   - Official start of rulemaking.
   - 11 comment letters received.

2) Second Request for Comments (1/18/22).
   - Renewal of rulemaking.
   - 8 comment letters received.

❖ All comments posted on BWSR website.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Volume 40, Number 16
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Topics Likely to be Held for a Future Rulemaking

- Wetland Bank Plan Approval Process
- In-Lieu Fee Program & Compensation Planning Frameworks/High Priority Areas
- Wetland Replacement Buffers
- Stream Restoration and Wetland Credits (Quantification Tool)

Wetland Bank Approval Process

Wetland Bank Plan Decision Process

- Statute change – in effect, BWSR *may* make bank plan decisions for WCA.
  - Efficient and consistent decisions across bank service areas.
  - Ease the workload for the LGUs.
- Discussed various approaches with Wetlands Advisory Committee.

1) Generally, the committee was not supportive of:
   - The status quo.
   - BWSR having full decision-making authority.
2) Other options will require more work and vetting to implement.

In-Lieu Fee Program & Compensation Planning Frameworks

ILF Program – Statutory Background (2015)

Several provisions related to an In-Lieu Fee (ILF) program were enacted in the 2015 Statutory revisions. They included:

A. 103G.2242 Subd. 1: Clarified that the banking program established in the WCA Rules can include an ILF program, and the ILF must be consistent with the requirements of the Federal Mitigation Rule.

B. 103G.2242 Subd. 3(a)(2): Provided authorization for wetland replacement to occur after the impact when using the ILF.

C. 103G.2242 Subd, 3(b): Provided BWSR with specific authorities related to implementation of the banking program, including establishing in-lieu fee payment amounts and holding money in an account in the special revenue fund.

D. 103G.2242 Subd. 12: Revisions to allow wetland replacement to take place after wetland impacts occur, enabling implementation of an in-lieu fee program.

In-Lieu Fee Program
and Compensation Planning Frameworks

In-Lieu Fee Program Instrument

- Administrative document
- Prospectus submitted 2017.
- Draft Instrument to be submitted 2024.

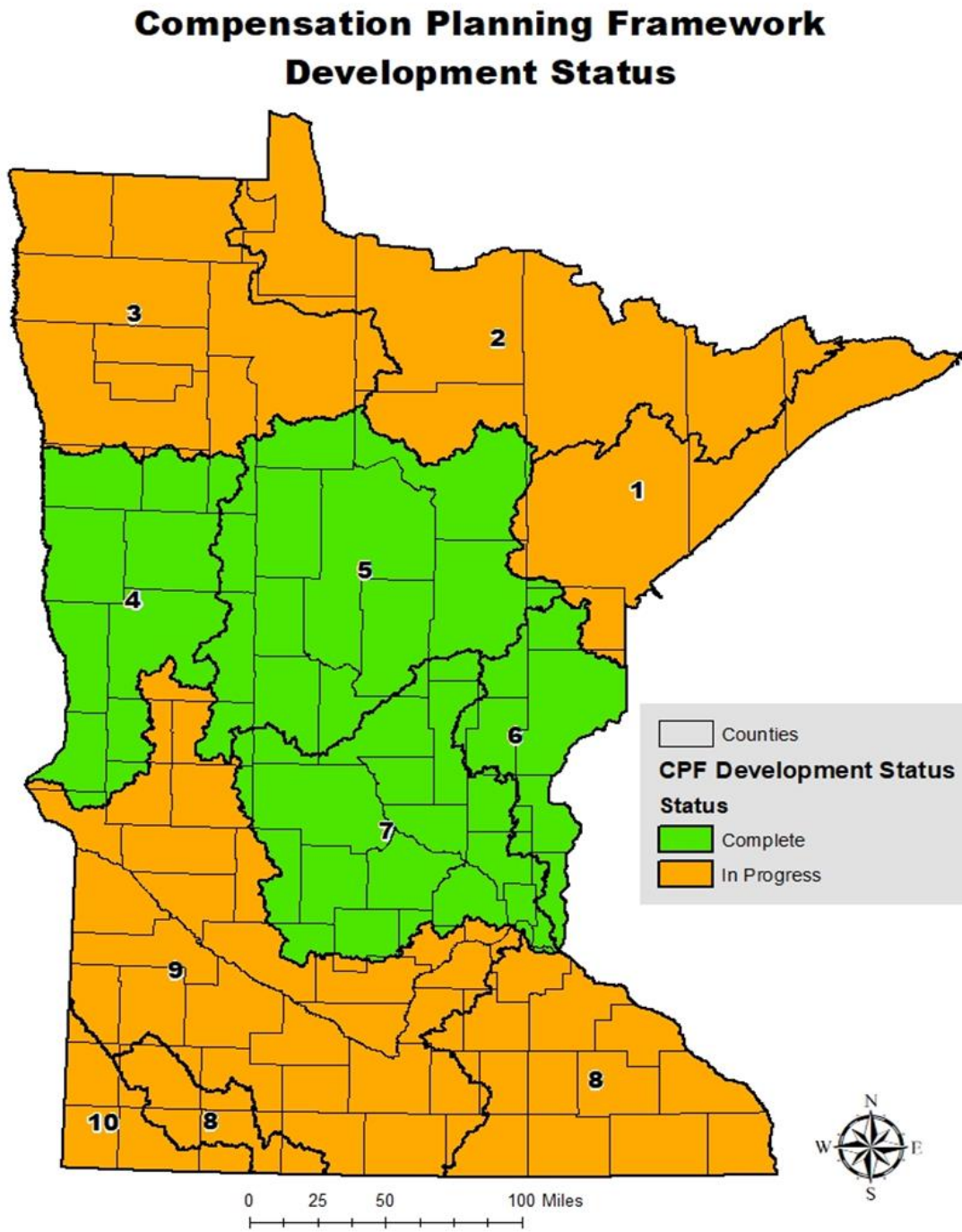
Compensation Planning Frameworks (CPF)

- Document that prioritizes wetland mitigation based on watershed-based needs.
- Required component of In-Lieu Fee Program (ILF).
- Completion of all CPFs expected in 2024.

Development Status

- Completion Dates:
  - BSA 6 2018
  - BSA 7 2019
  - BSA 4 2020
  - BSA 5 2022
  - BSA 1,2,3 2024
  - BSA 8,9,10 2024
  - Instrument 2025

- Combined BSAs 9, 10, with SW portion of 8
  - Same wetland types
  - Same land use



The ILF/CPFs and High Priority Areas

- In 2015, Minn. Stat. 103B.3355(e) was amended to direct BWSR to identify "High Priority Areas" (HPA) for wetland replacement:

  BWSR, in consultation with the DNR, MDA, and local government units, must: *"identify areas of the state where preservation, enhancement, restoration, and establishment of wetlands would have high public value…"*

  - CPFs will identify local HPAs and help identify statewide HPA.

  - The implementation of the HPAs will occur through a future rulemaking.

How will the CPFs be used?

1. Local Government Roads Wetland Replacement Program (LGRWRP) site prioritization and selection.
    - Under the LGRWRP, BWSR provides the wetland replacement for qualifying local road improvement projects.
2. CPFs can be incorporated into the WCA rule as High Priority Areas (local and statewide).
3. Other conservation programs can use the CPF priorities to evaluate potential projects.

ILF Next Steps

1) Make minor language tweaks (this rulemaking) if/where necessary to allow for use of the ILF by the LGRWRP.

2) Finish and seek approval of Program Instrument and CPF for LGRWRP.

3) Discuss associated rules for potential private sector use of the ILF.

Wetland Replacement Buffers

Replacement Wetland Buffers
Requirements and Crediting

- No statute change directly related to buffers.
- 2012 Executive Order Report, 2016 WCA Legislative Report, and many associated statute changes were intended to improve mitigation outcomes.
- Buffers have a huge influence on wetland functions and mitigation outcomes.
- The science as it relates to buffers has evolved.

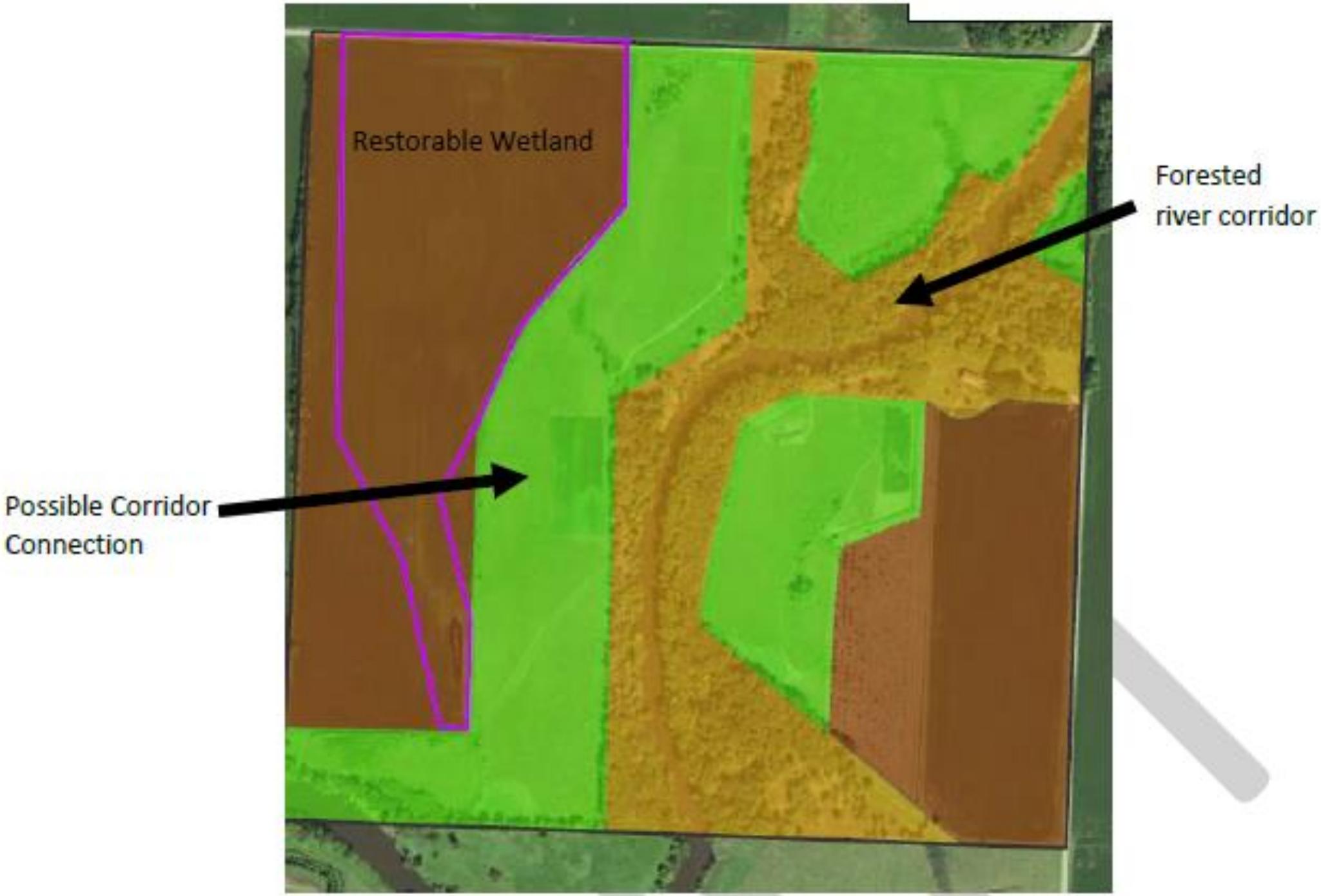
Replacement Wetland Buffers

- Limitations on the amount of buffer and credit amount discourages restoration of small prairie pothole complexes.

- Limitations on the amount of buffer and credit amount discourages connections to habitat corridors.

Wetland Buffer

Corridor Connection


Restorable Wetland
Forested
river corridor
Possible Corridor
Connection

Stream Restoration for Wetland Credits

Sec. 88. Minnesota Statutes 2014, section 103G.2242, subdivision 12, is amended to read:

Subd. 12. **Replacement credits.**

(c) Notwithstanding section 103G.222, subdivision 1, paragraph (i), the following actions, and others established in rule, that are consistent with criteria in rules adopted by the board in conjunction with the commissioners of natural resources and agriculture, are eligible for replacement credit as determined by the local government unit or the board, including enrollment in a statewide wetlands bank:

(1

a

p

(2

wetlands;

) in a greater than 80 percent area, restoration and protection of streams and riparian buffers that are important to the functions and sustainability of aquatic resources.

(3) wetlands restored for conservation purposes under terminated easements or contracts; ~~and~~

(4) water quality treatment ponds constructed to pretreat storm water runoff prior to discharge to wetlands, public waters, or other water bodies, provided that the water quality treatment ponds must be associated with an ongoing or proposed project that will impact a wetland and replacement credit for the treatment ponds is based on the replacement of wetland functions and on an approved storm water management plan for the local government~~.~~; and

(5) in a greater than 80 percent area, restoration and protection of streams and riparian buffers that are important to the functions and sustainability of aquatic resources.

Stream Restoration as Replacement (>80 areas)

- Crediting system and assessment tools needed to implement.
- Received funding from EPA to develop stream quantification tool.
- Interagency team and consultant developed tool over 2 years.
- Finalized tool rolled out and being used by several entities for regulatory and conservation purposes (presentation at 2021 Water Resource Conference).
- Tool provides basis to develop crediting system for stream restorations under WCA.

Kettle River; Falls above the Sandstone Dam, which were exposed when the dam was removed in 1995. With the removal of the Sandstone Dam, the Kettle River is now 'free-flowing' and is a tributary to the St. Croix River.

Minnesota Stream Quantification Tool
and Debit Calculator
User Manual (Version 2.0)

US Army Corps of Engineers
St. Paul District

BOARD OF WATER AND SOIL RESOURCES
MINNESOTA POLLUTION CONTROL AGENCY
DEPARTMENT OF NATURAL RESOURCES

StreamMechanics
EPR Ecosystem Planning & Restoration

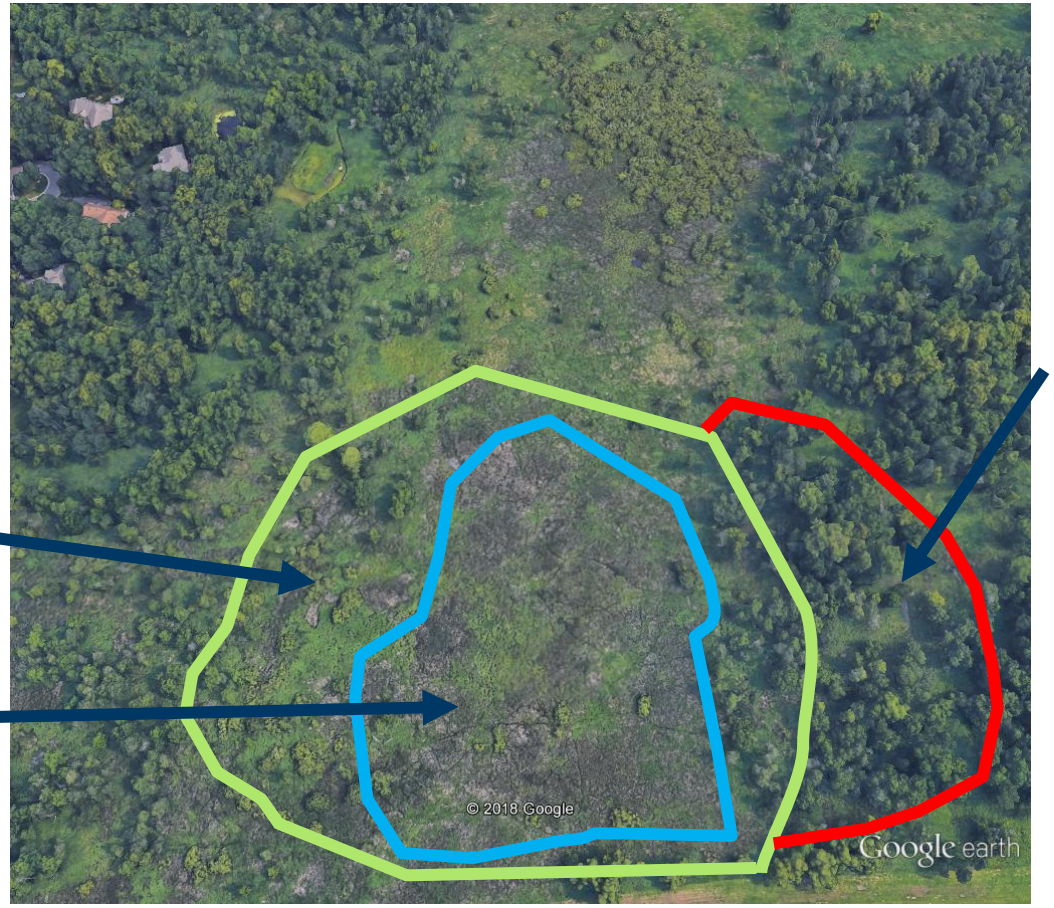
Wetland Typing for Mitigation

Wetland Typing for Impacts and Replacement

- ✓ Statute directs the Technical Evaluation Panel to use Circular 39 (Type 1, 2, 3, ….) and Cowardin systems (PEMA, PSS1B, etc.).
- ✓ Plant Communities (shallow marsh, wet meadow, etc.) added to rule in 2009 for consistency with the Corps.
- ✓ Complications associated with all of these systems, and the science has advanced.
- ✓ Circular 39 outdated and not readily available anymore.

Current System

- 12 plant community types
- Multiple plant community types on any one wetland



Complicated Crediting Outcomes

- Requires sponsors to delineate, and agency staff to evaluate, wetland plant community types at a very fine scale.

Legend

- Buffer (10.996 ac)
- Wet Meadow (10.957 ac)
- Sloped Wet Meadow (4.734 ac)
- Shallow Marsh (10.231 ac)
- Deep Marsh (7.662 ac)
- Shallow Open Water (0.901 ac)
- Easement Boundary
- Vegetative Monitoring Transect
- Well Location

Complicated Crediting Outcomes

- When this level of detail is required each plant community type must have a set of performance standards, a release schedule, and a monitoring plan to assess performance.

Area ID	Type of Compensation (Wetland Area)	Total Projected Acreage	Type of Wetland Credit (Credit Action)	Credit Ratio	Final Projected Credits	Initial Release (15%)	Hydrology Performance Standards (release of additional 20% of total projected credits, excluding buffer)	Interim 1 Vegetation Performance Standards (release of additional 20% of total projected credits for wetland, 30% for buffer)	Interim 2 Vegetation Performance Standards (release of additional 20% of total projected credit for wetland, 30% buffer credit)	Final Vegetation Performance Standards & Approval of Final Wetland Delineation Report[4] (final release)
Wet Meadow	Wet Meadow	9.712	Reestablishment (Subp. 3)	100%	9.7	1.4568	1.9424	1.9424	1.9424	2.4280
Sloped Wet Meadow	Wet Meadow	4.19	Reestablishment (Subp. 3)	100%	4.2	0.6285	0.8380	0.8380	0.8380	1.0475
Ex. Wet Meadow	Wet Meadow	0.353	Rehabilitaion (Subp. 4)	50%	0.2	0.0265	0.0353	0.0353	0.0353	0.0441
Shallow Marsh	Shallow Marsh	10.077	Reestablishment (Subp. 3)	100%	10.1	1.5116	2.0154	2.0154	2.0154	2.5193
Ex. Shallow Marsh	Shallow Marsh	0.64	Rehabilitaion (Subp. 4)	50%	0.3	0.048	0.0640	0.0640	0.0640	0.0800
Deep Marsh	Deep Marsh	7.164	Reestablishment (Subp. 3)	100%	7.2	1.0746	1.4328	1.4328	1.4328	1.7910
Ex. Deep Marsh	Deep Marsh	0.327	Rehabilitaion (Subp. 4)	50%	0.2	0.0245	0.0327	0.0327	0.0327	0.0409
Shallow Open Water	Shallow Open Water	0.415	Reestablishment (Subp. 3)	100%	0.4	0.0623	0.0830	0.0830	0.0830	0.1038
Ex. Shallow Open Water	Ex. Shallow Open Water	0.476	Rehabilitaion (Subp. 4)	50%	0.2	0.0357	0.0476	0.0476	0.0476	0.0595

Wetland Typing for Impacts and Replacement – Move to HGM

- ✓ Moving towards an HGM-based system for mitigation credits will simplify banking procedures and provide a better correlation to function.
- ✓ HGM is a better functional surrogate than plant communities.
- ✓ Basis for using HGM already in rule.
- ✓ Minnesota National Wetland Inventory update includes HGM descriptors which can easily be converted to HGM classes.

What is HGM?

The “Hydrogeomorphic” wetland classification system is based on geomorphic (landscape) position and hydrologic characteristics to group wetlands into seven different wetland classes as defined by Brinson (1993). The seven classes are:

- Depressional
- Riverine
- Mineral Flats
- Organic Flats
- Tidal Fringe (N/A to MN)
- Lacustrine Fringe
- Slopes

The Science on Functional Surrogates

- Vegetation is a poor indicator of wetland function.
- The HGM approach classifies a wetland based on its setting in the landscape (landscape position), its source of water, and its hydrodynamics (inflow, outflow, flow-through, etc.).
- Wetlands in one HGM class versus another HGM class have been found to have a fundamentally different set of functional attributes, more so than other classifications that are based on inherently variable outward characteristics such as plant species composition/abundance.

Logic

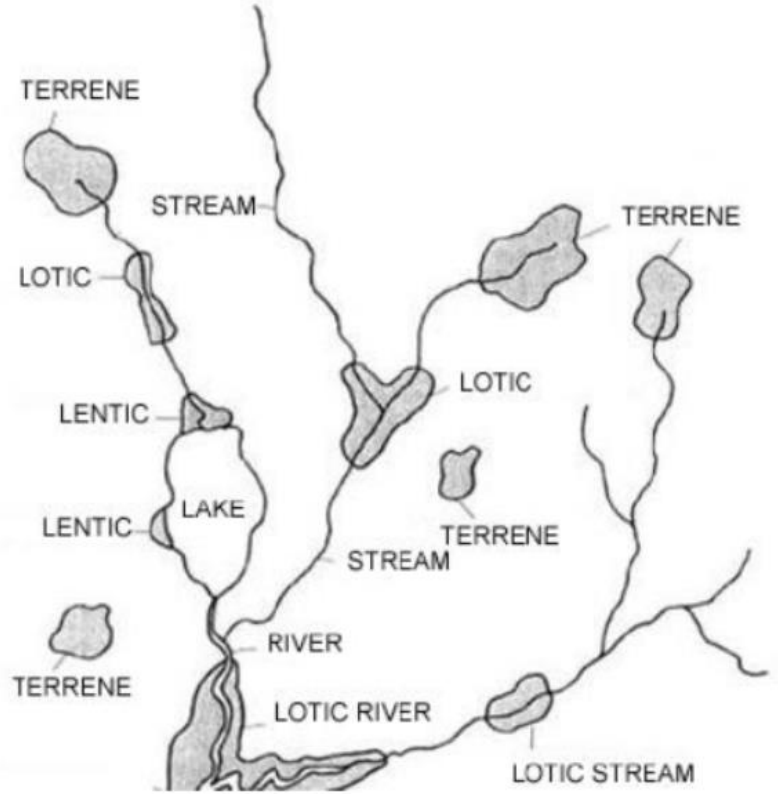
A wet meadow in this floodplain functions differently than a wet meadow in this prairie pothole.

HGM Classification System for MN

Classification Name	Definition
Lacustrine	Wetland occurs within a topographic depression that has a closed elevation contour that allows the accumulation of surface water and is restricted to the margin of a depressional lake basin.
Riverine	Wetland occurs on a nearly level landform and lies along and is influenced by flooding from a stream, river or flow-through ditch.
Slope	Wetland occurs on a slope (generally >2%) with groundwater discharge as its primary source of hydrology.
Mineral Flat	Wetland occurs on a nearly level landform, is not significantly influenced by flooding from a stream, river or flow-through ditch and has predominately mineral soils.
Organic Flat	Wetland occurs on a nearly level landform, is not significantly influenced by flooding from a stream, river or flow-through ditch and has predominately organic soils.
Depression	Wetland occurs within a topographic depression that has a closed elevation contour that allows the accumulation of surface water and is not associated with the margin of a depressional lake basin.

New DNR National Wetland Inventory Mapping

The regional HGM-based descriptors developed for Minnesota is a starting point for developing a system for wetland regulatory application.



Convert NWI Descriptors to Minnesota HGM System

Landscape Position/Landform Type from MN NWI	Class
Lentic Basin	Lacustrine
Lentic Flat	Lacustrine
Lentic Fringe	Lacustrine
Lentic Island	Lacustrine
Lotic Basin	Riverine
Lotic Flat	Riverine
Lotic Floodplain	Riverine
Lotic Fringe	Riverine
Lotic Island	Riverine
Terrene Basin	Depression
Terrene Flat	Mineral Flat
Terrene Fringe	Depression
Terrene Island	Depression
Terrene Peatland	Organic Flat
Terrene Slope	Slope

Potential Rule-Related Actions

- Clarify use of HGM system for credit and impact tracking in WCA rule.
- Add HGM system definition and categories in rule.
- In the future: Convert entire rule to HGM-based system?
  - Would require statute changes and restructuring the De minimis Exemption.

8420.0111 Subp. 31 – Definitions; Hydrogeomorphic wetland classification.

"Hydrogeomorphic wetland classification" means classifying a wetland for assessment and characterization of wetland functions based on its geomorphic position in the landscape and hydrologic characteristics.

Reason for/Effect of change: Creates a definition of hydrogeomorphic (HGM) class to differentiate it from wetland type as defined in statute. HGM class is indirectly referred to in current rule for purposes of determining in-kind replacement.

8420.0111 Subp. 75 – Definitions; Wetland type or type

"Wetland type" or "type" means a wetland type classified according to Wetlands of the United States (1956 and 1971 editions), as summarized in this subpart. Classification of Wetlands and Deepwater Habitats of the United States (2013) and Wetland Plants and Plant Communities of Wisconsin and Minnesota (2015) ~~is a~~ are separate~~, parallel~~ wetland typing systems that may be used to characterize components of a wetland more precisely. Both documents are incorporated by reference under part 8420.0112, items A and B.

Reason for/Effect of change: This revision clarifies that both typing systems used in various technical aspects of WCA implementation are separate from the statutory definition of "wetland type", and describes the intended use of these typing systems.

DRAFT Rule Language

8420.0405 Subp. 2 – Boundary, ~~or~~ Type, and Hydrogeomorphic Classification.

Wetland type must be identified according to United States Fish and Wildlife Service Circular No. 39 (1971 edition) Wetlands of the United States, ~~and~~ Classification of Wetlands and Deepwater Habitats of the United States, and Wetland Plants and Plant Communities of Minnesota & Wisconsin. Hydrogeomorphic classification of the wetland must be identified according to A Hydrogeomorphic Classification for Wetlands (Brinson, 1993) including modifications or guidance provided by the board. ~~Wetland type in relation to Wetland Plants and Plant Communities of Minnesota & Wisconsin is shown in the following table:~~ **<table deleted>**

Reason for/Effect of change: This revision incorporates HGM classification into wetland boundary and type decisions. This is a necessary addition for using HGM class to meet in-kind replacement requirements. The table was necessary when in-kind replacement depended upon wetland type but is not necessary when using HGM in-kind replacement. Eliminating the table recognizes current and future changes to the Cowardin and Eggers/Reed typing systems that affect the accuracy of the comparisons.

DRAFT Rule Language

8420.0522 Subp. 3 – Replacement Standards; In-Kind Replacement

In-kind means a wetland of similar ~~type and~~ function to the impacted wetland. Wetland replacement is in-kind if it is~~:~~ of the same hydrogeomorphic wetland class

~~A. the same type or plant community~~ as the impacted wetland ~~or, for degraded wetlands, the same type or plant community that historically occurred at the impact site; or~~

~~B. the same hydrologic conditions and landscape position as the impacted wetland~~.

Reason for/Effect of change: With HGM defined in rule, this revision replaces "same hydrology conditions and landscape position" with the more comprehensive term "hydrogeomorphic class'. It eliminates the use of Circular 39 wetland type or plant community type as surrogates for wetland function, and thereby, the means of using it for determining in-kind replacement. Wetlands of the same HGM class tend to have similar wetland functions, more so than wetlands that are classified through other typing systems.

8420.0725 - Certification and Deposit of Credits.

(A). To be deposited into the state wetland bank, replacement credits must be certified for deposit by the local government unit ~~in which they are located~~. Certification of credits by the local government unit is requested by the banking plan applicant and may occur at any time during the monitoring period. The certification must be based on the findings and recommendation of the technical evaluation panel and must identify the ~~area by type, area of buffer, and~~ number of credits eligible for deposit by area and hydrogeomorphic wetland class. The technical evaluation panel must ensure that sufficient time has passed for the wetland to become established, especially vegetation and hydrology, before recommending certification. The area certified must be based on a land survey or comparable method of field measurement. The person making the measurement must verify in writing as to the method and accuracy of the measurement. Failure to follow the approved construction specifications or vegetation management plan is sufficient grounds for the local government unit to deny certification of credits for deposit.

(B) The certification and request for deposit of credits must be in a form prescribed by the board and must contain the following information: (5) amount of replacement credit to be deposited, to the square foot, by ~~wetland type~~hydrogeomorphic wetland class;

Reason for/Effect of change: Paragraph (A) is revised to reflect that the LGU that has jurisdiction over a project may differ from the physical location of the project, such as when DNR or other state agencies are designated as LGU under certain circumstances.

Paragraph (A) was further revised to eliminate the confusing requirement of buffer area identification and focus on the overall credit amount. It also attaches HGM class to the tracking of credits with the wetland banking system for purposes of in-kind replacement determinations.

Paragraph (B) replaces wetland type with HGM class for categorization of credits during certification and requests for deposit of credits, consistent with using HGM class for determining in-kind replacement.

5 Minute Break

Bank Service Areas and Presettlement Zones

Presettlement Areas for Wetland Replacement and Bank Service Areas (BSAs)

- ✓ Presettlement Areas were incorporated into WCA early to address substantial differences in the amount of existing and drained wetlands in the northeast vs the south & west. Replacement ratios and other statute/rule provisions differ between areas.
- ✓ Bank Service Areas (BSAs) were added later as both the State and Federal Government moved towards more of a watershed-based system.
- ✓ The Presettlement Area and BSA boundaries did not align, creating some conflicts.
- ✓ Statute was amended in 2017 to align presettlement areas on BSA boundaries for purposes of wetland replacement.
- ✓ Adjusting BSAs will create more consistency with past presettlement area boundaries and help solve related conflicts.

2017 Statute Changes

>80% Presettlement Wetlands Remaining
50-80% Presettlement Wetlands Remaining
<50% Presettlement Wetlands Remaining

>80% Presettlement Wetlands Remaining
<80% Presettlement Wetlands Remaining

D

"ty or, watershed, or, for purposes of wetland replacement, bank service area where 50 percent or more of the presettlement wetland acreage is intact and:

(1) ten percent or more of the current total land area is wetland; or

(2) 50 percent or more of the current total land area is state or federal land.

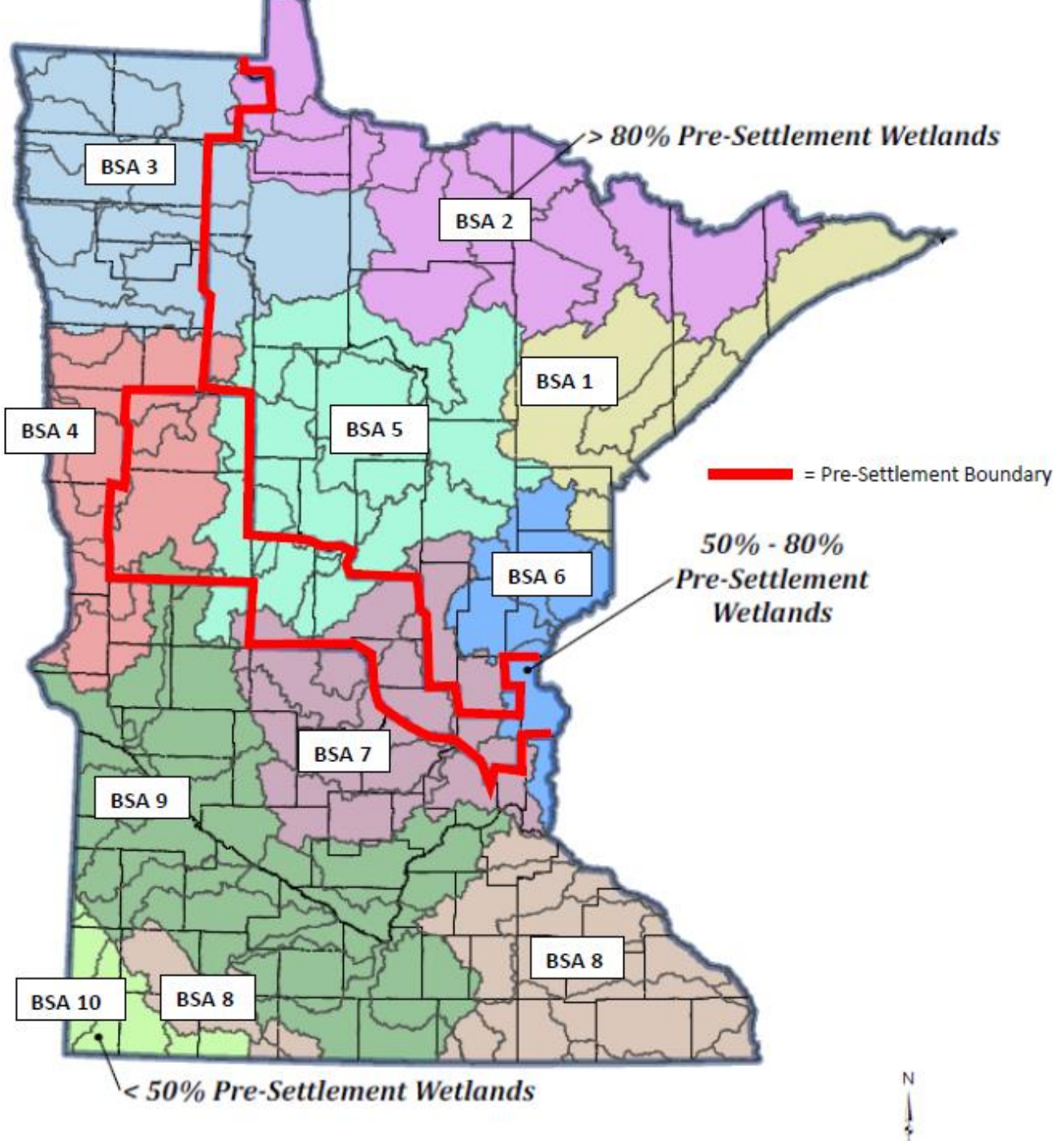
Definition: Less than 50 percent area.

"Less than 50 percent area" means a county or, watershed, or, for purposes of wetland replacement, bank service area with less than 50 percent of the presettlement wetland acreage intact or any county or, watershed, or bank service area not defined as a "greater than 80 percent area" or "50 to 80 percent area."

Wetland replacement siting.

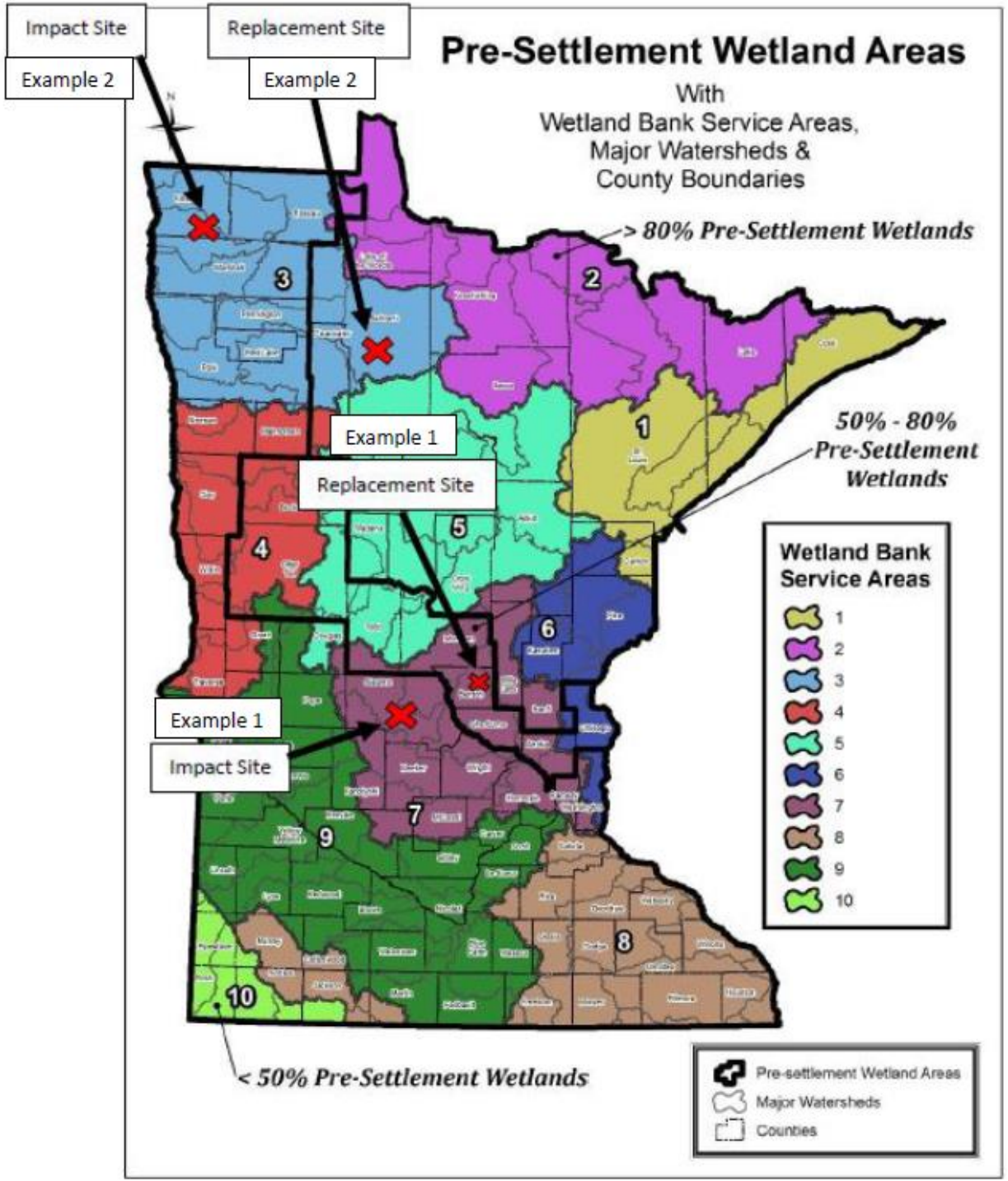
(a) ~~Impacted wetlands in a 50 to~~ Impacted wetlands outside of a greater than 80 percent area must not be replaced in a ~~50 to~~ greater than 80 percent area. ~~or in a less than 50 percent area. Impacted wetlands in a less than 50 percent area must be replaced in a less than 50 percent area~~

Current map of Presettlement Areas and Bank Service Areas.

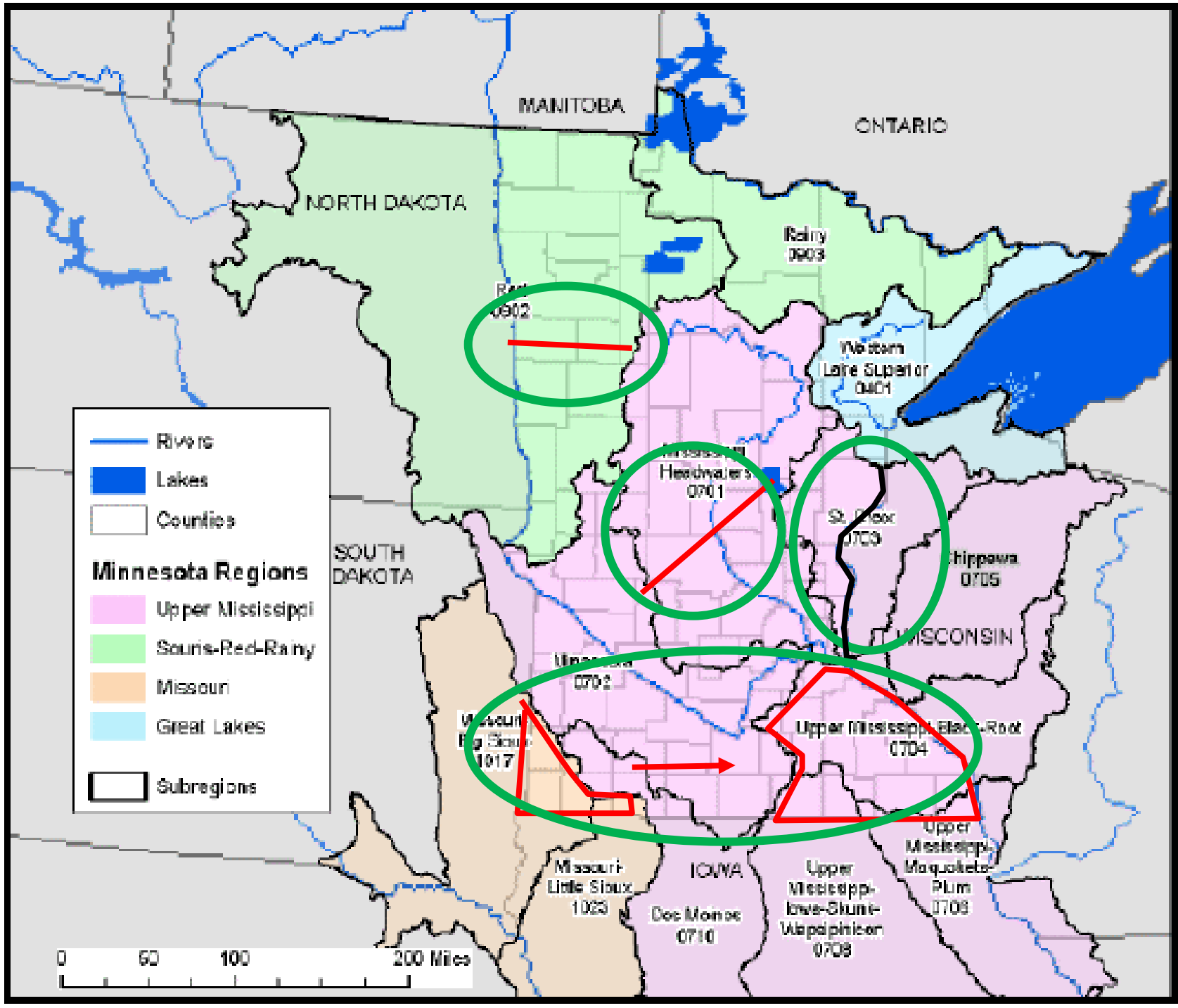


Examples where BSA and Presettlement Area Boundaries Conflict

- Impacts in parts of some BSAs cannot be replaced within the same BSA.
- Replacement ratios are different within same BSA.



- BSAs are not entirely watershed based.
- Several “splits and lumps” were made when originally developed.



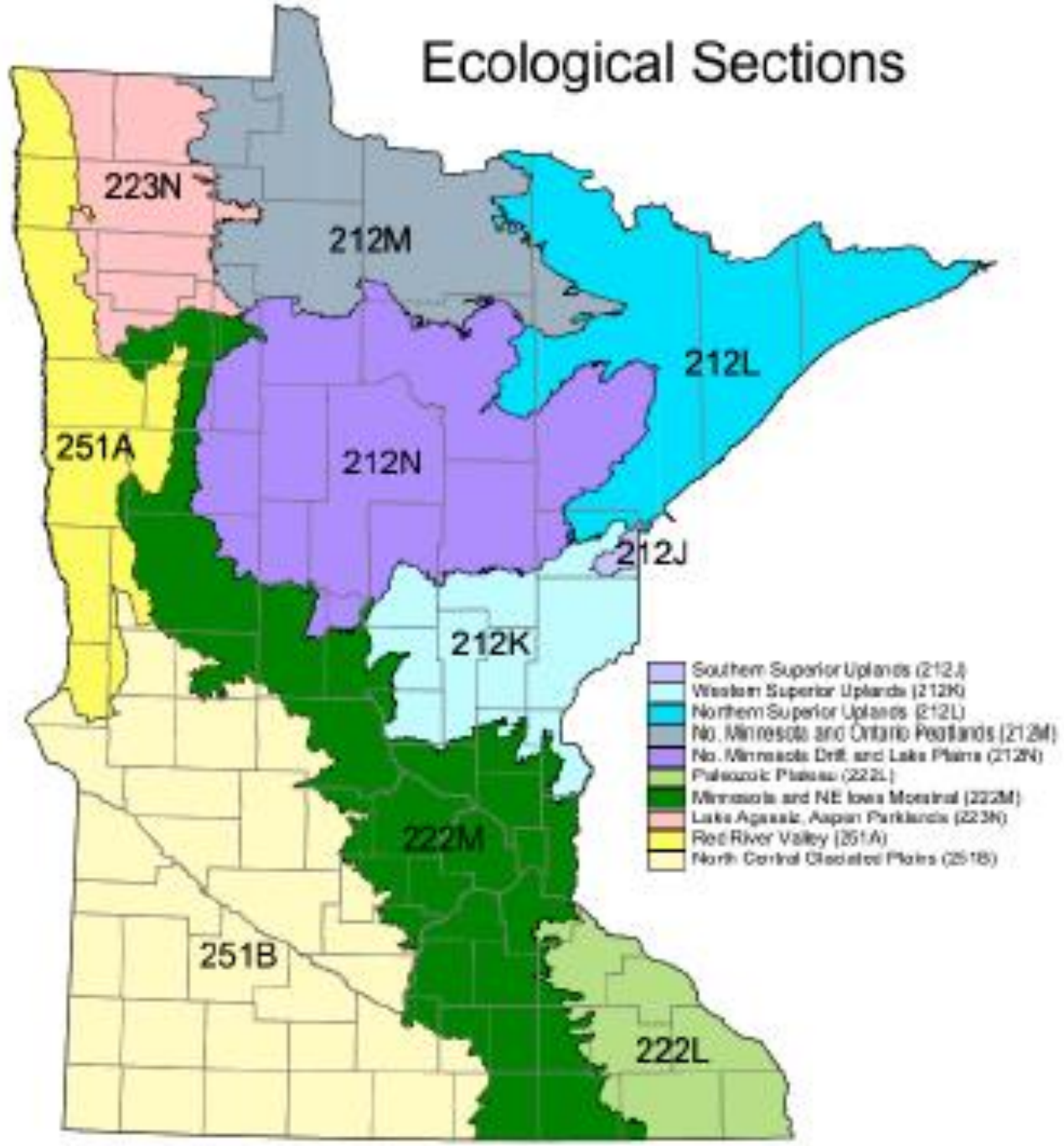
Setting BSA Boundaries

Goal: Develop BSA boundaries that are based on sound science and ecological principles, while minimizing changes to replacement ratios that result from establishing the >80% presettlement area along BSA boundaries.

Multiple factors can be considered in setting BSA boundaries:

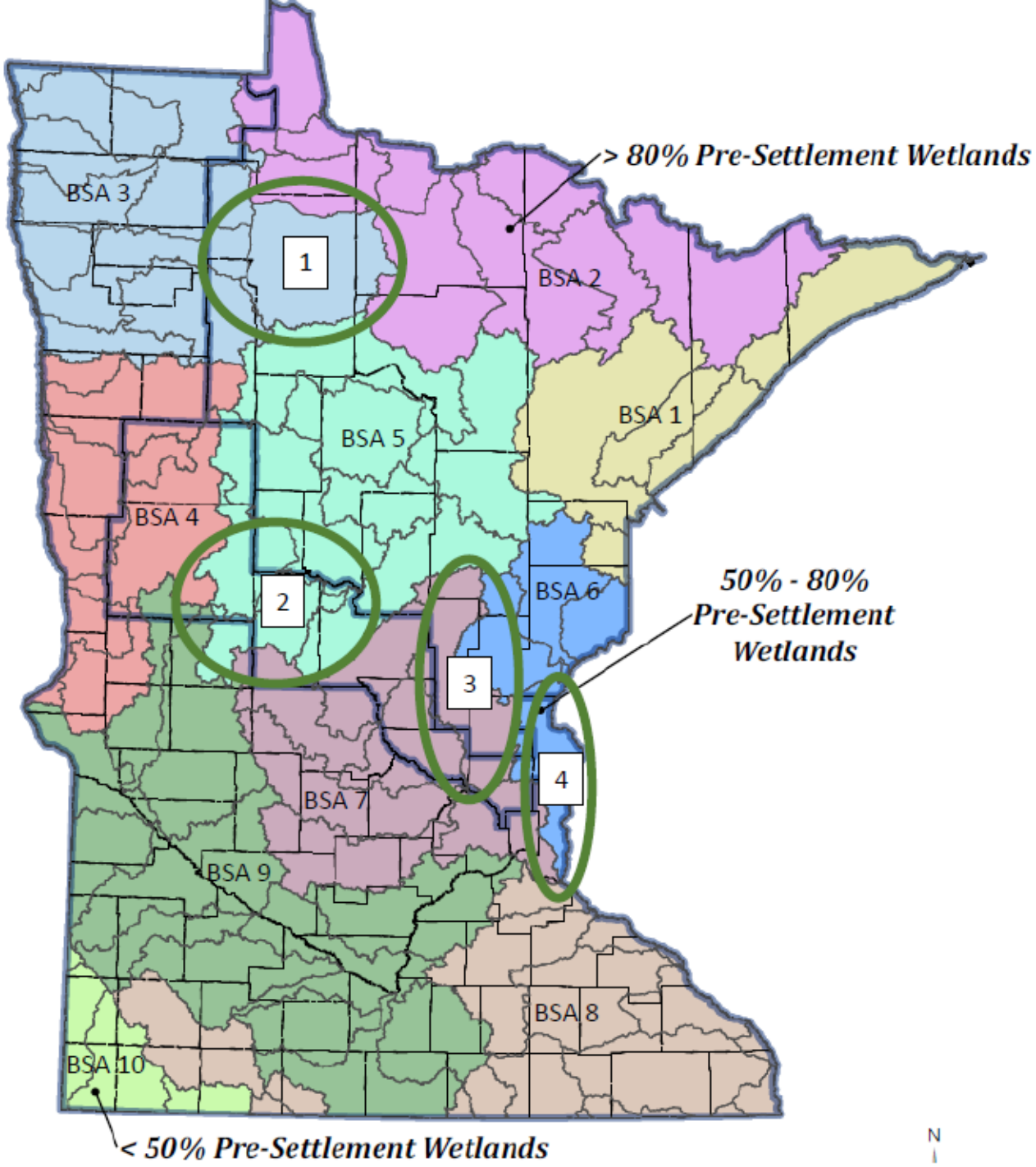
- Watershed boundaries
- Ecological Section boundaries
- Land Use (historic and current)
- Historic wetland loss
- Current wetland abundance and quality
- Restoration opportunities
- Geographic size
- Economic viability of private wetland banks and markets for mitigation

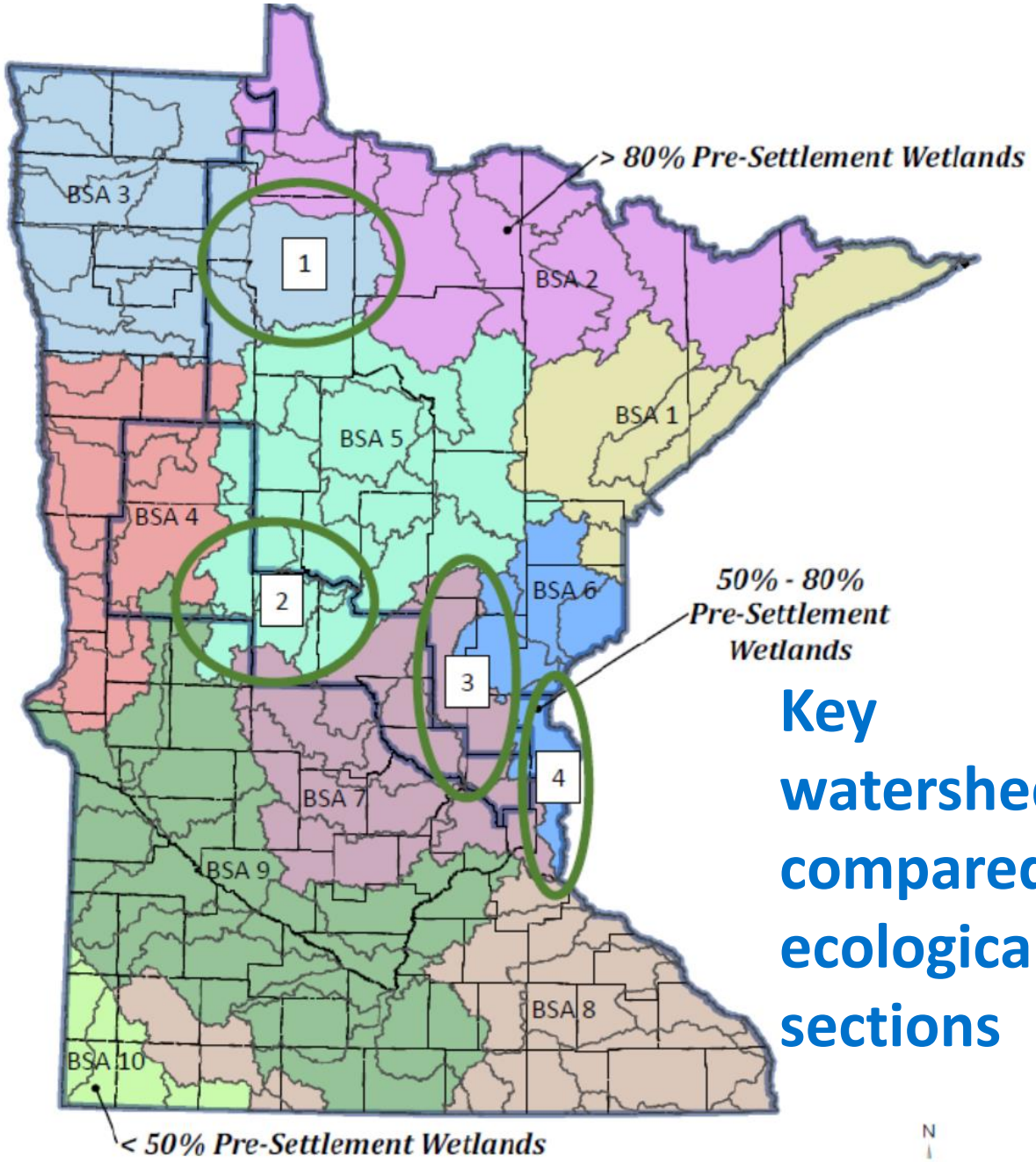
- Other aspects, including ecology, can be relevant factors to consider when setting BSA boundaries.



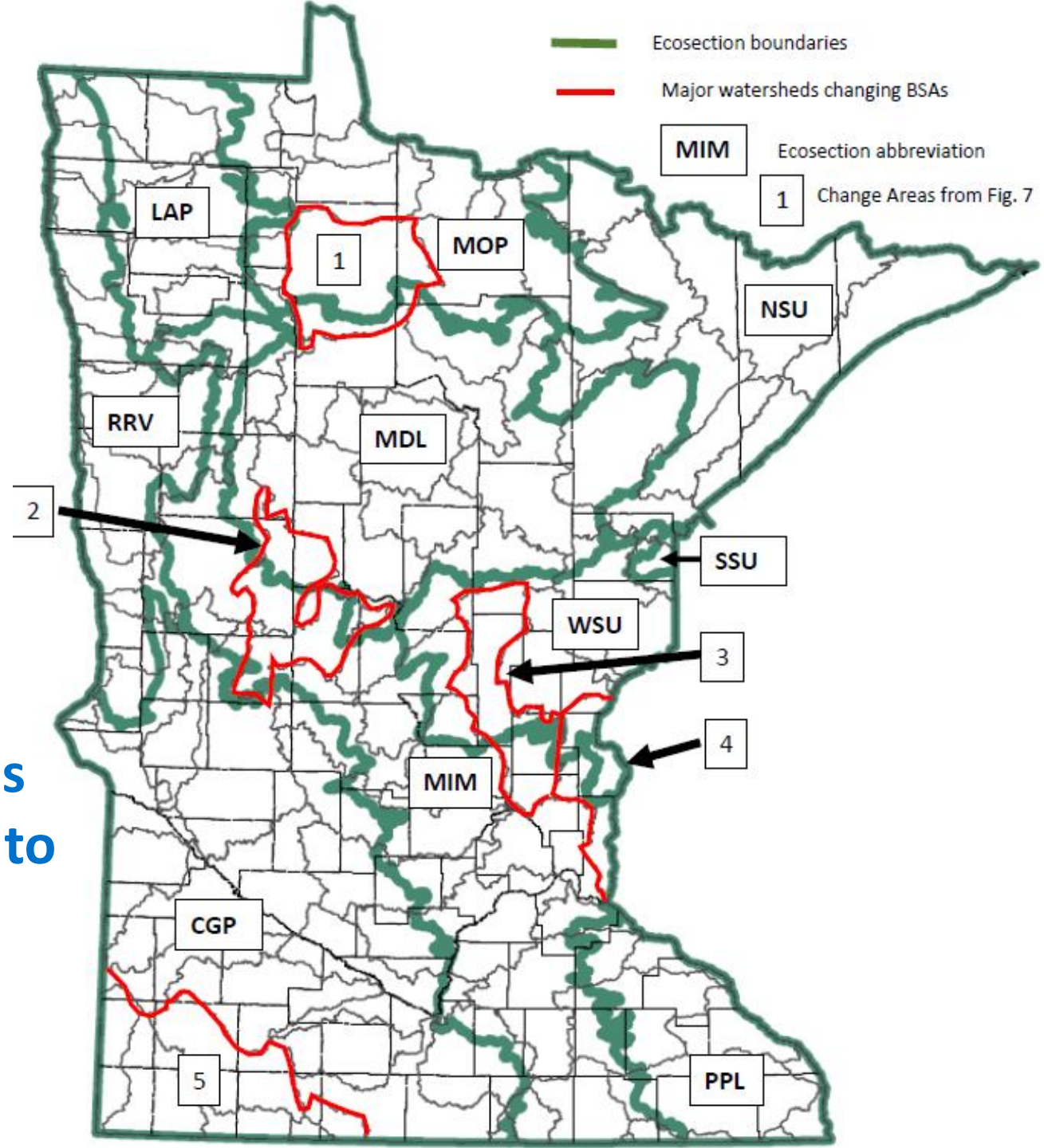
Key Watersheds

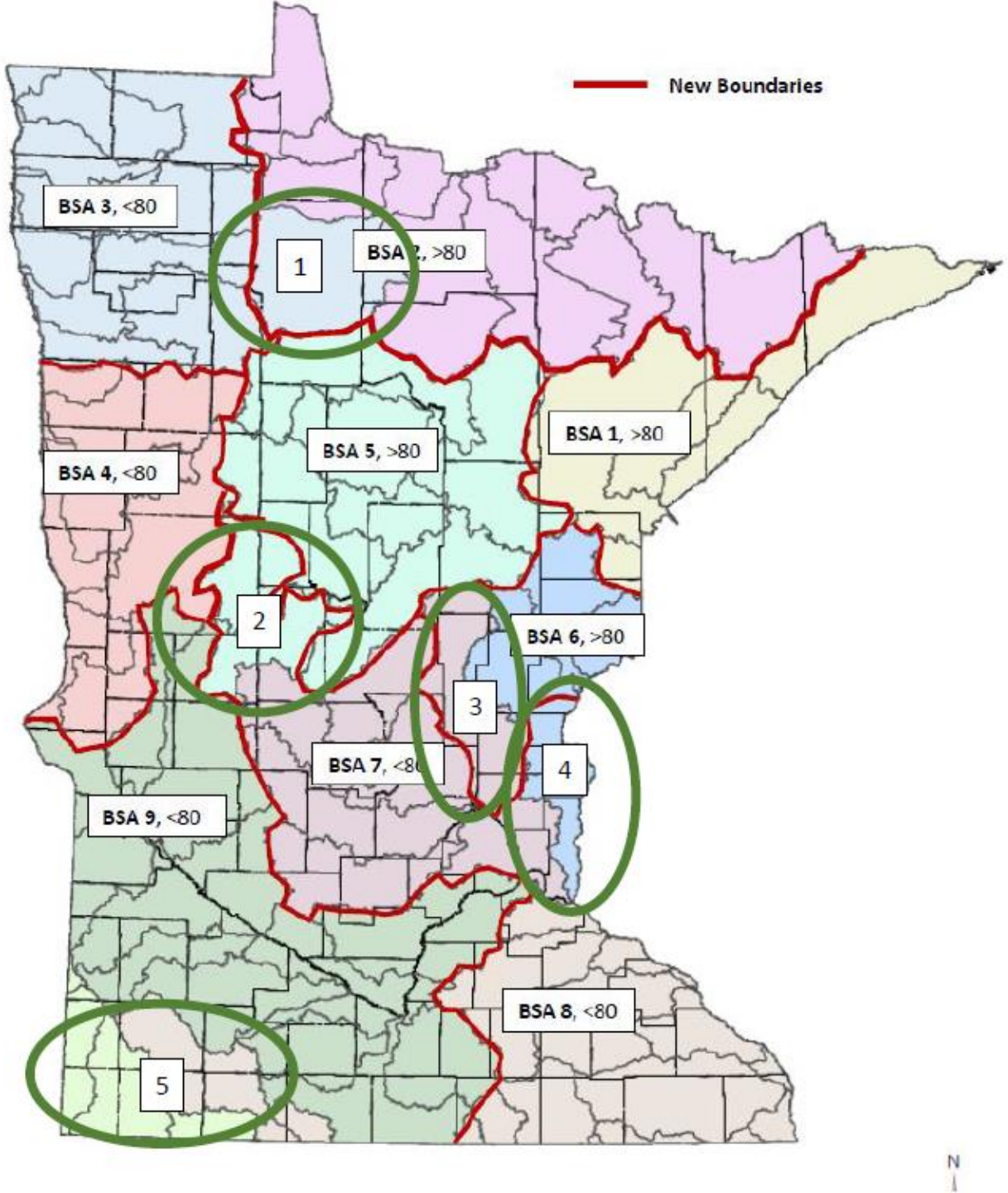
- Areas where BSAs are split by presettlement area boundaries.

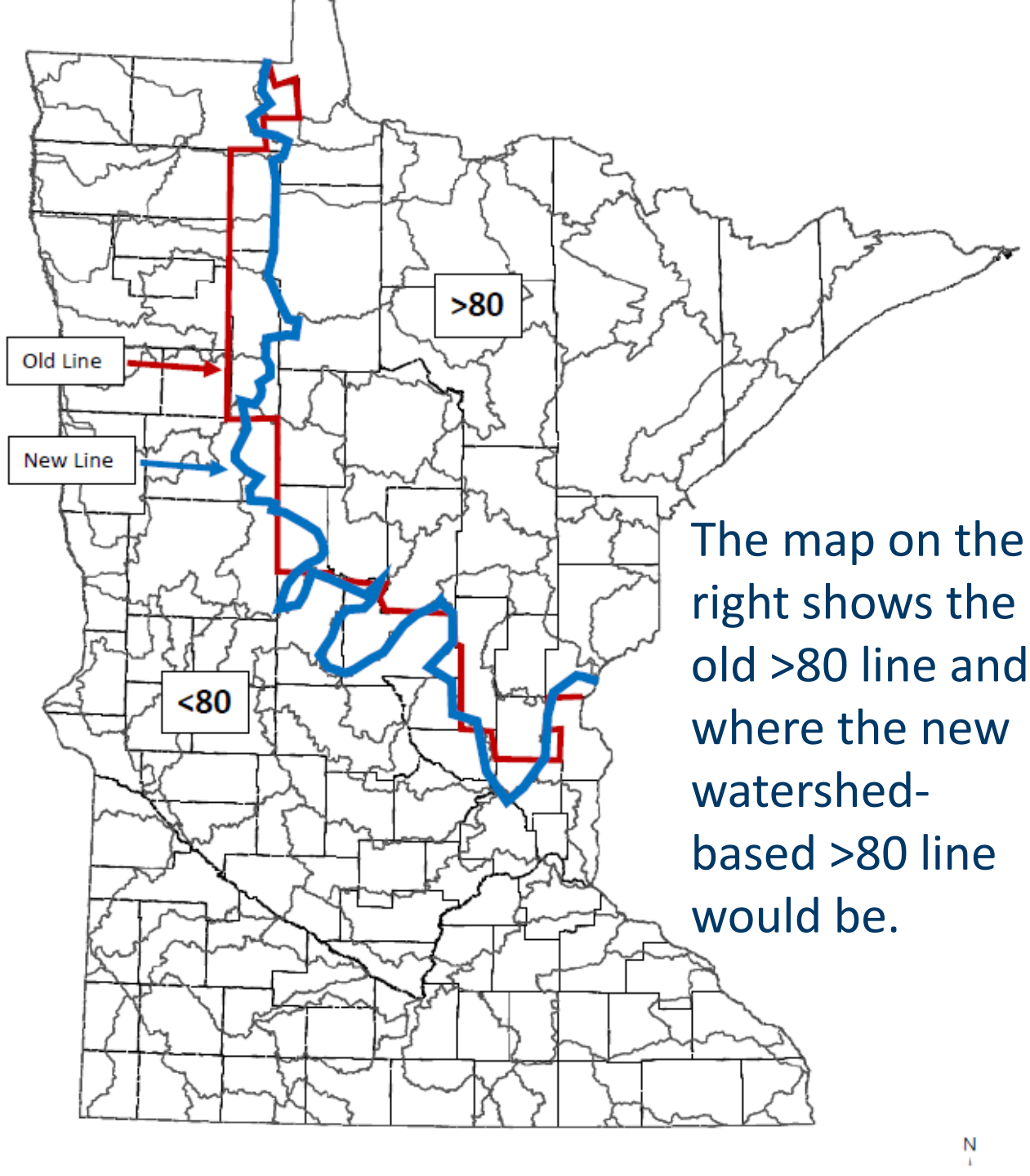




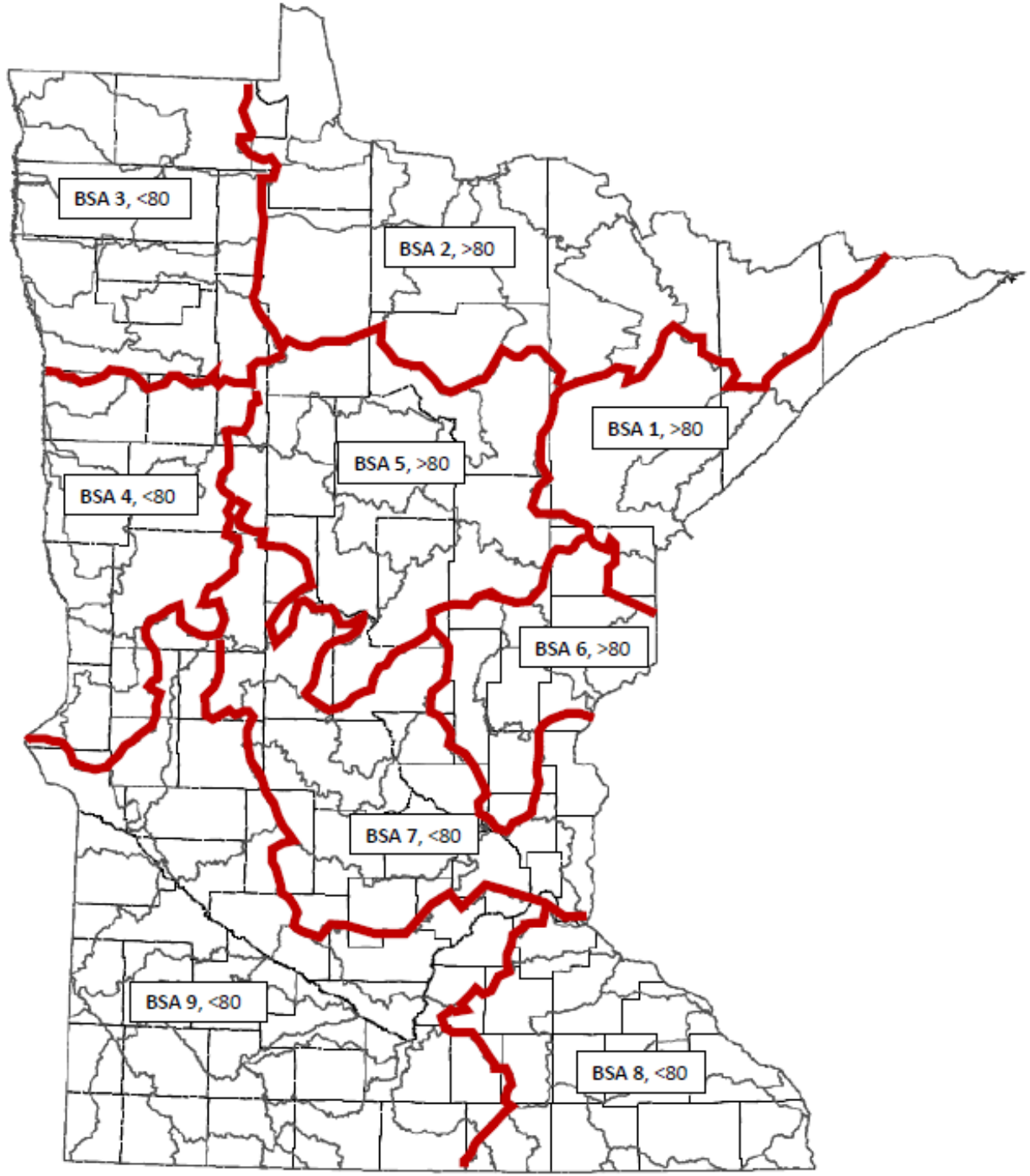
Key watersheds compared to ecological sections







The map on the right shows the old >80 line and where the new watershed-based >80 line would be.


BSA 3, <80
BSA 2, >80
BSA 1, >80
BSA 5, >80
BSA 4, <80
BSA 6, >80
BSA 7, <80
BSA 9, <80
BSA 8, <80

Grandfathering Provisions

Potential Rule Addition: "Grandfather" existing banks located within a watershed that changes BSAs so they can sell their remaining credits in both the previous and new BSA.

DRAFT Rule Language

Bank Service Area – No definition exists in statute.

8420.0111 Subp. 11a. Bank Service Area. "Bank Service Area" means a geographic area wherein replacement wetlands, including banking credits, can provide preferred replacement for wetland impacts incurred in the same area according to part 8420.0522. Bank Service Areas are established by the board and publicly available on the board's website.

Reason for/Effect of change: This term is used throughout the current rule and has been incorporated into the recent revisions to statute but was previously undefined, other than a map showing current BSA's.

DRAFT Rule Language

8420.0111 Subp. 28. Greater than 80 percent area. "Greater than 80 percent area" means a county, ~~or~~ watershed, or, for purposes of wetland replacement, bank service area where 80 percent or more of the presettlement wetland acreage is intact and:

A. ten percent or more of the current total land area is wetland; or

B. 50 percent or more of the current total land area is state or federal land. Greater than 80 percent areas are provided in part 8420.0117.

Reason for/Effect of change: The effect of this revision in combination with other statutory revisions is a reduction from three (<50, 50-80, >80), to two (<80, >80), presettlement areas for purposes of wetland replacement. This definition in rule has been revised to match that which is contained in statute.

DRAFT Rule Language

8420.0111 Subp. 37. Less than 50 percent area.

"Less than 50 percent area" means a county, ~~or~~ watershed, or, for purposes of wetland replacement, bank service area with less than 50 percent of the presettlement wetland acreage intact or any county, ~~or~~ watershed, or bank service area not defined as a greater than 80 percent area or 50 to 80 percent area, as provided in part 8420.0117.

Reason for/Effect of change: The effect of this revision in combination with other statutory revisions results in a reduction from three (<50, 50-80, >80), to two (<80, >80), presettlement areas for purposes of wetland replacement. This definition in rule has been revised to match that which is contained in statute.

DRAFT Rule Language

8420.0117 Subp. 1 – Presettlement Wetland Acres and Areas; County Classification

For purposes of ~~this chapter~~ part 8420.0420 Subp. 8:

8420.0117 Subp. 3 Presettlement Wetland Acres and Areas; Bank Service Area Classification.

For purposes of this chapter, notwithstanding 8420.0420 subpart 8, the board will designate bank service areas as greater than 80 percent areas or less than 80 percent areas in accordance with part 8420.0111, subparts 28 and 37. The board may consider watershed boundaries, ecological characteristics, land use, wetland quality, restoration opportunities, geographic size, the economic viability of wetland banks, and other factors when defining bank service areas.

Reason for/Effect of change: The effect of this revision in combination with related revisions in 103G.005 Subdivisions 10b and 10h is a reduction from three (<50, 50-80, >80), to two (<80, >80), presettlement areas based on bank service area designations for purposes of wetland replacement. Additional rule language was entered to provide a basis for the board setting bank service area boundaries.

Wetland Replacement Siting

Siting of Wetland Replacement 2015 and 2017 Statute Changes

103G.222, Subd. 3. Wetland replacement siting.

(a) Impacted wetlands ~~in a 50 to~~ outside of a greater than 80 percent area must not be replaced in a ~~50 to~~ greater than 80 percent area ~~or in a less than 50 percent area. Impacted wetlands in a less than 50 percent area must be replaced in a less than 50 percent area~~. All wetland replacement must follow this priority order:

(1) ~~on site or~~ in the same minor watershed as the impacted wetland;

(2) in the same watershed as the impacted wetland;

(3) in the same ~~county or~~ wetland bank service area as the impacted wetland; and

(4) in another wetland bank service area~~; and~~.

~~(5) statewide for public transportation projects~~…

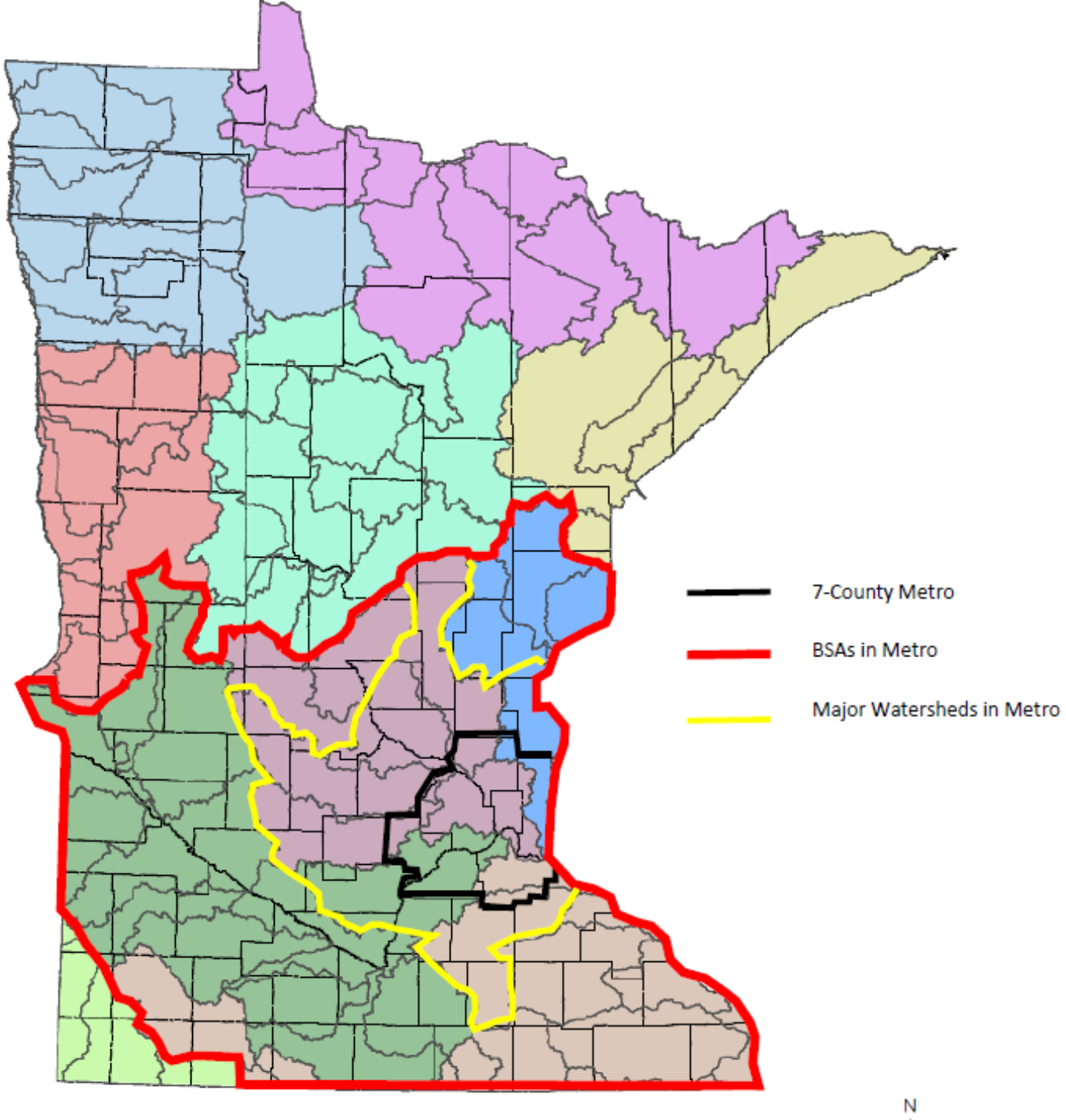
(c) Notwithstanding paragraph (a), clauses (1) and (2), the priority order for replacement by wetland banking begins at paragraph (a), clause (3), according to rules adopted under section 103G.2242, subdivision 1.

Siting of Wetland Replacement when using the Wetland Bank

Siting criteria:

- Primarily location (distance)-based.
- Can move down the criteria (farther away) when certain factors are met.
- Involves some judgment and discretion.
- Developed when "project-specific" was the primary mechanism for replacement.

- ✓ Wetland Banks now account for >95% of all replacement/mitigation.
- ✓ Wetland banks developed to a higher standard, generally more sustainable (all bank credits meet the criteria to move down the criteria, i.e. move farther away).
- ✓ Competition and access to wetland banks vital to the operation and goals of WCA.
- ✓ New statutory siting criteria the beginning of a shift from distance-based criteria to priority-based criteria.



Twin-Cities Metropolitan Area

Potential Problem Area?

- 7 counties
- 4 BSAs
- 10 major watersheds
- Multiple factors somewhat unique to the metro area.

Twin Cities Metropolitan Area

- High land values = high replacement costs.
- Lack of replacement opportunities due to the extent of development.
- High cost of dealing with stressors (water fluctuations, invasive species, poor water quality runoff, etc.) to achieve replacement standards.
- More people = more encroachments; difficult to achieve long-term sustainability.
- Higher standards for banks since 2008/2009 = fewer opportunities for high quality, sustainable bank sites.

❖ **Result: Significant cost disparity with non-metro banks.**

Potential Issue?

Potential issue:

- If the siting criteria starts at the BSA level, it may be difficult for existing metro area banks to compete with non-metro banks.
- Currently 19 banks with approximately 110 credits total (ave. 5.8 per bank).

Solution?

- "Grandfather" existing metro banks by delaying implementation of the BSA-wide siting criteria for banking in the metro area.
  - Allow time for those banks to sell their credits under the current siting criteria (i.e. the market conditions that existed at bank establishment).

Potential Rule Language

MN Rule 8420.0522, Subp. 7. Siting of replacement.

A. Impacted wetlands outside of a greater than 80 percent area must not be replaced in a greater than 80 percent area. Siting of wetland replacement must follow this priority order:

(1) in the same minor watershed as the impacted wetland;
(2) in the same major watershed as the impacted wetland;
(3) in the same wetland bank service area as the impacted wetland; and
(4) in another wetland bank service area

B. Notwithstanding item A, clauses (1) and (2), the priority order for replacement by wetland banking begins at item (a), clause (3). <u>This item does not apply to the siting of wetland replacement for impacted wetlands within the seven-county metropolitan area until January 1, 2028.</u>

Questions?

- Is the grandfather clause necessary?
- Is the length of time sufficient?
- Are there other options?
- Other questions/comments?

Miscellaneous Topics

Replacement Ratios

8420.0522 Subp. 4. Replacement ratios.

A. The replacement ratio is 2.5 replacement credits for each acre of wetland impacted, except in greater than 80 percent areas or on agricultural land the replacement ratio is 1.5 replacement credits for each acre of wetland impacted. The replacement ratio may be reduced by 0.5:1 when the replacement consists of:

(1) withdrawal of available credits from an approved wetland bank site within the same bank service area as the impacted wetland; ~~or~~

(2) project-specific replacement within the same major watershed or county as the impacted wetland, a majority of which is in-kind~~.~~; or

(3) withdrawal of available credits from an approved wetland bank site within the boundaries of a local government when the bank is owned and used by the same local government for a project within their jurisdiction.

Wetland Mitigation for Mining
2011 and 2017 Statute Changes

103G.005, Subd. 10e. Local government unit. "Local government unit" means:

<no change>

(4) for wetland banking projects established solely for replacing wetland impacts under a permit to mine under section 93.481, the commissioner of natural resources.

103G.222, Subd. 1. Requirements.

(a) <no change> Project-specific wetland replacement plans submitted as part of a project for which a permit to mine is required and approved by the commissioner on or after July 1, 1991, may include surplus wetland credits to be allocated by the commissioner to offset future mining-related wetland impacts under any permits to mine held by the permittee, the operator, the permittee's or operator's parent, an affiliated subsidiary, or an assignee pursuant to an assignment under section 93.481, subdivision 5. <no change> The commissioner must provide notice of an application for wetland replacement under a permit to mine to the county in which the impact is proposed and the county in which a mitigation site is proposed. <no change>

Banking and Technical Evaluation Panel Members
2017 Statute Change

103G.2242, Subd. 2. Evaluation.

(b) A member of the Technical Evaluation Panel that has a financial interest in a wetland bank or management responsibility to sell or make recommendations in their official capacity to sell credits from a publicly owned wetland bank must disclose that interest, in writing, to the Technical Evaluation Panel and the local government unit.

EIS and Wetland Replacement Siting
2017 Statute Change

103G.222, Subd. 3. Wetland replacement siting.

(h) Wetland replacement sites identified in accordance with the priority order for replacement siting in paragraph (a) as part of the completion of an adequate environmental impact statement may be approved for a replacement plan under section 93.481, 103G.2242, or 103G.2243 without further modification related to the priority order, notwithstanding availability of new mitigation sites or availability of credits after completion of an adequate environmental impact statement. Wetland replacement plan applications must be submitted within one year of the adequacy determination of the environmental impact statement to be eligible for approval under this paragraph.

Fees
2011 and 2015 Statute Changes

103G.2242, Subd. 14. Fees established.

<no change>

(b) The board may establish fees at or below the amounts in paragraph (a) for single-user or other dedicated wetland banking accounts.

(c) Fees for single-user or other dedicated wetland banking accounts established pursuant to section 103G.005, subd. 10, paragraph (e), clause (4) are limited to establishment of a wetland banking account and are assessed at the rate of 6.5 percent of the value of the credits not to exceed $1,000.

(d) The board may assess a fee to pay the costs associated with establishing conservation easements, or other long-term protection mechanisms prescribed in the rules adopted under subdivision 1, on property used for wetland replacement.

Stewardship Contribution
2015 and 2023 Statute Changes (Excerpts)

103B.103 EASEMENT STEWARDSHIP ACCOUNTS.

- "The water and soil conservation easement stewardship account and the mitigation easement stewardship account are created in the special revenue fund."
- "The board shall seek a financial contribution or assess an easement stewardship payment to the mitigation easement stewardship account for each wetland mitigation easement acquired by the board."
- "…the board shall determine the amount of the contribution or payment…" (statute then lists considerations for determining the amount of the contribution)
- "Five percent of the balance on July 1 each year… [is] annually appropriated to the board and may be spent to cover the costs of managing easements held by the board… (statute lists items the funds can be used for)

❖ Currently implemented via Board policy, which will be amended to address 2023 statute change.

❖ The rule may identify the stewardship payment, but implementation will remain via Board policy.

Next Steps

Next Steps

- Develop first draft of the rule amendment language.
- Additional meetings of the Wetlands Advisory Committee, local governments and other stakeholder groups, and the BWSR Wetlands Committee.
- Develop official draft rule and SONAR.
- Begin formal rulemaking public input and adoption process (including public comment opportunities).

❖*All rulemaking information (mtgs, drafts, etc.) will be posted on the BWSR website.*

BOARD OF WATER AND SOIL RESOURCES

Questions or Comments?

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