



# Minnesota Wetland Conservation Act Rulemaking MN Rules Chapter 8420

Wetlands Advisory Committee

April 25, 2023

<https://bwsr.state.mn.us/>

# Meeting Protocol

- ✓ Keep your microphone muted except when you are speaking.
- ✓ Please keep your camera off during the meeting to save bandwidth.
- ✓ We'd like the meetings to be relatively informal and conducive to discussion. Just "raise your hand" if you have a question.
- ✓ We will remain available after the meeting ends in case any of you have 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.
- ✓ 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.
- ❖ You will have additional opportunities to comment. If you want to think about the changes more before commenting, you are welcome to contact us at a later time with your comments or questions.

# Agenda (Amended)

- 1) Attendance & brief recap of previous meeting.
- 2) In-Lieu Fee Wetland Replacement, Compensation Planning Frameworks, High Priority Areas, and timing of related rule changes.
- 3) Begin review of draft rule language amendments.
- 4) Wrap-up and Discussion.

- Amber Hanson Glaeser MN Farm Bureau
- Beth Brown MN Department of Transportation
- Brian Martinson Association of MN Counties
- Brian Watson SWCD Staff (Dakota SWCD)
- Craig Johnson League of MN Cities
- Dan Larson MN Rural Counties Caucus
- Julie Lucas Mining MN
- Grace Keliher Builders Association of MN
- Jim Foldesi MN County Engineers Association
- John Cunningham Aggregate Ready-Mix Association of MN
- TBD Freshwater
- Josh Stromlund County Staff (Lake of the Woods)
- Carly Griffith MN Center for Environmental Advocacy
- Joel Asp Iron Mining Association of MN
- Margaret Levin Sierra Club
- Matt Massman MN Intercounty Association
- Nick Tomczik MN Association of Watershed Districts
- Rob Sip Red River Watershed Management Board
- Rebecca Beduhn MN Wetland Professionals Association
- Sheila Vanney MN Association of SWCDs
- Steve Morse MN Environmental Partnership
- Stu Lourey MN Farmers Union
- Tony Kwilas MN Chamber of Commerce
- Warren Formo MN Agricultural Water Resource Center

# BWSR Wetlands Advisory Committee

## Organizations & Participants

Note: Representatives of the organizations at each meeting may vary as alternates can be used depending on member availability.



# Mtgs 1 (8-18-22) and 2 (9-27-22) Recap

- 1) Rulemaking process, roles, responsibilities, background, and history.
  - 1) Reviewed the 2011-2017 statute changes.
  - 1) Brief overviews/introductions potential rulemaking topics.
- 
- 2) Presettlement Areas for Wetland Replacement and Bank Service Areas
  - 2) Siting of Wetland Replacement when using the Wetland Bank
  - 2) Wetland Typing – for Impacts and Replacement
  - 2) Replacement Wetland Buffers – Requirements and Crediting
  - 2) Wetland Bank Plan Approval Process

**Mtg Recordings are available at:** <https://bwsr.state.mn.us/wca-rulemaking>

# In-Lieu Fee Program

- 1) The In-Lieu Fee Program itself
  - 2) “Compensation Planning Frameworks” and their relationship to High Priority Areas
- Update on status and future of both, including timing of rulemaking.

# 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. Authority added to require an ILF program sponsor to provide a programmatic financial assurance, if in-fact a non-BWSR sponsor is allowed.
- 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.

# What is an In Lieu Fee Program (ILF)

- Federal Wetland Mitigation Program that allows fees to be paid to a program sponsor to satisfy a wetland mitigation requirement in-lieu of wetland credits.
- Differs from a wetland bank
  - Restoration activities are performed then credits awarded and used
  - Credits used and restoration activities performed at a later date
- This is termed “Advanced Credits” (or “ILF credits”)
  - Similar to the use of a credit card



# Why Develop an ILF

- 2015 legislation (Minn. Stat. 103G.2242) allowing BWSR to develop an ILF
- Initial purpose of supporting the Local Government Roads Wetland Replacement Program (LGRWRP)
- ILF credits to be used in BSAs when adequate wetland banking credits are not available
- Private sector use of the program will be developed later.

# Components of an ILF

## 1. Instrument

- Contract between BWSR and Corps that governs the use and development of the program
- Documents the fee for credit schedule
- How funds will be held, transferred and used
- Scheduled to be completed in 2024

# Components of an ILF

## 2. Compensation Planning Framework (CPF)

- Watershed based plan that prioritizes wetland mitigation at the major watershed scale for each BSA.
- Ranks catchments within the major watersheds through a GIS based scoring process using specific criteria.
- The result is a map of the BSA identifying areas where wetland mitigation projects will be targeted by BWSR

# CPF Overview

## Wetland Replacement Prioritization Strategy

- A two-step process:
  1. Baseline condition assessment
    - Resource inventory conducted at major watershed scale
  2. Catchment prioritization
    - Catchment assessment and ranking within major watersheds
    - Assessment of potential sites within catchments using restorable wetland inventory (RWI)

## BANK SERVICE AREA 6 COMPENSATION PLANNING FRAMEWORK

Watershed Based Approach to Compensatory Wetland Mitigation

# CPF Development

## Baseline conditions for each major watershed

- Pre-settlement vegetation (Veg Mod)
- Wetlands (2019 NWI) (Palustrine only)
- Lakes (DNR Hydrography)
- Watercourses (DNR Rivers and Streams)
- Water Quality (MPCA list of impaired Waters)\*
- Land cover (NLCD)
- Areas of Bio-Diversity (Biological Survey)
- Important Habitats (e.g. white cedar)
- Stakeholders additional criteria

# CPF Overview

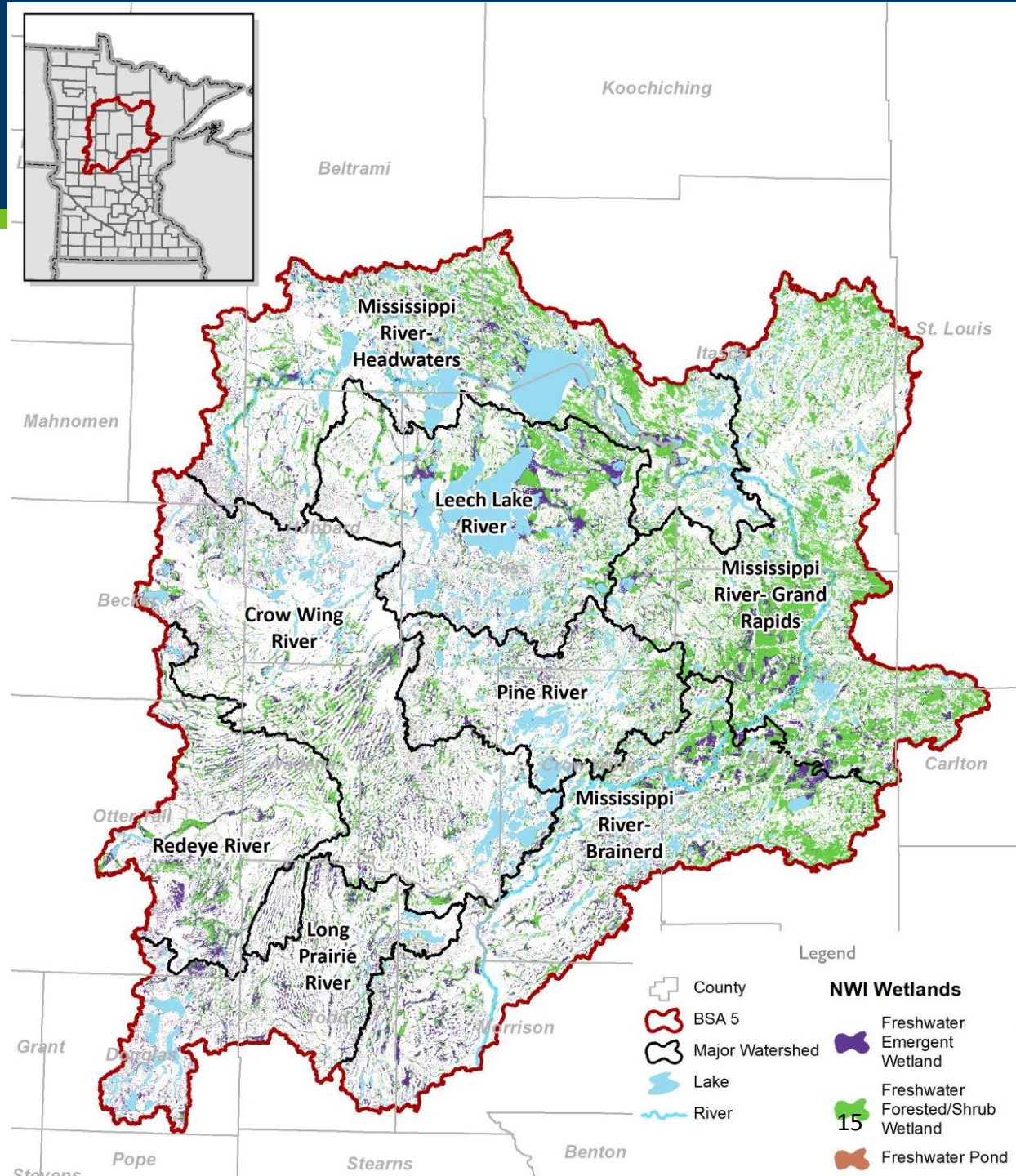
Baseline Conditions - Acres of Wetland							
Major Watershed	Watershed Acres	Palustrine				Total Wetland Acres	Percent Watershed Wetland
		Emergent	Forested	Scrub-Shrub	AB+UB*		
Crow Wing River	1,268,959	110,242	42,438	87,540	9,997	250,217	20%
Leech Lake River	857,971	67,061	79,434	55,039	4,356	205,890	24%
Long Prairie River	565,078	68,399	14,706	26,013	4,978	114,096	20%
Mississippi River- Brainerd	1,076,300	112,103	96,554	105,610	7,213	321,479	30%
Mississippi River- Grand Rapids	1,332,798	82,084	242,067	195,402	8,095	527,648	40%
Mississippi River- Headwaters	1,228,889	83,852	134,502	92,876	6,389	317,618	26%
Pine River	500,887	36,939	31,904	38,908	4,487	112,238	22%
Redeye River	572,069	64,831	25,478	49,116	3,173	142,598	25%
<b>BSA 5 Total</b>	<b>7,402,952</b>	<b>625,509</b>	<b>667,082</b>	<b>650,505</b>	<b>48,688</b>	<b>1,991,784</b>	<b>27%</b>
<b>Statewide</b>	<b>55,643,000</b>	<b>3,497,216</b>	<b>4,017,768</b>	<b>3,272,709</b>	<b>291,406</b>	<b>11,079,099</b>	<b>20%</b>

Data from the Minnesota NWI (2019 update)

\*Aquatic Bed and Unconsolidated Bottom



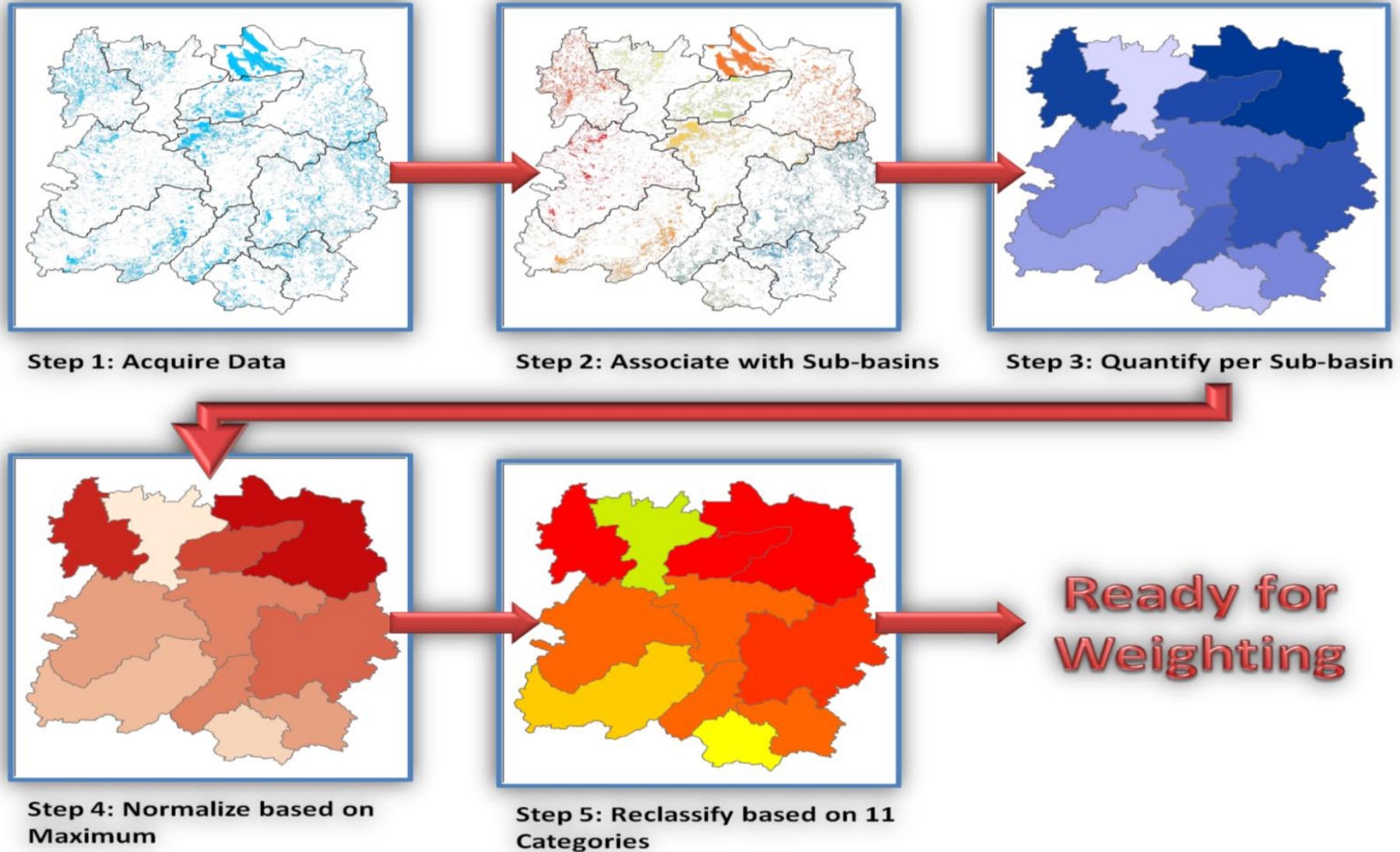
# NWI Wetlands



## Criteria Used in the Catchment Prioritization for the MMRW

Assessment Criteria	General Description and Source
Areas with more altered watercourses (C1)	The altered watercourse score measures the proportion of streams and rivers that have been altered within each catchment watershed (MPCA's Altered Watercourses Project).
Areas with high potential for groundwater recharge (C2)	Wetlands play an important role in storing water and allowing surface water to slowly infiltrate which benefits recharge efforts. The pollution sensitivity of near-surface materials index from the WHAF was used to represent this criterion.
Areas with low amounts of perennial cover (C3)	Perennial cover was considered to be any land cover not identified as developed or in any form of agricultural use based on the 2011 National Land Cover Data. Hay and pasture was considered to be perennial cover.
Areas with high Section 404 permitting frequency (C4)	The number of permits per catchment divided by the area of wetlands in the catchment using data provided by the U.S. Army Corps of Engineers permit database from 2011 to 2016.
Areas with poor riparian habitat connectivity (C5)	The Riparian Connectivity Index in the WHAF compares the amount of cropped or developed land cover to the amount of open land in the riparian area.
Areas where there are high quality/value habitats (C6)	Using information from the MNDNR 2015-2025 Wildlife Action Plan a ratio of the high and medium high scored areas to total area was calculated for each catchment.
Areas with higher amounts of impaired lakes and streams (C7)	Using the MPCA's Water Quality Assessment Database (2018) a value representing lake area and stream length impaired for the water quality concerns identified by stakeholders was calculated for each catchment.
Areas with more degraded wetlands (C8)	The acreage of ditched wetlands in each catchment was determined using the special modifiers in the NWI.
Areas with higher amounts of historic wetland loss (C9)	Historic wetland loss as a percentage of historical wetlands using hydric soil ratings and the NWI.
Wetland restoration priorities in w-shed/regional plans (C10)	Identification of wetland restoration opportunities in other local/regional plans.

# CPF Data Analysis



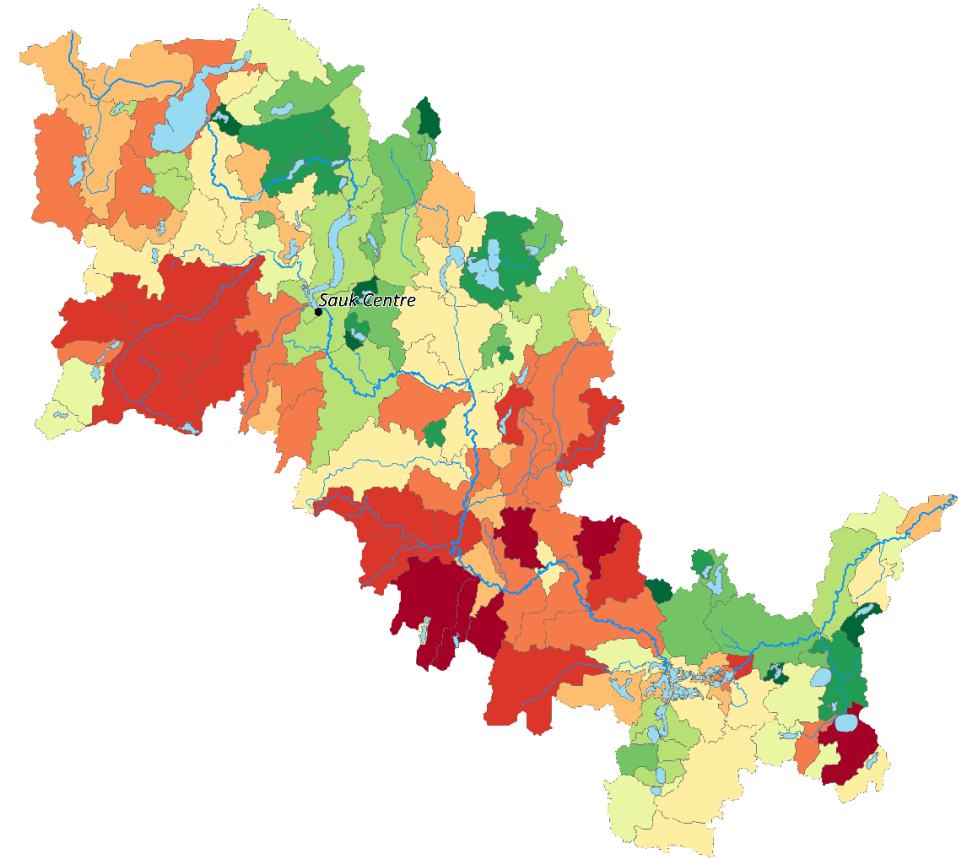
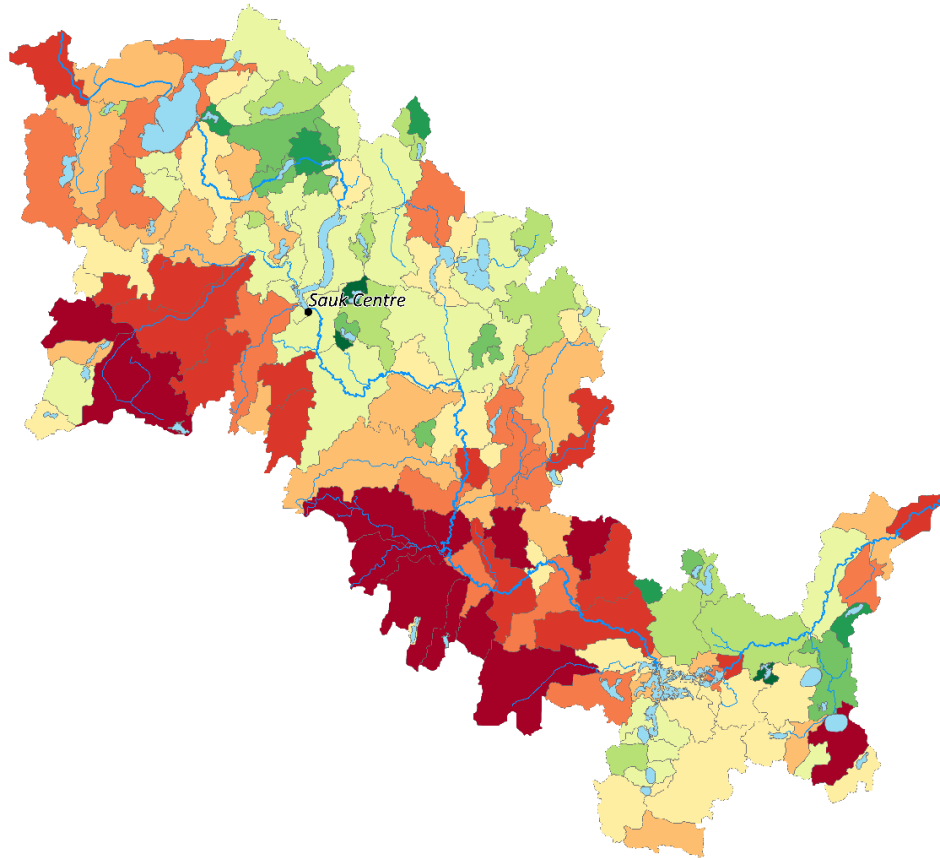


# Middle Mississippi River Watershed Wetland Restoration Planning Study

## - Sauk River -

Unweighted

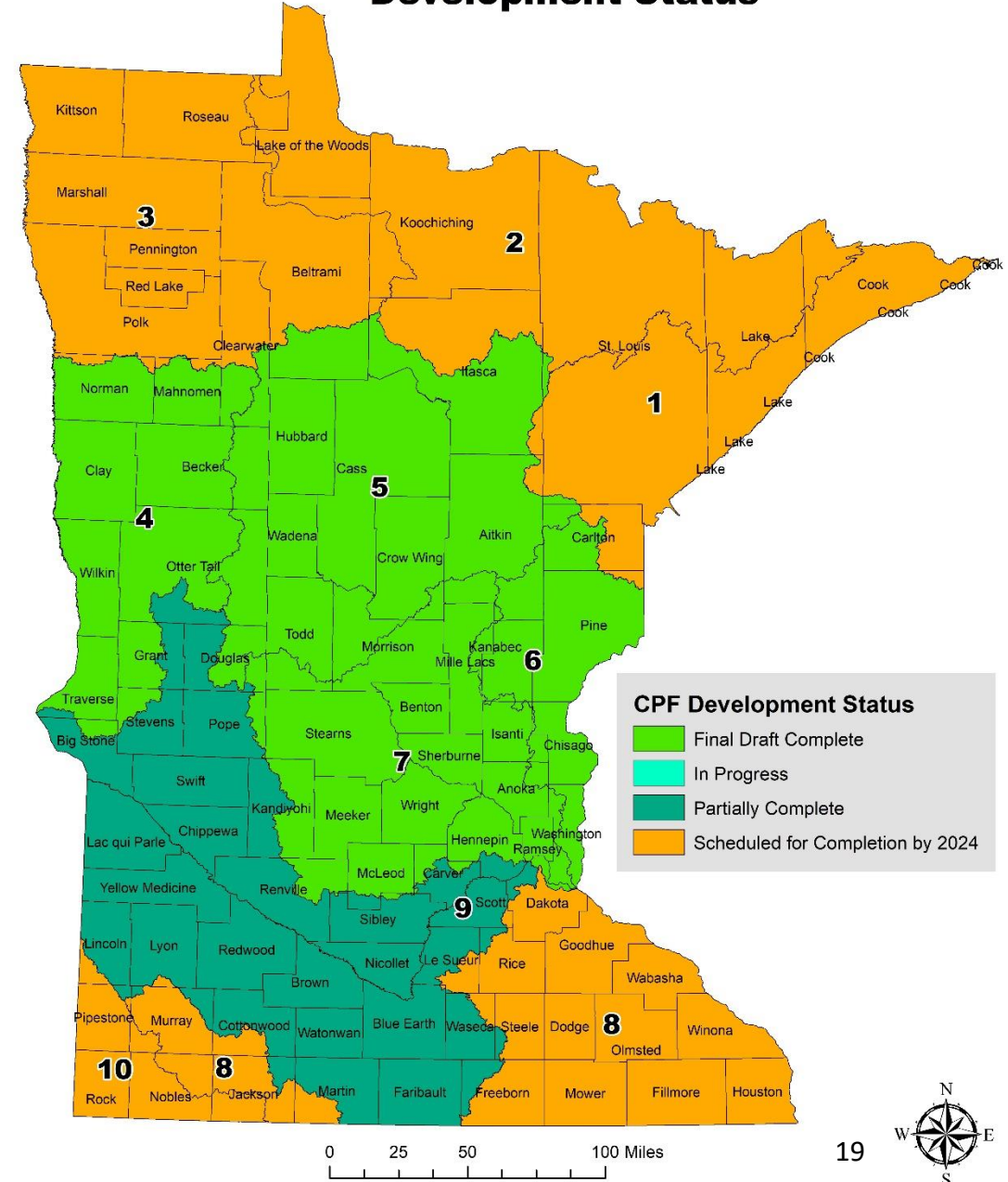
Weighted



# Development Status

- ✓ BSAs 4, 5, 6, and 7 are complete.
- ✓ Obtained funding to complete the remaining CPFs.
- ✓ Currently developing BSAs 1, 2, 3, 8, 9, and 10.
  - (BSA 10 will be combined with SW portion of 8)

## Compensation Planning Framework Development Status



# How will the CPFs be used?

1. Initially, they will be used to prioritize and select projects for the Local Government Roads Wetland Replacement Program.
  - Under the LGRWRP, BWSR provides the wetland replacement for qualifying local road improvement projects.
2. In the future, the CPFs can be incorporated into the WCA rule as High Priority Areas.
3. Potential for a future switch to priority-based siting criteria?
4. Other conservation programs can use the CPF priorities to evaluate potential projects.



# The ILF/CPFs and High Priority Areas

- In 2015, Minn. Stat. 103B.3355(e) was amended to direct BWSR to identify “High Priority Areas” 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...”*

- “High Priority Areas” and the ILF “Compensation Planning Frameworks” are essentially the same thing, so we are combining them into a single process.
- The implementation of the High priority Areas will primarily occur through a future rulemaking.

# ILF Next Steps

- 1) Make minor language tweaks (this rulemaking) where necessary to allow for use of the ILF by the Local Government Roads Wetland Replacement Program.
- 2) Finish the ILF “instrument” and Compensation Planning Frameworks, obtain approval from the USACE.
- 3) Begin using for LGRWRP.
- 4) Identify the program structure and requirements for public use of the ILF.
- 5) Seek rule amendments for broader (i.e. private sector) use in a future rulemaking.

# Discussion

## Questions or comments about:

- The In-Lieu Fee Program?
- The Compensation Planning Frameworks/High Priority Areas?
- The timing of implementation?
- Use for the Local Government Roads Wetland Replacement Program?
- Other?

# Begin Review of Proposed Rule Language Amendments (First Draft)

- 1) WCA Statute Changes and Corresponding Rule Revisions
  - 2) WCA Rule Revisions; Non-Statutory
- These are initial language drafts of some of the more straightforward changes.
  - Punctuation, grammar, etc. will be addressed in next version.
  - There will likely be changes, depending on feedback received.
  - The Adv. Comm. will review the rule (2<sup>nd</sup> draft) again prior to board adoption of a final draft and initiation of the official public comment and rule adoption process.

# WCA Statute Changes and Corresponding Proposed Rule Revisions (First Draft)

**(No Date) (No Reference) 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.



**(2017) 103G.005 Subd. 10b. Greater than 80 percent area.** "Greater than 80 percent area" means a county, watershed, or, for purposes of wetland replacement, bank service area where 80 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.

**8420.0111 Subp. 28. Greater than 80 percent area.** "Greater than 80 percent area" means a county, 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.

**(2011) 103G.005, Subd. 10e. Local government unit.** "Local government unit" means:

(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.

**8420.0111 Subp. 38 Definitions; Local government unit.** "Local government unit" means: (D) for wetland banking projects established solely for replacing wetland impacts under a permit to mine under Minnesota Statutes section 93.481, the commissioner.

**Reason for/Effect of change:** This change establishes the DNR as an LGU responsible for implementing the WCA wetland banking provisions only for projects that will be used exclusively to replace wetland impacts occurring under a permit to mine.

Also, Subpart 1 was revised to specify that the LGU may be a **town board**, consistent with existing statute. This oversight was identified at the end of the last rulemaking, with insufficient time remaining to correct the omission.

**8420.0200 Subp. 1 – Determining Local Government Unit;**

**Duties**

(B) In the seven-county metropolitan area, the local government unit is the city, town **board under Minnesota Statutes section 368.01**, or water management organization regulating surface-water-related matters in the area in which the activity is located, or its delegate.

(D) Notwithstanding items A to G, the Department of Natural Resources is the approving authority for activities associated with projects requiring permits to mine, and wetland banking projects established solely for replacing wetland impacts under a permit to mine, under Minnesota Statutes, section 93.481, and for projects affecting calcareous fens.

**(2011) 103G.005 Subd. 10f. Electronic transmission.** "Electronic transmission"

means the transfer of data or information through an electronic data interchange system consisting of, but not limited to, computer modems and computer networks.

Electronic transmission specifically means electronic mail, unless other means of electronic transmission are mutually agreed to by the sender and recipient.

**8420.0111 Subp. 23a Electronic transmission.** Electronic transmission" means

the transfer of data or information through an electronic data interchange system consisting of, but not limited to, computer modems and computer networks. The

method of electronic transmission through the data interchange system will be electronic mail, unless other means of electronic transmission are mutually agreed

to by the sender and recipient.

**(2011) 103G.2373 Electronic Transmission.**

For purposes of sections 103G.221 to 103G.2372, notices and other documents may be sent by electronic transmission unless the recipient has provided a mailing address and specified that mailing is preferred.

**8420.0255 Subpart 1. Local Government Unit Application and**

**Decision Procedures. General.** Notices and local government unit decisions made under this chapter must be in compliance with

Minnesota Statutes, section 15.99. Notices and other documents may be sent by electronic transmission except when the recipient has

provided a **valid** mailing address and specified that mailing is preferred.

**Reason for/Effect of change:** Provides a definition for “electronic transmission,” which was previously undefined, and authorizes the use of electronic transmission. WCA was enacted in 1991 and, although amended numerous times, the statute had not kept pace with current technologies. Specifically, statute required LGU notices regarding applications, decisions, etc. to be sent via U.S. mail. This requirement was counter to how many people prefer to communicate, resulting in delays and increased workload, and increased printing expenses. Additionally, the regulation at 8420.0255 Subpart 1 was revised to specify that for physical mailing to be used at recipient request the provided mailing address **must be valid**.

**(2015) 103G.005 Subd. 10g. In-lieu fee program.**

"In-lieu fee program" means a program in which wetland replacement requirements of section 103G.222 are satisfied through payment of money to the board or a board-approved sponsor to develop replacement credits according to section 103G.2242, subdivision 12.

**8420.0111 Subp. 35a. In-lieu Fee**

"In-lieu fee program" means a program in which wetland replacement requirements of this chapter are satisfied through payment of money to the board or a board-approved sponsor to develop replacement credits.

**Reason for/Effect of change:** This statutory revision establishes a definition of in-lieu fee (ILF) program.

**(2017) 103G.005 Subd. 10h 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."

**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.

**(2017) 103G.222 Subd. 1, Wetland Replacement Siting; Mining**

(a) Wetlands... <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. For ...<no change> in section 103G.2242. 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. Public ...<no change> wetlands.

**Reason for/Effect of change:** This change allows permittees under a Permit to Mine to use any surplus wetland credits they generate under an approved project-specific replacement plan for future mining impacts. It also requires DNR to provide notice to the counties where both wetland impacts and replacement are proposed under a Permit to Mine wetland replacement plan.

**8420.0930 Mining, Subp. 1 Impacts from mining.**

- A. Wetlands must not be impacted as part of a project for which a permit to mine is required by Minnesota Statutes, section 93.481, except as approved by the commissioner. Impacts to wetlands that the landowner can demonstrate, to the satisfaction of the local government unit commissioner, were created by pits, stockpiles, or tailing basins, and by actions the purpose of which was not to create the wetland according to part 8420.0105, subpart 2, item D, are not regulated under this chapter.
- B. 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 the mitigation site is proposed.
- C. Wetlands replacement plans required under this part must meet the same principles and standards of for replacing wetlands under-parts 8420.0500 to 8420.0528 and provide for construction certification and monitoring according to parts 8420.0800 and 8420.0810.

**Subp. 4. Applicability.**

- A. Replacement wetlands approved under this part must only be used for mining-related impacts covered under a permit to mine unless the credits are approved and deposited in the state wetland bank according to parts 8420.0700 to 8420.0755. 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 in accordance with Minnesota Statute 103G.222, Subpart 1(a).

Additionally, a minor organizational change to this part of rule was made to **reduce redundancy**, and **"LGU" was replaced with "commissioner"** in one location to be consistent with a previous reference to the commissioner of DNR as the LGU for purposes of this part.



**(2012) 103G.222 Subdivision 1, Paragraphs c and d. Wetland Replacement; Requirements.**

(c) If a wetland is located in a cultivated field, then replacement must be accomplished through restoration only without regard to the priority order in paragraph (b), provided that a deed restriction is placed on the altered wetland ~~prohibiting~~ is not converted to a nonagricultural use for at least ten years.

(d) If a wetland is replaced under paragraph (c), or drained under section 103G.2241, subdivision 2, ~~paragraphs paragraph (b) and or (e),~~ the local government unit may require a deed restriction that prohibits nonagricultural use for at least ten years ~~unless the drained wetland is replaced as provided under this section.~~ The local government unit may require the deed restriction if it determines the wetland area drained is at risk of conversion to a nonagricultural use within ten years based on the zoning classification, proximity to a municipality or full service road, or other criteria as determined by the local government unit.

**8420.0520 Subp. 8. Wetlands on cultivated fields.**

A. If the wetland is located on a cultivated field and will be replaced through restoration, then the priority order for sequencing in subpart 1 is not required. A wetland impacted under this subpart must not be converted to nonagricultural land for ten years. ~~The landowner must execute and record a notice of this requirement in the office of the county recorder for the county in which the property is located and, as a condition of approval, provide documentation of the recording to the local government unit.~~

B. A local government unit may require the recording of a deed restriction prohibiting non-agricultural use, for a period of ten years, on a wetland replaced under paragraph (A) of this subpart or drained under 8420.0420 Subpart 3 when it determines the wetland is at risk of conversion to non-agricultural use. The determination must be based on zoning classification, proximity to a municipality or full-service road, or other criteria as determined by the local government.

**Reason for/Effect of change:** This change removes the requirement that a deed restriction be placed on wetlands impacted for agricultural use and replaced at 1:1 without regards to sequencing. However, the requirement that the land remain in agricultural use for a minimum of 10 years remains in place regardless of whether the deed restriction is recorded or not. Under the new language, a deed restriction is only required when the local government unit deems a risk of conversion from agricultural use to another use within ten years. The deed restriction language is now consistent for all agricultural wetland impacts (both wetlands impacted and replaced for agricultural use, and wetlands impacted under the agricultural exemption without replacement).



**103G.222 Subd. 3 – Replacement of Wetlands; 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. All wetland replacement must follow this priority order:

**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 50 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.

**(2017) 103G.223 Calcareous Fens.**

(a) Calcareous fens, as identified by the commissioner by written order published in the State Register, may not be filled, drained, or otherwise degraded, wholly or partially, by any activity, unless the commissioner, under an approved management plan, decides some alteration is necessary or as provided in paragraph (b). Identifications made by the commissioner are not subject to the rulemaking provisions of chapter 14 and section 14.386 does not apply.

(b) The commissioner may allow water appropriations that result in temporary reductions in groundwater resources on a seasonal basis under an approved calcareous fen management plan.

**Reason for/Effect of change:** This change adds in the flexibility for DNR to allow temporary reductions in groundwater to calcareous fens on a seasonal basis consistent with the approved fen management plan.

Also, some existing rule language was re-organized and one subpart was re-titled for readability and clarity.

**8420.0935 Standards and Criteria for Identification, Protection, and Management of Calcareous Fens. Subpart 1. Purpose.** The purpose of this part is to provide minimum standards and criteria for identifying, protecting, and managing calcareous fens as authorized by Minnesota Statutes, section 103G.223. ~~Calcareous fens, as identified by the commissioner, must not be impacted or otherwise altered or degraded, wholly or partially, by any action, unless the commissioner, under an approved management plan, decides some alteration is necessary. The exemptions under part 8420.0420 and the sequencing provisions under part 8420.0520 do not apply to calcareous fens.~~

**Subp. 4. Approved Impacts and Management plans.** Calcareous fens must not be impacted or otherwise altered or degraded except unless either i) the commissioner decides some alteration is necessary as provided for in a calcareous fen management plan approved by the commissioner, or, ii) the commissioner decides to allow water appropriations that result in temporary reductions in groundwater resources on a seasonal basis under an approved calcareous fen management plan. The commissioner must provide technical assistance to landowners or project sponsors in the development of management plans. The exemptions under part 8420.0420 and the sequencing provisions under part 8420.0520 do not apply to calcareous fens.

**(2012) 103G.2241 Subd. 1 (Agricultural activities), Clause 7.**

A replacement plan for wetlands is not required for: (7) agricultural activities on agricultural land that is subject to the swampbuster provisions of the federal farm program restrictions that meet minimum state standards under this chapter and sections 103A.202 and 103B.3355 and that have been approved by the Board of Water and Soil Resources, the commissioners of natural resources and agriculture, and the Pollution Control Agency consistent with a memorandum of understanding and related agreements between the board and the United States Department of Agriculture, Natural Resources Conservation Service.

**8420.0420 Subp. 2 - Exemption Standards, Agricultural Activities**

A replacement plan is not required for: (G) impacts resulting from agricultural activities on agricultural land that is subject to the Wetland Conservation Compliance Provisions of the Food Security Act of 1985, as amended, consistent with the memorandum of understanding and related agreements between the board and the United States Department of Agriculture, Natural Resources Conservation Service.~~that are subject to federal farm program restrictions that meet minimum state standards under this chapter and Minnesota Statutes, sections 103A.202 and 103B.3355, and that have been approved by the board, the commissioners of natural resources and agriculture, and the Pollution Control Agency. An exemption under this item is not valid until such approval is obtained. If approved ...<deleted> ...are not beyond what is:~~

**Reason for/Effect of change:** This 2012 statute change added the connection to the federal agency (USDA-NRCS) and allowed for the development of the Agricultural Wetland Bank MOU between BWSR and NRCS. The resulting MOU, which is still in place, is successfully implementing the statutory exemption above. The rule language is being updated to be consistent with statute.

**(2012) 103G.2241 Subd. 9. De minimis.**

Due to the length of the de minimis section the statutory text has not been included here.

**8420.0420 Subp. 8. De minimis**

A. Except as provided in items B and C, a replacement plan is not required for projects that impact up to the following amounts of wetlands:

**Reason for/Effect of change:** The de minimis exemption language has been re-organized, but the exemptions remain at the same level for all but a very few Type 7 (forested) wetlands in the <50% areas of the state. Specifically, the de minimis for Type 7 wetlands outside of shoreland in <50% areas outside of the 11-county metro area is increased from 100 to 2,000 square feet, while the de minimis for Type 7 wetlands in <50% areas outside of shoreland within the 11-county metro area is eliminated (reduced from 100 square feet to zero). Additionally, the new language allows for moderate increases to certain de minimis impacts within the shoreland building setback zone when permanent water runoff retention or infiltration practices are installed and approved by the shoreland management authority. For clarity and ease of interpretation, the exemption language has been converted from narrative to table form, and from using county lists to using presettlement areas for determination of location.

County Location	Types 1, 2, 6 or 7 (excl. white cedar & tamarack) outside shoreland	Types 1, 2, 6 or 7 (excl. white cedar & tamarack) w/in shoreland	Types 1, 2, 6 or 7 (excl. white cedar & tamarack) w/in setback in shoreland	Types 3, 4, 5, 8, white cedar or tamarack outside shoreland	Types 3, 4, 5, 8, white cedar or tamarack w/in shoreland	Types 3, 4, 5, 8, white cedar or tamarack w/in setback in shoreland
Greater than (>) 80% area	10,000 sf	400 sf or 1,000 sf <sup>1</sup>	20 sf or 100 sf <sup>2</sup>	100 sf	100 sf	20 sf or 100 sf <sup>2</sup>
50 to 80% area	5,000 sf	400 sf	20 sf or 100 sf <sup>2</sup>	100 sf	100 sf	20 sf or 100 sf <sup>2</sup>
Less than (<) 50% area	2,000 sf	400 sf	20 sf or 100 sf <sup>2</sup>	100 sf	100 sf	20 sf or 100 sf <sup>2</sup>
50% to 80% area in the 11-county metro area	2,500 sf	400 sf	20 sf or 100 sf <sup>2</sup>	100 sf	100 sf	20 sf or 100 sf <sup>2</sup>
Less than (<) 50% area in the 11-county metro area	1000 sf; 0 sf for type 7	400 sf	20 sf or 100 sf <sup>2</sup>	100 sf	100 sf	20 sf or 100 sf <sup>2</sup>

<sup>1</sup> if isolated and no direct surficial connection to the public water or if permanent water runoff retention or infiltration measures are established.

<sup>2</sup> if permanent water runoff retention or infiltration measures are established.

**(2017) 103G.2242 Subd. 1 - Wetland Value Replacement Plans; Rules**

(d) When making a determination under rules adopted pursuant to this subdivision on whether a rare natural community will be permanently adversely affected, consideration of measures to mitigate any adverse effect on the community must be considered.

**Reason for/Effect of change:** This change requires the consideration of any mitigation measures when determining if a rare natural community is adversely affected.

Additional detail was provided in rule to establish a basis for both DNR and LGU determinations related to this provision. These added details are consistent with previously developed joint DNR/BWSR guidance.

**8420.0515 Subd. 3 – Special Considerations; Rare Natural Communities**

[Opening text unchanged]

- A. The Commissioner must consider the following when making a rare natural community determination:
- 1) existing data on native plant communities in the area;
  - 2) conservation, condition, and biodiversity significance status ranks of the community;
  - 3) location relative to surrounding native plant communities and land uses; and
  - 4) presence, abundance, and rarity of the same community type at local, regional, and statewide scales.
- B. The local government unit must consider the following when determining if the proposed activities will permanently adversely affect a rare natural community:
- 1) permanence of the impact to the community;
  - 2) size of the area affected by the impact relative to overall size of the community and the extent to which the impact will alter its character and quality;
  - 3) the potential for ongoing and reasonably foreseeable further impacts to any remaining areas of the community after the impact;
  - 4) proposed onsite mitigation measures aimed at sustaining or enhancing the same community type; and
  - 5) any proposed compensatory mitigation measures that either restore comparable rare natural communities or permanently protect at-risk rare natural communities. To restore a rare natural community means to permanently protect its native community attributes, preferably in the same watershed or ecological section.

**(2011) 103G.2242 Subd. 2a(e) - Wetland Value Replacement Plans; Wetland Boundary Type or Determination.**

The local government unit decision is valid for ~~three~~ five years unless the Technical Evaluation Panel determines that natural or artificial changes to the hydrology, vegetation, or soils of the area have been sufficient to alter the wetland boundary or type.

**Reason for/Effect of change:** Increases the default timeframe that decisions are valid, which is more consistent with 404 permit timelines. Additionally, Subp. 4, into which this statutory revision was incorporated, was revised from a narrative format to a more concise list-based format for ease of interpretation and increased clarity.

**Existing Narrative Format:** ~~The local government unit's decision must be based on the standards and procedures required by this chapter and on the technical evaluation panel's findings and recommendation, when provided. The local government unit must consider and include in its record of decision the technical evaluation panel's recommendation, when provided, to approve, modify, or deny the application. The local government unit must also consider any comments received from those required to receive notice. The local government unit's decision must be made in compliance with the time period prescribed by Minnesota Statutes, section 15.99, which, on the effective date of this part, generally requires a decision in 60 days. The local government unit may make on-site exemption and no-loss decisions if the decisions are noticed according to subpart 5 and project details are provided sufficient to document eligibility. The local government unit's decision is valid for three years or as otherwise specified in the local government unit's decision when the technical evaluation panel advises that a longer period is justified in accordance with the standards in parts 8420.0100 to 8420.0935. in this chapter.~~



**Revised to list format and included statutory timeframe revision described in previous slide:**

**8420.0255 Subp. 4 – Local Government Unit Application and Decision Procedures; Application**

The local government unit's decision:

- A. must be based on the standards and procedures required by this chapter;
- B. must be based on the technical evaluation panel's findings and recommendation, when provided, and must include such findings and recommendation in the record of decision;
- C. must take under consideration any comments received from those required to receive notice;
- D. must be made in compliance with the time period prescribed by Minnesota Statutes, section 15.99, which, on the effective date of this part, generally requires a decision in 60 days;
- E. may include on-site exemption and no-loss decisions if such decisions are noticed according to subpart 5 and project details are provided sufficient to document eligibility;
- F. and, will be valid for a period of **three five years** from the date of notice, except for wetland boundary and type decisions where the Technical Evaluation Panel, subsequent to the issuance of the decision, determines that natural or artificial changes to the hydrology, vegetation or soils, of the area have altered the wetland boundary or type, or, as otherwise specified in the local government unit's decision when the technical evaluation panel advises that a longer period is justified in accordance with the standards in parts 8420.0100 to 8420.0935 in this chapter.



**(2011) 103G.2242 Subd. 14. Fees established.**

(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.

**8420.0755 Subp. 2. Bank Account Administration; Administrative fees.**

B. The board may establish fees at or below the amounts in (A) for single user or other dedicated wetland banking accounts. Fees will be assessed on single-user or other dedicated wetland banking accounts established solely for replacing wetlands impacts under a permit to mine authorized under MN Statute § 93.481 only for initial account deposit and will be assessed at the rate of 6.5 percent of the value of the credits, not to exceed \$1,000.

**Reason for/Effect of change:** Allowing BWSR to establish fees less than those otherwise required recognizes that certain special account types, specifically including those established per 103G.005, Subd. 10(e) above, may have reduced administrative costs associated with them due to their nature and operation, and thus a reduced fee can be appropriate. BWSR's fee structure will be adjusted accordingly for banking projects approved for mining. Any other reduced fees would be established via board policy within the limits of the statute.

**(2015) 103G.2242 Subd. 14. Fees established.**

(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.

**8420.0755 Subp. 2(A)(4) Bank Account Administration; Administrative Fees**

The board may assess a fee to recover costs associated with the establishment of easements meeting the requirements of 8420.0705 Subpart 5, or other long-term mechanisms meeting the requirements of this chapter.

**Reason for/Effect of change:** Establishes the authority for BWSR to recoup costs associated with establishing easements or other long-term protection mechanisms on land used for wetland replacement.

**(2011) 103G.2251 State Conservation Easements; Wetland Bank Credit.**

In greater than 80 percent areas, preservation of wetlands ~~owned by the state or a local unit of government~~, protected by a permanent conservation easement as defined under section 84C.01 and held by the board, may be eligible for wetland replacement or mitigation credits, according to rules adopted by the board. To be eligible for credit under this section, a conservation easement must be established after May 24, 2008, and approved by the board. Wetland areas preserved under this section are not eligible for replacement or mitigation credit if the area has received financial assistance from public conservation programs.

**8420.0526 Subp. 9 Actions Eligible for Credit; Preservation of wetlands owned by the state or a local unit of government.**

In greater than 80 percent areas, up to 12.5 percent of wetland areas and adjacent buffer is eligible for replacement credit when the wetland area and buffer are protected by a permanent conservation easement and have not received financial assistance from public conservation programs. ~~owned by the state or a local unit of government and protected by a permanent conservation easement is eligible for replacement credit.~~

**Reason for/Effect of change:** Allows the preservation of important high-quality wetlands for replacement credit, regardless of property ownership (statute previously limited preservation to public lands). This provides more options in >80% areas where traditional replacement opportunities are limited and improves consistency with federal wetland regulations. It will also improve the targeting of preservation to wetlands truly at risk, help protect valuable wetland functions critical to watershed health, and improve consistency with federal rules. The revisions further provide assurance that wetlands protected by other conservation easements are not eligible.

# Proposed Non-Statutory WCA Rule Revisions (First Draft)

**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.

## 8420.0012 – Incorporation by Reference

This chapter incorporates by reference the following documents and any subsequent updates, addenda, or derivations related to them, as approved by the board:

C. Classification of Wetlands and Deepwater Habitats of the United States ~~Cowardin, et al., 1979 edition~~ Federal Geographic Data Committee, 2013.

D. A Hydrogeomorphic Classification for Wetlands M.M. Brinson, 1993.

P. Wetland Plants and Plant Communities of Minnesota & Wisconsin, S. Eggers and D. Reed, ~~1997~~ 2015.

**Reason for/Effect of change:** This revision updates the reference to the Cowardin classification system and NWI mapping standards, adds a citation related to the hydrogeomorphic wetland classification definition, and updates the date for Wetland Plants and Plant Communities of Minnesota and Wisconsin to the current version.



### **8420.0255 Subp. 3 – Local Government Unit Application and Decision Procedures; Notice of Application**

If requested, individual members of the public ~~who request a copy~~ must be sent a ~~summary~~ copy of the application that includes information to identify the applicant and the location and scope of the project. The comment period must ~~be at least~~ end no sooner than 15 business days from the date the notice of application is sent.

**Reason for/Effect of change:** This revision was made to bring the rule into alignment with 103G.2242 Subd. 16, requiring that a *copy* of the application, not a *summary* of the application, be provided upon request. Additionally, increased clarity was provided concerning the comment period timeframe.

**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.

**8420.0420 Subp. 2(A) – Exemption Standards; Agricultural Activities**

A replacement plan is not required for: impacts resulting from agricultural activities in a wetland that was planted with annually seeded crops or was in a crop rotation seeding of pasture grass or legumes in six of the last ten years prior to January 1, 1991. Documentation, such as aerial photographs, United States Department of Agriculture records, or other applicable documentation may be used as evidence for this exemption. ~~Impacts eligible for this exemption must be to type 1 or 2 wetlands;~~

**Reason for/Effect of change:** This revision eliminates a conflict with the statute at 103G.2241, Subd. 1, which does not limit this exemption to impacts on type 1 and 2 wetlands.

**8420.0520 Subp. 7(a)(A) – Sequencing; Sequencing Flexibility**

Flexibility in application of the sequencing steps may be applied by ~~requested by the applicant and allowed at the discretion~~ of the local government unit, subject to the conditions in item B, as determined by the local government unit, if:

**Reason for/Effect of change:** This revision corrects unintended limitations on the use of sequencing flexibility by removing the requirement that flexibility be requested by the applicant and allowing it to be applied directly by the LGU absent the applicant's request.

**8420.0520 Subp. 7(a)(B) – Sequencing; Sequencing**

Sequencing flexibility in the order and application of sequencing standards must not be implemented unless alternatives have been considered and the proposed replacement wetland is certain to provide equal or greater public value as determined based on ~~a functional assessment~~ an assessment of wetland functions reviewed by the technical evaluation panel ~~using a methodology approved by the board~~. The applicant must provide the necessary information and the local government unit must document the application of sequencing flexibility in the replacement plan approval.

**Reason for/Effect of change:** This revision shifts the mechanism for determination of public value from the use of “a functional assessment” to, more broadly, “an assessment of wetlands functions”, as the use of the quantitative methods characteristic of functional assessment models is not always necessary.

### **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.



- Any specific questions, comments, or suggestions that we didn't get to?
- Thoughts in general?

# Next Steps

- Continue development of “First Draft” Proposed rule language, review at next Wetland Advisory Committee meeting.
- Obtain additional feedback (local government staff, state and federal agencies, wetland bankers, other stakeholders, etc.).
- Develop second draft of rule language (entire rule), review at future Wetland Advisory Committee meeting.
- Obtain additional feedback.
- Begin formal rulemaking public input and adoption process.

# Questions or Comments?

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