

# Minnesota Wetland Conservation Act

## Report to the Legislature



March 15, 2016

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This report was prepared to comply with 2015 Laws of MN, 1st Special Session, Chapter 4, Article 4:  
Sec. 133. WETLAND CONSERVATION ACT REPORT.

By March 15, 2016, the Board of Water and Soil Resources, in cooperation with the Department of Natural Resources, shall report to the committees with jurisdiction over environment and natural resources on the proposals to implement high priority areas for wetland replacement and in-lieu fees for replacement and modify wetland replacement siting and actions eligible for credit. In developing the report, the board and department shall consult with stakeholders and agencies.

Estimated cost of preparing this report (as required by Minn. Stat. § 3.197) was \$6,900.

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## Introduction

This report was prepared to comply with 2015 Laws of MN, 1st Special Session, Chapter 4, Article 4, which directed the Board of Water and Soil Resources (BWSR) to report to the committees with jurisdiction over environmental and natural resources on the proposals to implement certain aspects of the Wetland Conservation Act (WCA); specifically high priority areas for wetland replacement, in-lieu fee wetland replacement, wetland replacement siting, and actions eligible for credit. The primary purpose of the report is to summarize progress and challenges with policy development and implementation of these items.

## 2015 Wetland Conservation Act Statute Changes

In 2015, several changes were made to WCA statutes, including amendments to Minn. Stat. § 103G and 103B. The primary purpose of these statute changes was to improve the targeting and public value outcomes of wetland mitigation. The changes were the result of several years of work by agency staff and coordination with other state and federal agencies and stakeholders. The impetus for most of the changes can be found in the “Siting of Wetland Mitigation in Northeast Minnesota” interagency report. The report is available on the BWSR website at: [http://www.bwsr.state.mn.us/wetlands/wca/NE\\_MN\\_mitigation/siting\\_NE\\_MN\\_mitigation.html](http://www.bwsr.state.mn.us/wetlands/wca/NE_MN_mitigation/siting_NE_MN_mitigation.html)

In addition, several issues relating to the 2015 WCA statute changes were addressed in the Governor’s Executive Order 12-04 final report, “Supporting and Strengthening Implementation of the State’s Wetland Policy.” The report is available on the BWSR website at: [http://www.bwsr.state.mn.us/wetlands/executive\\_order\\_12-04/](http://www.bwsr.state.mn.us/wetlands/executive_order_12-04/)

The concepts contained within the siting report, and other issues, were explored and further developed in direct consultation with stakeholders leading up to the 2015 statute changes. For specific information, presentations, and comments regarding this effort, see the BWSR website at: [http://www.bwsr.state.mn.us/wetlands/2015\\_leg\\_recommend/2015\\_leg\\_recommend.html](http://www.bwsr.state.mn.us/wetlands/2015_leg_recommend/2015_leg_recommend.html)

Significant WCA statute changes in 2015 included:

- creating a mitigation easement stewardship account and authority for BWSR to recoup costs incurred for establishing mitigation easements;
- requiring BWSR to designate high priority areas for wetland mitigation;
- additional authorities for BWSR to develop an in-lieu fee wetland mitigation program;
- modifying the wetland mitigation siting criteria to improve consistency with the watershed approach;
- requiring BWSR to establish wetland replacement ratios and wetland mitigation service area priorities to implement the siting and targeting of wetland mitigation and encourage the use of high priority areas;
- directing BWSR to establish an interagency team to review potential wetland mitigation sites;
- creating new actions eligible for mitigation credit in northeastern Minnesota; and
- adjusting local government responsibilities relating to the approval of wetland mitigation.

For the specific statute changes, see the “2015 WETLAND CONSERVATION ACT STATUTE CHANGES, Summary of Key Statute Changes and Related Legislation with Explanations” on the Wetlands page of the BWSR website: <http://www.bwsr.state.mn.us/wetlands/index.html>

## Report Development Process

BWSR assigned a core team of experienced wetland staff the task of further developing the 2015 statutes and related concepts, which formed the basis for this report. The BWSR staff team presented ideas, options, and proposals to stakeholders, local governments, and staff of other agencies for review and feedback. Staff from the

Department of Natural Resources were consulted and participated in the presentations to stakeholders. In addition to the substantial stakeholder coordination leading up to the 2015 statute changes, further review opportunities associated with the preparation of this report included:

- State Register request for comments on WCA Rulemaking (see below) - October 19, 2015
- Local government staff presentation and discussion at BWSR Academy - October 2015
- Interagency Wetlands Group meeting for identifying High Priority Areas for Wetland Mitigation – January 26, 2016
- Stakeholder meeting and presentation – February 3, 2016
- Stakeholder meeting and presentation – February 24, 2016
- BWSR Wetland Committee – March 9, 2016

The presentations and materials associated with the February 2016 stakeholder meetings can be viewed on the BWSR website at:

[http://www.bwsr.state.mn.us/wetlands/2016\\_Leg\\_Report/2016\\_WCA\\_Legislative\\_Report.html](http://www.bwsr.state.mn.us/wetlands/2016_Leg_Report/2016_WCA_Legislative_Report.html)

On October 19, 2015, BWSR initiated the administrative rulemaking process via an initial request for comments published in the State Register. This report, and the work leading up to it, will form an important basis for developing the more specific implementation details in the WCA Rule. The rulemaking process will provide considerable opportunities for input by stakeholders and local governments, including the formation of a rulemaking advisory committee. See Appendix 1 for the “2015-2017 WCA Rulemaking Plan.” Interagency coordination with the St. Paul District of the U.S. Army Corps of Engineers (Corps) will also be vital to maximize consistency with Corps policy for implementation of Section 404 of the Federal Clean Water Act.

This report will also be reviewed by the BWSR Board on March 23, 2016.

## Framework and Context for Implementation

The issues discussed in this report are all interrelated components of the State’s WCA policy and rule implementation, as modified by recent statute changes. This section addresses the items specified by the 2015 legislation to be included in the report, and discusses several other issues directly related to those items.

### Designating High Priority Areas for Wetland Mitigation

The primary purpose of the 2015 WCA statute changes was to improve the targeting and public value outcomes of wetland mitigation. Originating as a recommendation in the “Siting of Wetland Mitigation in Northeast Minnesota” interagency report, the designation of High Priority Areas is intended to prioritize areas for wetland mitigation consistent with state and local planning efforts.

#### Statewide High Priority Areas

The 2015 WCA statute amendments provided clear direction for BWSR to designate “High Priority Areas” for wetland replacement (Minn. Stat. 103B.3355, Paragraph (e)) as one mechanism to improve the targeting and public value outcomes of wetland mitigation. BWSR has stated the intention to utilize available information regarding wetland functions, the historic loss and abundance of wetlands, and current state and local plans and studies (e.g. the Minnesota Prairie Conservation Plan) to identify these High Priority Areas. See Appendix 2 for a summary planning document regarding the “Identification of Statewide High Priority Areas for Wetland Mitigation.”

The identification of High Priority Areas for wetland mitigation should, to the extent possible, draw from existing State natural resource plans and priorities. Targeting wetland mitigation to these areas can help achieve objectives already identified in previous planning efforts, resulting in mitigation that is of greater value to the public, and provides direction to regulated parties on where to look for and site required wetland mitigation. One of the most important considerations for identifying High Priority Areas is scale. The appropriate scale must balance the need to provide ample wetland restoration opportunities, with the need to target mitigation to priority areas small enough to where the cumulative benefit of mitigation and other conservation projects will improve public value outcomes (i.e. the benefits will not be diluted over too large an area).

Through the Interagency Wetlands Group, BWSR intends to utilize the expertise of State and Federal agency staff to assemble information and present agency priorities for consideration in the development of statewide High Priority Areas. Initial group discussions have indicated general agreement on the usefulness of the Minnesota Prairie Conservation Plan (Figure 1) to accomplish the goals of multiple State plans and priorities. The Prairie Conservation Plan was the result of significant agency and stakeholder coordination, and also seems to offer the proper scale - providing substantial project opportunities while allowing for greater cumulative benefits.

BWSR and its partners are also cognizant that agricultural production occurs within and adjacent to priority areas outlined in the Prairie Conservation Plan. Appendix 3 illustrates prime soils and other soil classifications that have been determined by the USDA based on soil type and other soil characteristics. Based on this map, prairie conservation efforts can be focused on marginal agricultural lands that are less productive and that do not frequently provide positive economic returns. As an example, the beaches ridges of glacial Lake Agassiz in Northwest Minnesota are often comprised of wetland complexes or coarse-textured soil areas that are marginal for agriculture. The Prairie Conservation Plan focuses on areas such as this for wetland and prairie restorations and enhancements.

BWSR intends to further explore utilization of the Prairie Conservation Plan as the basis for establishing statewide High Priority Areas, with the potential for expansion of core areas to accommodate other priorities or local planning information as appropriate.

**Local Watershed Planning Priorities**

The 2015 WCA statute changes included a provision allowing local governments to identify local priority areas for wetland replacement and provide them for consideration as High Priority Areas. Specifically, Minn. Stat. § 103B.3355, Paragraph (f) states:

*Local units of government, as part of a state-approved comprehensive local water management plan as defined in section 103B.3363, subdivision 3, a state-approved comprehensive watershed management*

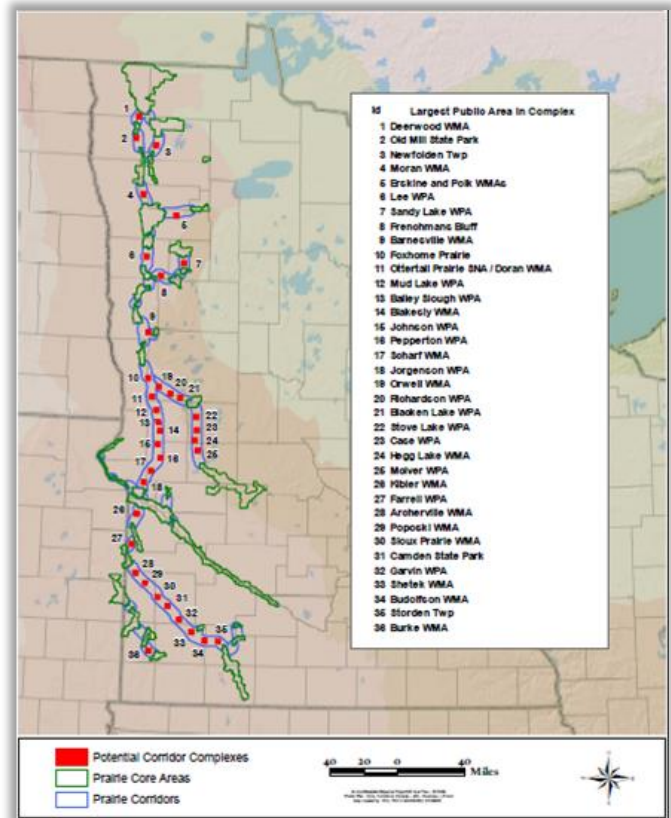


Figure 1: Prairie Conservation Plan Corridor Complexes

*plan as defined in section 103B.3363, subdivision 3a, or a state-approved local comprehensive wetland protection and management plan under section 103G.2243, may identify priority areas for wetland replacement and provide them for consideration under paragraph (e).*

These planning processes provide an opportunity for enhanced watershed planning and prioritization, consistent with the watershed approach of the Federal Mitigation Rule (33 CFR Part 332), which can result in better targeting of wetland mitigation to areas and projects that best address watershed needs. As discussed in the In-Lieu Fee Wetland Replacement section below, a Compensation Planning Framework can serve as the link between these local planning efforts and State implementation policy. In order to facilitate the appropriate planning activities consistent with the watershed approach of Federal Mitigation Rule, BWSR, in consultation with the Corps, would develop guidance to local governments for the development of wetland replacement priorities through local water planning.

## **In-Lieu Fee Wetland Replacement**

Similar to wetland banking, an In-Lieu Fee (ILF) program can provide mitigation for wetland impacts. Wetland banking provides an option for applicants to replace unavoidable wetland impacts by withdrawing wetland “credits” from an account in the State wetland bank. The “credits” represent previously restored or created wetlands that have been deposited in the bank for use by the entity that established the credits, or to be offered for sale to other applicants proposing to impact a wetland.

An ILF program provides an option for landowners to replace wetland impacts by purchasing credits from an ILF program sponsor before the replacement wetlands have been restored or created. The ILF sponsor must then develop the replacement wetlands in accordance with all applicable requirements and timeframes established in State and Federal regulations. Like banking, ILF programs are managed solely to establish mitigation, and do not affect the requirements of State and Federal laws to avoid and minimize wetland impacts before pursuing wetland mitigation. One of the primary differences between ILF and wetland banking is timing (ILF mitigation can occur after-the-fact) and an associated need for greater oversight.

WCA statutes have ostensibly allowed for the development of an in-lieu fee (ILF) wetland replacement program by BWSR since 1994, however those statutes were unclear and arguably lacked the full range of authorities necessary to effectively implement an ILF program. In 2012, Minn. Stat. § 103G.2242, Subd. 3 was amended to provide clear authority for BWSR to establish an ILF. However, further clarifications and authorities were identified and incorporated into the 2015 amendments to Minn. Stats. §§ 103G.005 and 103G.2242.

The Federal Mitigation Rule contains specific rules and procedures for establishing and operating ILF programs (see 33 CFR Part 332.8) to comply with Section 404 of the Federal Clean Water Act. As of the date of this report, there are 77 current and pending ILF programs nationally according to the Corps’ Regulatory In-Lieu Fee and Bank Information Tracking System (RIBITS) website ([https://ribits.usace.army.mil/ribits\\_apex/f?p=107:2](https://ribits.usace.army.mil/ribits_apex/f?p=107:2)).

## **Establishment and Operation of the ILF Program**

It is both advantageous and required that mitigation under an ILF program in Minnesota comply with Section 404 requirements. Since these requirements are well laid out in the Federal Mitigation Rule, BWSR intends to rely on the existing federal rule language as much as possible rather than recreating new structure and requirements. The WCA Rule will, whenever possible, cite the appropriate section(s) of the Federal Mitigation Rule, and focus on language necessary to mesh those requirements with State laws and priorities.

The ILF program in Minnesota, including a Compensation Planning Framework discussed below, could be integrated into the overall implementation of State wetland planning and policy. Also, the ILF program could take a longer term, planned approach to targeting and achieving both State and local watershed goals in regards to



mitigation. As such, BWSR will further explore operating as the ILF program sponsor, with implementation occurring through agreements and contracts with other organizations and landowners as appropriate.

BWSR, acting as the ILF program sponsor, will ensure involvement of agency technical staff in the areas of site selection, hydrology, vegetation, soils, and engineering. In this situation, the ILF program will also be situated to take advantage of partnership opportunities with local governments, conservation organizations or programs, and projects requiring coordination among multiple landowners. Of particular importance is the opportunity for coordination with the BWSR Local Government Roads Wetland Replacement Program, typically funded by the legislature on the biennium.

### **Compensation Planning Framework**

The “Compensation Planning Framework” is a fundamental component of an ILF program. The framework provides a basis for establishing replacement wetlands that will provide the greatest watershed benefits, and is a requirement of the Federal Mitigation Rule. 33 CFR Part 332.8(c) requires that:

*“The approved instrument for an in-lieu fee program must include a compensation planning framework that will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities. The compensation planning framework must support a watershed approach to compensatory mitigation. All specific projects used to provide compensation for [Corps] permits must be consistent with the approved compensation planning framework.”*

The Federal Rule identifies ten specific elements that must be included in an ILF program Compensation Planning Framework. One of those requirements is particularly notable given the current statutory direction to improve the targeting and outcomes of wetland mitigation in Minnesota. Item (vi) of Part 332.8(c) requires the framework to include “A prioritization strategy for selecting and implementing compensatory mitigation activities.”

Essentially, the Compensation Planning Framework can be the mechanism to implement wetland mitigation priorities as identified through watershed planning. In the context of the Federal Mitigation Rule, it is a requirement for an ILF program. However, applying the framework only to the ILF program could create disparities between mitigation types and disincentives for its use. In order to improve the targeting and outcomes of *all* mitigation, the framework should be applicable and utilized regardless of the mitigation type (banking, ILF, or project-specific mitigation). The applicability of the Compensation Planning Framework will be addressed in WCA rulemaking.

The Compensation Planning Framework can also serve as the link between local watershed planning and State wetland policy. In accordance with Minn. Stat. § 103B.3355, Paragraph (f), as discussed above, local governments, as part of a state-approved comprehensive water, watershed, or wetland management plan, may identify priority areas for wetland replacement and provide them for consideration as High Priority Areas for wetland mitigation. The local watershed planning mechanisms currently exist to assess and prioritize the resource needs of watersheds; the Compensation Planning Framework can provide the mechanism to guide wetland mitigation in line with those priorities.

### **Use of the ILF Program**

Currently, landowners and other entities proposing unavoidable impacts to wetlands have the option of establishing their own replacement wetlands corresponding directly to specifically identified wetland impacts (project-specific replacement), or utilizing the State wetland bank if appropriate credits are available (wetland banking). The ILF program would provide another mitigation option.

All wetland mitigation (banking, ILF, and project specific) will benefit from the improved targeting of locations and types of mitigation projects. However, wetland banking is generally recognized as a successful means of

mitigation with the least risk due to the fact that the replacement wetlands have already been established when credits are made available. Since the inception of the State Wetland Bank, Minnesota local governments have approved more wetland bank sites than any other state in the nation.

The establishment of an ILF program does not change the general preference for wetland banking, particularly if future bank sites are established in High Priority Areas or in accordance with the Compensation Planning Framework discussed above. This general preference for wetland banking is also part of federal policy. The Federal Mitigation Rule, 33 CFR Part 332.3(b), specifically establishes the following priority for wetland mitigation types:

1. Mitigation bank credits.
2. In-lieu fee program credits.
3. Permittee-responsible mitigation\* under a watershed approach.
4. Permittee-responsible mitigation through on-site and in-kind mitigation.
5. Permittee-responsible mitigation through off-site and/or out-of-kind mitigation.

\*Note: “Permittee-responsible mitigation” is a term used in federal policy that corresponds to the term “project-specific replacement” in the WCA Rule.

The current WCA Rules provide incentives for wetland replacement via the State Wetland Bank. However, BWSR will explore other options to minimize conflicts between the banking and ILF programs and to ensure continued viability of the wetland banking program in Minnesota. These options will include establishing a similar mitigation priority order in the WCA Rule that is consistent with the Federal Mitigation Rule cited above, and others that may best achieve State goals in regards to improving mitigation.

By establishing this priority order, utilization of the ILF program will primarily occur when the appropriate bank credits are not practicably available in the watershed. This will provide another opportunity to search for mitigation opportunities within the watershed, and to utilize High Priority Areas for mitigation when in-watershed opportunities are not available.

### **Necessary Elements for Effective ILF Implementation**

The Federal Mitigation Rule contains numerous specific requirements for the establishment and operation of an ILF program. Two issues in particular are notable for Minnesota, and not able to be fully addressed through rulemaking alone.

Planning Timeframes and Program Funding. ILF programs can produce some or all of the required mitigation after the wetland impacts have occurred. This increases potential risks associated with project failure and/or ILF sponsor solvency. The Federal Mitigation Rule attempts to limit this risk in-part by including a requirement that the ILF wetland mitigation project construction begin within three years of the first wetland impact. Specifically 33 CFR Part 332.8(n)(4) requires that:

*Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area is secured by a permittee, unless the district engineer determines that more or less time is needed to plan and implement an in-lieu fee project.*

While important to reduce risk, this requirement can have the unintended consequence of limiting an ILF’s effectiveness as a mechanism to take a longer-term, planned approach to improve the targeting and outcomes of wetland mitigation. Given the timeframes typically associated with completing a wetland restoration project for mitigation credit, the ILF sponsor must begin the process of searching for mitigation opportunities immediately upon the sale of the first credits (or even before). At this point, it is difficult to predict how many credits will be

sold and where the associated impacts will occur (and thus how large of a site to pursue and where). At this early stage, it is also unlikely that the ILF has accumulated enough funds to cover costs associated with planning, design, permitting, easement establishment, contracts, and other project components. In addition, credits are typically not fully released until several years later. These factors can create challenges for ILF programs.

For the ILF program to be effective at improving the targeting and outcomes of wetland mitigation through more proactive planning and site selection, **it is imperative that the program obtain implementation funding**. BWSR intends to pursue funding from the legislature and/or other sources. Implementation funding would allow the program to begin the mitigation site search and development process earlier, effectively expand the planning timeframes, and allow for improved targeting of mitigation. Funds would be recovered (with interest) through the sale of credits based on full cost accounting as required by the Federal Mitigation Rule, and re-invested in the development of targeted mitigation. The funds would essentially act as a revolving loan within the program that will provide multiple recurring natural resource benefits over time.

*Consistent Mitigation Standards and Maintenance Requirements.* All wetland mitigation, regardless of the mechanism by which it is established, is equally important. As such, the standards and procedures should be consistent for all wetland mitigation mechanisms. Differences in standards and procedures can create artificial incentives and disincentives for different mitigation mechanisms. In order for the ILF to be successful, to maintain the viability of wetland banking, and to improve programmatic efficiency, consistent standards and procedures are important.

The 2009 amendments to the WCA Rules made significant progress to develop consistent standards but, particularly with the addition of the ILF program, additional consistency is warranted. For example, 33 CFR Part 332.8(k)(3) of the Federal Mitigation Rule specifies that:

*An in-lieu fee program sponsor is responsible for the implementation, long-term management, and any required remediation of the restoration, establishment, enhancement, and/or preservation activities, even though those activities may be conducted by other parties through requests for proposals or other contracting mechanisms.*

Currently in Minnesota, long term maintenance requirements are the responsibility of the landowner. Land ownership and circumstances change over time, creating uncertainties regarding the capability of that landowner to perform maintenance, and even concerns about potential tax forfeiture. In this situation, all of the benefits accrue to the initial landowner, while some of the costs are borne by future landowners and/or the public.

The ILF program must incorporate the costs of long-term maintenance into the fee in order to comply with federal rules and to ensure that the future risk does not fall to the public. Given the fact that those same risks exist with wetland banking and project-specific mitigation, coupled with the need for consistent standards, provisions for the funding of long-term maintenance need to be developed for all mitigation types.

## Replacement Wetland Siting

Landowners proposing wetland impacts that require replacement under WCA are generally required to begin their search for wetland replacement opportunities as close to the impact site as possible. When suitable wetland replacement opportunities are not available, the search can be expanded to a broader area in accordance with the replacement wetland siting criteria established in statute and rule. The siting criteria apply, although somewhat differently, to both project-specific wetland replacement and mitigation accomplished using wetland bank credits. Both federal and State rules utilize Wetland Bank Service Areas (Figure 2), which are partly based on major drainage basins, in the siting of wetland mitigation.

### Summary of Current Siting Criteria

The replacement wetland siting criteria, established in Minn. Stat. § 103G.222, Subd. 3, generally require the search for wetland replacement to 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.

When wetland impacts are proposed via the withdrawal of wetland bank credits, the search for available credits can generally begin at step #3 above in accordance with WCA Rules. The above siting criteria are also limited by presettlement wetland area (Figure 3). Impacted wetlands in a 50 to 80 percent area must be replaced in a 50 to 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.

Presettlement wetland areas are established based on the percentage of wetlands remaining in each county compared to the amount of wetlands that county contained prior to European settlement. The percentages originate from a 1984 report by Anderson & Craig (Growing Energy Crops on Minnesota’s Wetlands: The Land Use Perspective), which determined that there are 8.8 million acres of wetlands in Minnesota, compared to 18.6 million acres of original wetlands. The amount of original wetlands is based on 1969 land use and soils data using 40 acre parcels. Although this study is dated, it remains the only statewide estimate of original vs. remaining wetlands. See Figure 4 for a map of remaining wetlands by county.

### Challenges Associated with Current Siting Language

The replacement wetland siting criteria have existed in statute, similar to their current structure, since the early days of WCA. Since that time, wetland science has evolved, bank service areas were created, the watershed approach to mitigation was established in federal rule, and clear direction to improve the targeting and public value outcomes of wetland mitigation was provided in State statute.

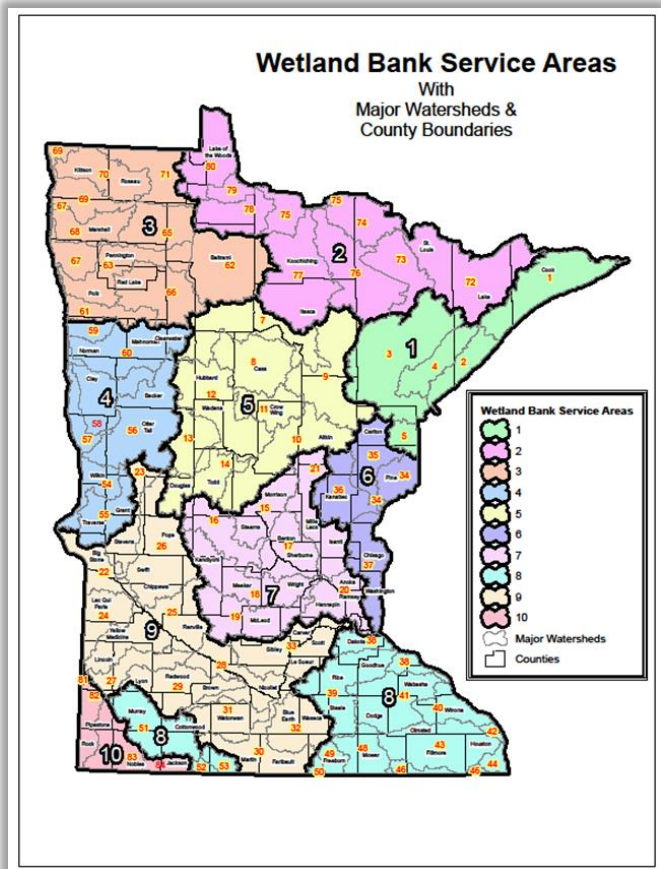


Figure 2: Wetland Bank Service Areas.

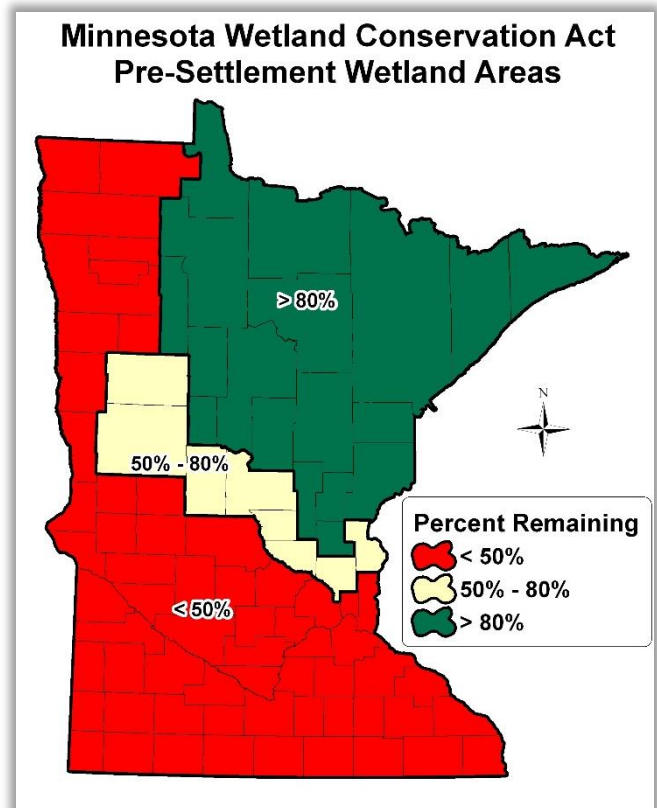


Figure 3: Pre-settlement wetland areas.

While the general concepts behind the siting criteria are still appropriate, the criteria may not be adequate to achieve the current State goals of mitigation. In addition, the current structure can create conflicts with current science, with Federal policy, and within State law.

**Targeting.** Consistent with the concepts outlined in this report, BWSR can establish statewide mitigation priorities primarily through the designation of High Priority Areas, and local watershed mitigation priorities primarily through watershed planning efforts. However, the existing siting criteria only consider location; not the types of mitigation projects and public value outcomes that can best achieve watershed goals. The criteria also do not address statewide or local watershed priorities, as they are currently undefined. It may prove difficult to incent the establishment of mitigation consistent with these priorities absent a requirement in the siting criteria to search for them.

**Siting Criteria for Replacement via Wetland Banking.**

When wetland mitigation is proposed via the withdrawal of wetland bank credits, the search for available credits can generally begin at the third step of the siting criteria (the “same county or wetland bank service area”) in accordance with the WCA Rules. This provision, part of the 2015 statute changes, is intended to:

- 1) promote wetland banking by providing greater certainty for wetland bank account owners regarding their potential markets, and
- 2) reduce conflicts arising from local governments having to determine when it is feasible to allow an applicant to use one bank over another based on different credit prices.

Currently, Minnesota’s bank service areas are quite large as compared to nationally. However, the approach to replacement wetland siting via banking described above should work in Minnesota, with one possible exception: the Twin Cities metropolitan area.

The Twin Cities are located at the confluence of four different bank service areas (see Figure 2 above). Those bank service areas stretch as far west as Big Stone County (BSA 9), as far southeast as Houston County (BSA 8), and as far north as Carlton County (BSA 6). The bank service areas that contain the Twin Cities cover more than one third of the State.

An additional challenge that the Twin Cities area presents is the extreme differences in land values between the Twin Cities metro area and non-metro areas within the same bank service area (particularly in the far reaches of the bank service areas). Land values are the single greatest factor in determining the cost of wetland mitigation, including bank credits. Absent some other limitation or incentive, the vast majority of impacts occurring in the Twin Cities metropolitan area will likely be replaced farther out in the bank service areas. However, the extent and significance of this potential migration of wetland functions associated with mitigation away from the Twin Cities will be modified to some degree by two primary factors:

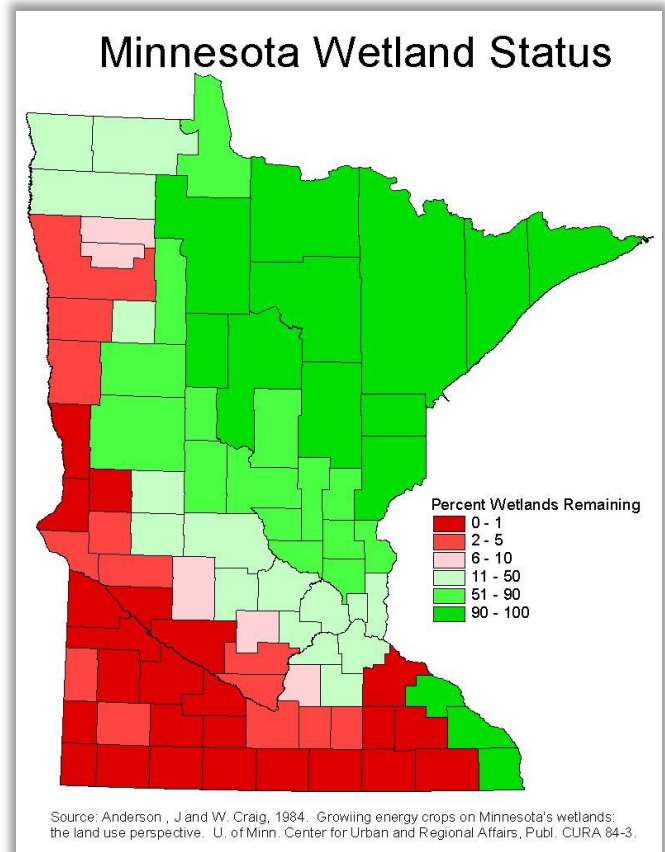


Figure 4: Wetland Loss by County

- 1) Wetland impacts in the Twin Cities area are typically associated with some form of development, for which stormwater treatment regulations apply. These regulations may provide at least some mitigating effects for the lost water quality and quantity functions of wetlands.
- 2) The Twin Cities area is covered by the Metropolitan Surface Water Management Act, which requires the establishment of Watershed Districts or Watershed Management Areas over the entire metropolitan area. These watershed organizations typically have additional requirements for water quality and quantity, and often have more stringent local standards for wetland impacts and replacement.

BWSR intends to further discuss this issue with stakeholders, local governments, and the Corps during the rulemaking process. Possible options for addressing it in rule include:

- Adjusting bank service area boundaries and/or establishing a metro service area.
- Establishing separate metro area mitigation siting criteria.
- Developing replacement ratio incentives/dis-incentives to encourage wetland mitigation within the metro area.
- No limitations except those developed by metro watershed management organizations through the local planning process.

Presettlement Wetland Areas and Siting. As discussed above, there are limitations to replacement wetland siting based on presettlement wetland area. The basic purpose of these limitations remains sound: to prevent wetland impacts in wetland-poor areas of the state (south and west) from being replaced in wetland-rich areas of the state (northeast). However, the structure of these limitations often conflicts with the watershed approach and the Federal Mitigation Rule.

For example, a wetland impact in Washington County (a <50% area) cannot be replaced in Anoka County (a 50-80% area), even when the impact and replacement site are in the same watershed. This can force applicants to look elsewhere for mitigation, often outside the watershed, despite the fact that a viable mitigation option exists in the immediate watershed of the impact. This exact situation occurs in Rice Creek Watershed District (see Figure 5).

A wetland was restored and banked in Anoka County. The hydrology source of the wetland includes a public drainage system that crosses the adjacent road (and county boundary) into Washington County. According to the siting criteria, wetland impacts associated with that same drainage system cannot use the bank across the road in Anoka County for mitigation, despite being in the same watershed. In these situations, the siting criteria actually prevent the use of ecologically preferable mitigation and conflict with the watershed approach required by the Federal Mitigation Rule.

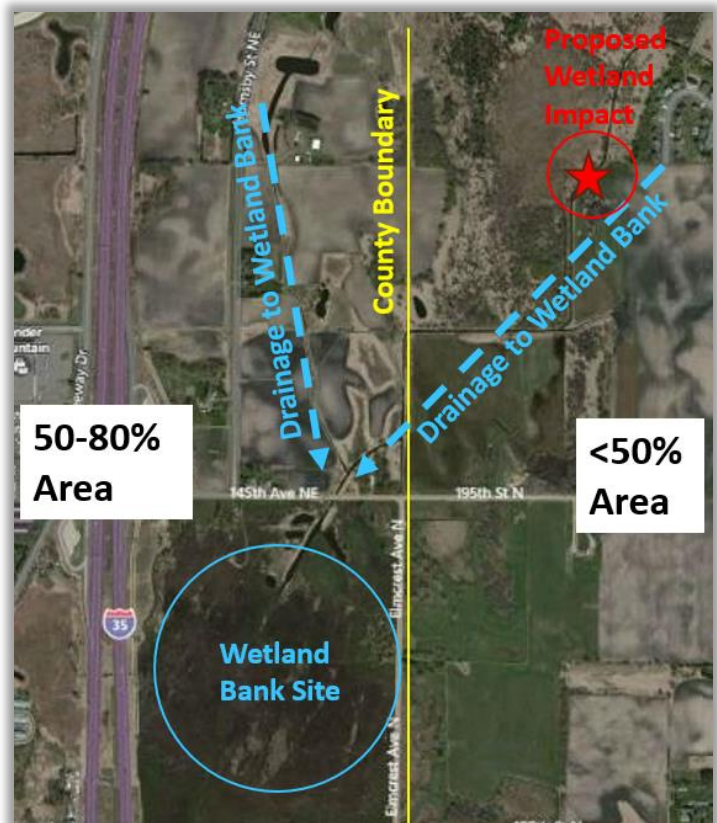


Figure 5: Rice Creek Watershed District Presettlement Area Example. Proposed wetland impacts in the same watershed and immediately upstream of this wetland bank cannot use the bank for mitigation according to current siting criteria.

A similar situation exists where bank service areas are split by presettlement areas. The presettlement area boundary introduces a county-based divide into a watershed-based service area (effectively creating two service areas). Establishing wetland mitigation options that are only available in a certain presettlement zone (i.e. >80% areas), rather than establishing availability by service areas, create further complications.

Since the presettlement areas, and their limitations on replacement wetland siting, are established in statute, changes to those statutes may be necessary to properly address this issue. However, BWSR does intend to explore the issue further during rulemaking in order to identify all available options, which could include a recommendation for a future statute change.

### **Potential Options for Addressing Problems with Replacement Wetland Siting**

BWSR intends to continue discussions of the above issues associated with replacement wetland siting with stakeholders, local governments, and the Corps during the rulemaking process. Since the current siting criteria are established in statute, the ability to modify the criteria via the WCA Rules may be somewhat limited. However, in addition to statute changes, possible options for partly addressing siting issues via rulemaking may include any or all of the following:

- Revise wetland bank service area boundaries to take into consideration watersheds, ecological considerations, and historic wetland losses.
- Address Twin Cities metropolitan area siting issues as discussed in the “Siting Criteria for Replacement via Wetland Banking” section above.
- To the extent WCA rulemaking authority allows, expand or limit the availability of certain actions eligible for credit to match bank service area boundaries and/or federal policies.
- Other options identified during the rulemaking process.

### **Replacement Ratios and Targeting**

Minn. Stat. § 103G.222, Subd. 3 (g) directs BWSR to *“establish wetland replacement ratios and wetland bank service area priorities to implement the siting and targeting of wetland replacement and encourage the use of high priority areas for wetland replacement.”*

The establishment of varied replacement ratios is currently the primary mechanism available to guide wetland mitigation to priority locations and projects. However, two additional mechanisms were discussed above that, in combination with replacement ratios, will contribute to the improved targeting and public value outcomes of wetland mitigation:

- 1) implementation of the In-Lieu Fee Wetland Replacement Program, and
- 2) the identification of local priority areas through local water planning processes and development of a statewide Compensation Planning Framework.

Minimum replacement ratios are currently established in Minn. Stat. § 103G.222, Subd. 1, with the specific ratios and criteria established in MN Rule Chapter 8420.0522, Subp. 4. Current replacement ratios are as follows:

Minimum Replacement Ratios: Banking		
Location of Impact	Replacement	Minimum replacement ratio
> 80% area or agricultural land	Outside bank service area	1.5:1
	Within bank service area	1:1
< 50% area, 50 – 80% area, and nonagricultural land	Outside bank service area	2.5:1
	Within bank service area	2:1

Minimum Replacement Ratios: Project-Specific		
Location of Impact	Replacement	Minimum replacement ratio
> 80% area or agricultural land	Outside major watershed or out-of-kind	1.5:1
	Within major watershed and in-kind	1:1
< 50% area, 50 – 80% area, and nonagricultural land	Outside major watershed or out-of-kind	2.5:1
	Within major watershed and in-kind	2:1

The current replacement ratios do not provide any incentive for targeting within watersheds or bank service areas. While there is an increase in ratio for leaving the bank service area, it applies across the board regardless of the service area chosen and is not always adequate to compensate for differences in land values and associated mitigation costs. The current ratios are neither tied to priority locations or projects, nor are they adequate to offset other factors such as varying land values.

In order to improve the targeting of wetland replacement as directed by statute, including the use of high priority areas, BWSR intends to explore structuring replacement ratios as follows:

- 1) Within Bank Service Areas:
  - Utilize a watershed approach to establish priorities for wetland mitigation within watersheds. Watershed priorities would be developed as part of the Compensation Planning Framework discussed above, and/or through incorporation of local watershed plan priorities into the framework.
  - Set replacement ratios according to the priorities established in the Compensation Planning Framework (i.e. highest priority replacement = lowest replacement ratio).
  - For areas in which watershed priorities are not yet established, allow “in-kind” wetland replacement (replacement of lost functions) as a surrogate.
  - Consider encouraging certain projects of statewide significance and value (i.e. white cedar restoration) through ratios and/or other means.
- 2) High Priority Areas:
  - Incent the use of Statewide High Priority Areas by establishing a replacement ratio comparably less than other out-of-service area options. The ratio must balance the need to first look for projects that will replace the functions and value lost to impacts within watersheds, with the desire to better target mitigation projects that are allowed to leave the service area.
- 3) Other Bank Service Areas (non-priority areas):



- Comparably higher replacement ratios must be established for out-of-service area replacement that is not located in a Statewide High Priority Area.

Depending on the circumstances, numerous factors can influence the establishment of replacement ratios, including both ecological and economic considerations. However, to be effective, the ratios must serve as adequate incentives/disincentives to improve the targeting of mitigation. Relying on replacement ratios as the primary mechanism to target wetland mitigation does present some challenges, including:

- The ability to set ratios within bank service areas that provide adequate incentives for targeting without being onerous when such projects are not available.
- The ability to set ratios across bank service areas that adequately address land values and other factors that change over time.
- The ability to incent the targeting of mitigation associated with mining projects in northeast Minnesota through replacement ratios may be limited. Minn. Stat. § 103G.222, Subd. 1(a) generally allows wetland impacts authorized or conducted under a permit to mine within the Great Lakes watershed (BSA 1) to be replaced within the Rainy River watershed (BSA 2), and vice-versa, without any replacement ratio increase.
- The effectiveness of variable replacement ratios may be limited given the structure of the current siting criteria, which do not incorporate any consideration of priority areas or projects.

## Actions Eligible for Credit

The “Actions Eligible for Credit” section of the WCA Rules (MN Rule 8420.0526) defines the actions that landowners can take to restore or create wetlands and associated aquatic resource functions in exchange for “credits” that can be used to replace wetlands lost to regulated activities. “Credits” serve as a rough surrogate for the functional gains accruing from the project. Some actions eligible for credit are established in statute with the implementation details provided in the WCA Rule. Other actions are established in Rule only.

It is important to note that the new actions, and potential changes to existing actions, discussed below are largely conceptual. They are intended to provide the current status and general direction for developing the specific implementation details, which will be developed in close cooperation with the Corps.

BWSR intends to work closely with the Corps to review all actions eligible for credit. Consistency between the State and Federal programs is of particular importance in regards to how the programs define eligibility and allocate credit to wetland replacement projects. Greater consistency will not only improve program effectiveness, but will be more efficient for the agencies and project proposers.

### New Actions Eligible for Credit in Northeast Minnesota

The *restoration and protection* of streams and riparian buffers were established as actions eligible for credit in the 2015 amendments to Minn. Stat. § 103G.2242, Subd. 12. The *preservation* of riparian buffers and essential watershed areas were established as actions eligible for credit in the 2015 amendments to Minn. Stat. § 103G.2251. The criteria for implementing these new actions will be established in the WCA Rules (MN Rule Chapter 8420).

These new actions were largely based on the recommendations contained within the “Siting of Wetland Mitigation in Northeast Minnesota” interagency report, in order to provide additional wetland mitigation options in an area of the state where traditional wetland restoration opportunities are limited. Statute limits their availability to the greater than 80 percent pre-settlement wetland area of the state (essentially the northeast).

By their nature, these new actions are not as straight-forward as a typical wetland restoration. However, based on investigation of the scientific literature and procedures in other states, along with consultation with appropriate resource professionals, BWSR staff have made substantial progress towards defining the potential implementation structure of these actions.

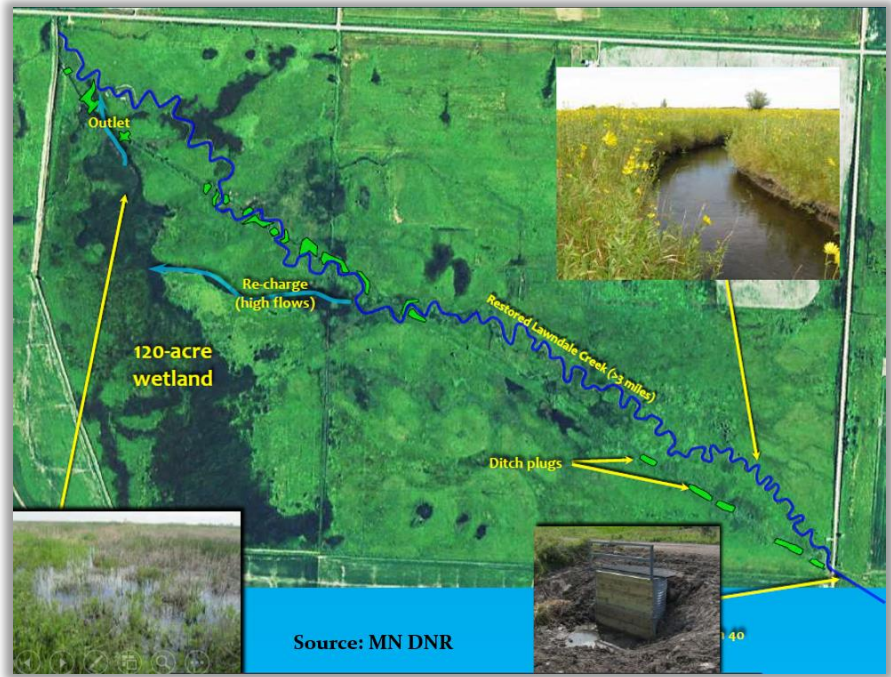
Restoration and Protection of Streams and Riparian Buffers.

Many streams have been degraded by direct channelization, changes in land use occurring near the stream or in its watershed, or both. Stream degradation often includes associated degradation of floodplain and/or adjacent wetland hydrology and function, providing opportunities for restoration actions that result in multiple aquatic resource benefits within watersheds. Identifying eligible projects, developing a restoration and protection strategy, and determining the corresponding amount of credits that the project will generate will require planning and analysis. This planning process will begin by identifying:

- 1) a degraded stream or stream reach eligible to be restored for credit;
- 2) the source(s) of degradation; and
- 3) the action(s) necessary to:
  - a. restore the stream to a natural condition,
  - b. address direct and indirect factors that caused the stream to become degraded, and
  - c. ensure sustainability (i.e. protect the stream from future degradation).

Defining what qualifies as a “degraded” stream that is eligible to be restored in exchange for wetland replacement credit will be critical. In general, common symptoms of stream degradation include:

- Unstable Channel
- Incised Channel
- Loss of Floodplain Connectivity
- Aggraded Channel
- “Over-Wide” Channel
- Unstable Width-to-Depth Ratio
- Loss of Stream Sinuosity



*This is an example of a stream restoration project completed in northern Minnesota that, in restoring the natural stream channel, also restored the stream's floodplain and adjacent wetlands, providing multiple benefits to both the stream/wetland complex and downstream aquatic resources.*

The actions necessary to restore a stream will vary, but in general, both developing and reviewing the proposed corrective actions will require expertise in fluvial geomorphology. The conceptual model for completing stream restoration projects for wetland replacement credit will involve:

- 1) the meander corridor (the area in which the stream is allowed to naturally move and bend over time),
- 2) other areas receiving hydrologic benefits from the stream restoration project, and
- 3) buffers and adjacent areas that are important for sustainability and/or related aquatic resource functions.

Substantial scientific information and expertise exists in regards to the restoration of streams, and even stream mitigation (stream-for-stream). However, little information or expertise exists to translate the restoration of a stream (linear) into credits to be used to replace impacts to wetlands (area), or to compare functions gained by stream restoration to functions lost to wetland impacts. In general, BWSR believes that credit could be allocated according to the following concepts:

- Greater credit would likely be allocated to areas within the meander corridor and other areas hydrologically restored.
- Lesser credit would likely be allocated to areas outside the meander corridor and/or only partially hydrologically restored.
- Credit may be allocated based on functional lift (i.e. improvements to water quality or habitat) if adequate functional assessment or alternative evaluation methodologies are identified or developed.
- Stream restoration projects will likely be completed as part of a package of restoration activities, which will be credited separately according to the applicable sections of WCA Rule.

Stream restoration projects may also be good candidates for cooperative projects between the ILF program, private entities, and/or conservation programs.

Given the specific skillset required, and the general need for more proactive watershed planning and analysis, two procedural components will be important for this action to be utilized and successful:

- 1) The Compensation Planning Framework discussed above should identify and prioritize watersheds, streams, and to the extent possible, specific stream restoration projects that could be completed for wetland replacement credit.
- 2) The process will require greater agency involvement to determine eligibility, appropriate restoration actions, and credit allocation. BWSR will explore the possibility of establishing interagency agreements to utilize the substantial stream expertise currently available in Minnesota.

In addition to stream degradation, the loss or degradation of riparian buffers can cause negative impacts to water quality, habitat, and other aquatic resource functions. In these instances, restoring and protecting those buffers will improve both the function and sustainability of the aquatic resource.

Stream restoration projects will invariably involve either the restoration or preservation of riparian buffers, but there may be other instances where restoring riparian buffers alone will remove a source of degradation, improve function, and provide protection for important streams, lakes, or wetlands. When not associated with a stream restoration project, eligibility for the restoration of riparian buffers will be largely based on the improvement and protection of important aquatic resources consistent with the discussion below.

*Preservation of Riparian Buffers and Essential Watershed Areas.* Existing buffers are often vital to the current function and sustainability of the adjacent aquatic resource (lakes, streams, and wetlands). Loss of those buffers can lead to degradation of the resource. Similarly, other areas in the watershed of a stream or lake often play an

important role in the function and sustainability of that water body, and those areas may currently have little or no protection.

For example, upstream watershed areas and stream headwaters can play an essential role in groundwater infiltration, maintaining temperature, and augmenting low flows necessary to support fish and other aquatic species. Other resources, such as wild rice lakes, may be very sensitive to changes in water quality and require a greater area of watershed protection. Many wildlife species also depend on larger blocks of habitat with connections to other aquatic resources.

Existing aquatic resources can vary significantly in regards to their current quality, function, and value. As such, it will be important that buffers and watershed areas for preservation be targeted to address high priority resources in order to ensure that the public value benefits that accrue from their preservation are adequate to replace the wetlands being lost to regulated projects. Priority resources under consideration for preservation credit eligibility in northeast Minnesota currently include:

- Wild rice lakes and streams,
- Cisco lakes,
- Critical Waterfowl Lakes,
- Headwaters of designated trout streams and their tributaries,
- Headwaters or reaches of streams beyond the Public Waters classification,
- Groundwater recharge areas important for trout stream flow and temperature,
- Critical habitat for important or threatened species, and
- White cedar riparian plant communities.



*Wild rice lakes like this one in Carlton County could be priorities for protection via the preservation of buffers and essential watershed areas.*

The WCA Rules currently include criteria for the eligibility and crediting of the preservation of certain exceptional wetland areas in northeast Minnesota. That existing language and process will be expanded to include the preservation of riparian buffers and essential watershed areas as described above.

### **Other Actions Eligible for Credit**

BWSR intends to review all existing actions eligible for credit for potential clarifications and improvements during rulemaking. In order to achieve the goals of WCA it is important that credit is allocated commensurate with the functional gains achieved by the action and, for wetland restoration, the full restoration of lost wetland functions is necessary to achieve full replacement credit. Ensuring that credit is allocated based on functional gain also creates an incentive to improve the public value outcomes of mitigation.

Replacement wetland buffers is one existing action eligible for credit that BWSR has already identified for likely amendments. Potential proposals include:

- Allocate credit commensurate with actions taken to improve the buffer (i.e. preservation vs. reestablishment of native vegetation).
- Improve the function and sustainability of replacement wetlands by determining minimum and maximum buffer widths based on site-specific factors.

- Address instances where the restoration of buffers adjacent to existing aquatic resources in northeastern Minnesota (discussed above) can qualify for replacement credit in accordance with the 2015 statutory amendments.

Consistent with the recommendations contained within the “Siting of Wetland Mitigation in Northeast Minnesota” interagency report, BWSR will also explore, in consultation with the Corps, the potential of establishing an action eligible for credit for the implementation of certain watershed plan projects. A recent study by the U.S. Environmental Protection Agency, “Northeastern Minnesota Compensation Siting: Alternative Wetland Mitigation Options” (August 2015), reviewed currently approved local water management plans in Northeast Minnesota and identified numerous plan implementation projects as potential wetland mitigation opportunities. These projects may not necessarily result in the restoration or creation of new wetland acres, but they would improve the function and sustainability of aquatic resources in northeast watersheds. The EPA report can be found on the Wetlands page of the BWSR website (<http://www.bwsr.state.mn.us/wetlands/index.html>).

By definition, the eligibility and crediting for these projects will not be as well defined as other actions, necessitating greater agency involvement. These projects may be most valuable when completed as part of a larger suite of actions that, when packaged together, will collectively restore and protect the aquatic resource functions in a watershed. Given these factors, if this action eligible for credit is established, it may likely be implemented only via the ILF program discussed above.

## Next Steps and Considerations for Future Discussion

BWSR initiated the WCA Rulemaking process via publication of the initial request for comments in the State Register on October 19, 2015. Initial work has focused on the issues discussed in this report, which will provide an important basis for rulemaking. However, the next step in the rulemaking process will be the development of specific implementation details for these and other issues.

The 2015 WCA statute changes, including the overall direction to improve the targeting and outcomes of wetland mitigation, are both significant and ambitious. This next phase of WCA rulemaking will be challenging. BWSR plans to utilize current science, incorporate administrative efficiencies, and consider the varying priorities and opinions of stakeholders in crafting implementation details that best achieve the overall public interest. During the next phase of WCA rulemaking, work and discussion will continue regarding the issues identified in this report and others. The following list summarizes some of the challenges identified in this report that merit further attention as the WCA Rule amendments are developed:

- The establishment of High Priority Areas for wetland mitigation consistent with the direction and process outlined in this report.
- Establishing consistent procedures and standards for all mitigation mechanisms (banking, ILF, and project-specific).
- Addressing the siting of wetland replacement via banking in the Twin Cities metropolitan area.
- The adequacy of replacement ratios alone to achieve goals relating to the improved targeting and outcomes of wetland mitigation.
- The potential need for additional statutory authority to address long-term maintenance of wetland mitigation sites.
- Potential alternatives to the current replacement wetland siting criteria, including options to address issues related to presettlement wetland areas.
- The implementation and geographic limitations of the new actions-eligible for credit in northeast Minnesota, including coordination and consistency with federal policy.

In addition to the policy challenges above, obtaining the necessary implementation funding is critical to achieving the State's goals of targeted, improved wetland mitigation outcomes. Specifically, BWSR will pursue:

- ❖ Funding for development of the wetland Compensation Planning Framework.
- ❖ Funding for the implementation and operation of the In-Lieu Fee Program.

For additional copies of this report or for more information about WCA Rulemaking, see the Wetlands page of the BWSR website at: <http://www.bwsr.state.mn.us/wetlands/index.html>

## Appendix 1: 2015 – 2017 WCA Rulemaking Plan

### 2015-2017 Wetland Conservation Act Rulemaking Plan

#### Scope

- 1) Reconcile the rule with statute changes from 2011, 2012, and 2015.
- 2) Improve outcomes relating to wetland replacement, including provisions to:
  - establish priorities and replacement ratios that encourage the use of high priority areas for wetland replacement,
  - develop the standards and procedures for an in-lieu fee wetland replacement program,
  - establish new actions eligible for wetland replacement credit in the greater than 80 percent pre-settlement wetland area of the state (northeast), and
  - modify the requirements and process for wetland replacement.
- 3) Changes identified by staff or during the rulemaking process that will improve the efficiency, effectiveness, and/or outcomes of the rule.

#### Rulemaking Goals

To the extent possible, proposed changes should address the following general goals of rulemaking:

- Consistency with the purpose of WCA.
- Simplification.
- Implementable.
- Clarification.
- 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/treat landowners consistently.

#### Process for Rule Development

##### BWSR Staff Rule Team

The BWSR staff “Rule Team” will develop and propose specific rule requirements, processes, and language to implement rulemaking priorities. Team members will also be responsible for presenting and interacting with the WCA Rule Advisory Committee and technical staff, including the consideration and vetting of comments/recommendations and the development of appropriate modifications and responses. The Team will utilize smaller sub-teams for specific issues, several of which will include assistance from other wetland and/or technical services staff. The initial topics for the Team to address first have been identified as:

- High Priority Areas (Designation)
- High Priority Areas (Implementation)
- In-Lieu Fee Program
- Actions Eligible for Credit (Northeast)
- Actions Eligible for Credit (statewide)
- Wetland Mitigation Approval Process
- Application Noticing/Re-Noticin

### **Stakeholder Input and WCA Rule Advisory Committee**

The review process will provide a forum for stakeholders and agencies to provide input and advice on proposed rule changes. Invited stakeholders will include representatives from statewide groups and organizations with an interest in the WCA rules. State and Federal government entities will also be invited to participate and additional coordination will occur outside of committee meetings, particularly with the Corps (Clean Water Act Section 404) and NRCS (Swampbuster).

The stakeholder input process will occur in two phases. Initially, a broad range of stakeholder organizations will be invited to participate in the review of issues and proposals related to the March 15, 2016 legislative report. General input on other issues will also be considered. BWSR will utilize the list of stakeholder organizations that was developed during the last WCA rulemaking and subsequent stakeholder coordination efforts, including the development of 2014 statute proposals. However, other interested organizations will be welcome to participate if interested.

After the March 15, 2016 report, work on rule language will become more specific and detailed. At this point, BWSR will establish a formal WCA Rule Advisory Committee. This committee will initially focus entirely on rulemaking. However, after adoption of the new WCA Rule, BWSR intends that the Advisory Committee continue to operate outside of rulemaking as a standing wetland advisory committee to provide opportunities for stakeholder input in accordance with Minnesota Statutes § 103B.101, Subd. 16. The size of the advisory committee will be limited in order to assure a workable group, but opportunities will also be provided for non-committee members to participate and provide input.

### **Implementation and Technical Review**

BWSR will also seek additional review and comment from local governments and consultants who work with WCA. A primary focus of this review will be to vet ideas and recommendations originating from the Rule Team and Advisory Committee for technical feasibility, unintended consequences, and the potential for effective implementation.

A technical review team was established for this purpose in 2014 as part of the process for developing recommendations for WCA statute changes. It consisted of a diverse group of staff and consultants with direct responsibilities implementing and/or complying with WCA. BWSR intends to utilize the nucleus of that group as part of the process to obtain technical input on rulemaking proposals. Technical input will also be solicited at training events (i.e. BWSR Academy) and/or through direct communications with local governments.

### **BWSR Wetland Conservation Committee**

The Wetland Conservation Committee of the BWSR Board will meet regularly to review rulemaking progress, advise on specific issues, and make a recommendation to the full Board regarding adoption of the final draft rule. The Committee will also review the March report to the legislature.



### Summary of Rule Development Process



### Prioritization of Issues

Work relating to the March 15 report to the legislature will be prioritized and addressed by the BWSR Rule Team and reviewed first by interested stakeholders. The report requirement was included in 2015 WCA legislation as follows:

*By March 15, 2016, the Board of Water and Soil Resources, in cooperation with the Department of Natural Resources, shall report to the committees with jurisdiction over environment and natural resources on the proposals to implement high priority areas for wetland replacement and in-lieu fees for replacement and modify wetland replacement siting and actions eligible for credit. In developing the report, the board and department shall consult with stakeholders and agencies.*

### General Timeline

2015	October	Send Preliminary Proposal to Governor’s Office. Publish Request for Comments in State Register.
	December	Comment period closes December 18 (60 days). BWSR Rule Team begins work on initial proposals. Begin interagency coordination efforts.
2016	January	BWSR Wetland Conservation Committee meets.
	February	Stakeholder input process begins. Focus on issues in upcoming legislative report.
	March	BWSR Wetland Conservation Committee meets. Report progress and recommendations regarding high priority areas, ILF, siting, and actions eligible for credit to legislative committees by March 15.
	April	Establish WCA Rule Advisory Committee. Address any feedback from legislative report, potential statute changes (if any), and remaining rule issues. BWSR Rule Team, Advisory Committee, and BWSR Wetland Conservation Committee meet as needed.
	May	
	June	
	July	
	August	
	September	Begin development of final draft rule and SONAR.
	October	
	November	
	December	
2017	January	404 Assumption Study report to legislative committees by January 15. Evaluate need for continued rulemaking and adjust remaining timeline as necessary.
	February	BWSR Wetland Conservation Committee reviews draft rule and SONAR, makes recommendation to Board.
	March	Board reviews and adopts rule and SONAR.
	April	Submit proposed rule and SONAR to Governor’s office and MMB.
	May	Obtain approved draft of rules from the Revisor.
	June	Request to schedule a hearing and submit the draft Dual Notice of Intent to Adopt Rules to the ALJ. After ALF approval, finalize Dual Notice and publish in State Register.
	July	Pre-hearing comment period ends.
	August	Hearings (if necessary).
	September	Adopt rules: Response to comments, ALJ report and approval, Governor’s office approval, submit “Order Adopting Rules” to OAH, give agency “notice of filing,” and submit “Notice of Adoption” to the State Register.
	October	
	November	
	December	

Note: The above timeline is approximate and is not a comprehensive list of rulemaking requirements or related meetings. It can and will be amended to address or accommodate issues and needs identified during the rulemaking process. It does, however, roughly identify the timeframe and order of activities as currently expected.

## Appendix 2: Identification of Statewide High Priority Areas for Wetland Mitigation

### Identification of Statewide High Priority Areas for Wetland Mitigation

*Draft - 1-21-16*

#### Background

In 2015, the State Legislature amended Minnesota Statutes § 103B.3355 to require the Board of Water and Soil Resources (BWSR) to identify and establish “high priority areas for wetland replacement” (mitigation). The intent of this change is to improve the targeting and public value outcomes of wetland mitigation, particularly when that mitigation occurs outside the watershed or bank service area of the impact. The new statute also provides the opportunity for local governments to establish priority areas for wetland replacement in local water plans, which can be submitted to BWSR for statewide consideration.

These and other 2015 WCA statute changes can be found on the BWSR website at:

[http://www.bwsr.state.mn.us/wetlands/wca/Summary\\_of\\_2015\\_WCA\\_Statute\\_Changes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Summary_of_2015_WCA_Statute_Changes.pdf) See also the “Relevant Statutes” section at the end of this document for the specific statute language.

Designation of High Priority Areas was one of the recommendations included in the “*Siting of Wetland Mitigation in Northeast Minnesota*” report developed by the Interagency Northeast Mitigation Siting Team (March 7, 2014). Specifically, the report recommended improved targeting of mitigation by establishing priority areas for wetland restoration based on recognized and approved state planning documents. See the full report on the BWSR website at: [http://www.bwsr.state.mn.us/wetlands/wca/NE\\_MN\\_mitigation/siting\\_NE\\_MN\\_mitigation.html](http://www.bwsr.state.mn.us/wetlands/wca/NE_MN_mitigation/siting_NE_MN_mitigation.html)

#### Process for Statewide High Priority Area Designation

The focus of this process will be solely to identify and establish statewide High Priority Areas for wetland mitigation; it will not address siting criteria, replacement ratios, or other considerations of rule and/or statute. BWSR intends to develop the requirements or incentives to use High Priority Areas for out-of-watershed mitigation through the Wetland Conservation Act Rulemaking process. Identification and establishment of High Priority Areas, however, will occur outside of rulemaking.

In accordance with statute, BWSR must consider the functional benefits that wetlands provide, the historic abundance and loss of wetlands, current applicable natural resource plans, and any relevant watershed studies that identify watershed needs. Designation of High Priority Areas should consider all reasonably available, relevant information and agency priorities.

To ensure a fully informed process, BWSR proposes to utilize multi-agency expertise similar to the collaborative process of the Interagency Northeast Mitigation Siting Team, for the purposes of providing information and recommendations for the designation of High Priority Areas for wetland mitigation. Specifically, BWSR proposes to utilize the Interagency Wetlands Group (IWG) to achieve this interagency coordination. At a minimum, the following agencies will be requested to participate on an ad hoc IWG team:

- MN Department of Natural Resources
- MN Pollution Control Agency
- MN Department of Agriculture
- US Army Corps of Engineers, St. Paul District
- US Environmental Protection Agency
- US Fish and Wildlife Service

- USDA Natural Resources Conservation Service

BWSR will also request information and feedback from local governments and non-governmental organizations as appropriate. Utilizing the information and recommendations obtained in the interagency process, BWSR staff will recommend approval/designation of the High Priority Areas by the BWSR Board. Board-designated High Priority Areas will be noticed in the State Register and posted on the BWSR website.

### **Goals of Interagency Process**

The objective of this process is to provide information, agency priorities, and to the extent possible, interagency consensus recommendations to BWSR for designating Statewide High Priority Areas. Such designation will consist of the identification of specific geographic areas on a map. Agency staff should consider the following goals in developing recommendations:

- Historic Loss - Areas of the State that have experienced the greatest loss of wetlands (i.e. the prairie pothole region) should be the starting point for HPA.
- Targeted - The statewide HPA designation(s) need to be small enough to be effective in achieving the benefits of targeting, but large enough to ensure adequate landowner interest and availability of quality mitigation projects.
- Stability – The Statewide HPA needs to be relatively stable over time. Frequent changes would increase risk and inhibit investment in establishing wetland mitigation in HPAs.
- Consistency – Target areas that will complement existing plans and associated priorities.
- Functional Benefits - Prioritize areas that will provide multiple functional benefits related to functional impairments or watershed and statewide needs.
- Multi-Purpose – HPA designation should identify areas important for wetland restoration regardless of purpose (i.e. mitigation of regulated impact vs. voluntary conservation program). This will provide greater opportunities for coordination between programs and will make the HPA designation more useful and effective.

### **Meetings and Timeline**

BWSR is required to report on proposals to implement High Priority Areas (and other initiatives) to the legislature by March 15, 2016. This report will not contain final High Priority Area designations, but it will need to indicate progress and direction in the designation process. As such, BWSR would like to convene a meeting in late January and a second meeting in mid to late February. The need for additional meetings would be assessed after the March report has been submitted and reviewed. Ultimately, the Statewide High Priority Areas will need to be designated at or before the effective date of the new WCA Rule (likely late 2017).

Statute does not establish minimum or maximum timeframes for review and potential update of Statewide HPA boundaries. BWSR will establish guidelines for potential updates, with the goal of consistency in mind, through rule or policy. Any future updates would likely include review by the same IWG team or something similar. Feedback from the IWG will also be solicited for this and other items.

### **Info/Plans with Potential Relevance to Establishing HPAs**

- MN Prairie Conservation Plan
- MN Wetlands Conservation Plan
- Mn Wetlands Restoration Strategy
- Minnesota Statewide Conservation and Protection Plan
- MN Nutrient Reduction Strategy

- Restorable Wetlands Inventory
- Pheasant Action Plan
- Impaired Waters
- State (DNR) Wildlife Action Plan
- MN DNR Long Range Duck Recovery Plan
- Working Lands Initiative
- Locations of existing public lands/easements
- Available info on groundwater recharge/discharge
- Other

### Relevant Statutes

2015 amendments to Minn. Stat. § 103B.3355, Wetland Functions for Determining Public Values:

*(e) The Board of Water and Soil Resources, in consultation with the commissioners of natural resources and agriculture and local government units, may must identify regions areas of the state where preservation, enhancement, restoration, and establishment of wetlands would have high public value. The board, in consultation with the commissioners, may must identify high priority wetland regions areas for wetland replacement using available information relating to the factors listed in paragraph (a), the historic loss and abundance of wetlands, current applicable state and local government water management and natural resource plans, and studies using a watershed approach to identify current and future watershed needs. The board shall notify local units of government with water planning authority of these high priority regions areas. Designation of high priority areas is exempt from the rulemaking requirements of chapter 14, and section 14.386 does not apply. Designation of high priority areas is not effective until 30 days after publication in the State Register.*

*(f) Local units of government, as part of a state-approved comprehensive local water management plan as defined in section 103B.3363, subdivision 3, a state-approved comprehensive watershed management plan as defined in section 103B.3363, subdivision 3a, or a state-approved local comprehensive wetland protection and management plan under section 103G.2243, may identify priority areas for wetland re-placement and provide them for consideration under paragraph (e).*

The changes to paragraph (e) eliminate the optional BWSR identification of high priority wetland regions, replacing it with clear direction for BWSR to designate “high priority areas” for wetland replacement (mitigation).

## Appendix 3: USDA Farmland Classification for Minnesota

