

Minnesota Board of Water and Soil Resources Updates

- 1) Waters of the United States
- 2) Local Government Roads Wetland Replacement Program
- 3) Wetland Conservation Act Rulemaking

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January 2024



Waters of the United States (WOTUS)

Sackett Supreme Court Decision and Amended Definition

Lewis Brockett, Wetland Policy Coordinator

State Regulatory Programs - Review

- Public Waters Work Permit Program (PWWPP): Regulates alterations to the course, current or cross section of Public Waters (PW) and Public Waters Wetlands (PWW). Administered by the DNR.
- Water quality standards (WQS): Regulates point source and non-point source discharges and physical alterations of waters of the state. Administered by the MPCA through other regulatory programs, such as National Pollutant Discharge Elimination System (NPDES) permits and CWA Section 401 Water Quality Certification.
- Wetland Conservation Act (WCA): Regulates draining, filling, and some excavation in non-PWWPP wetlands. Administered by local governments with oversight by the BWSR (except for permits to mine).

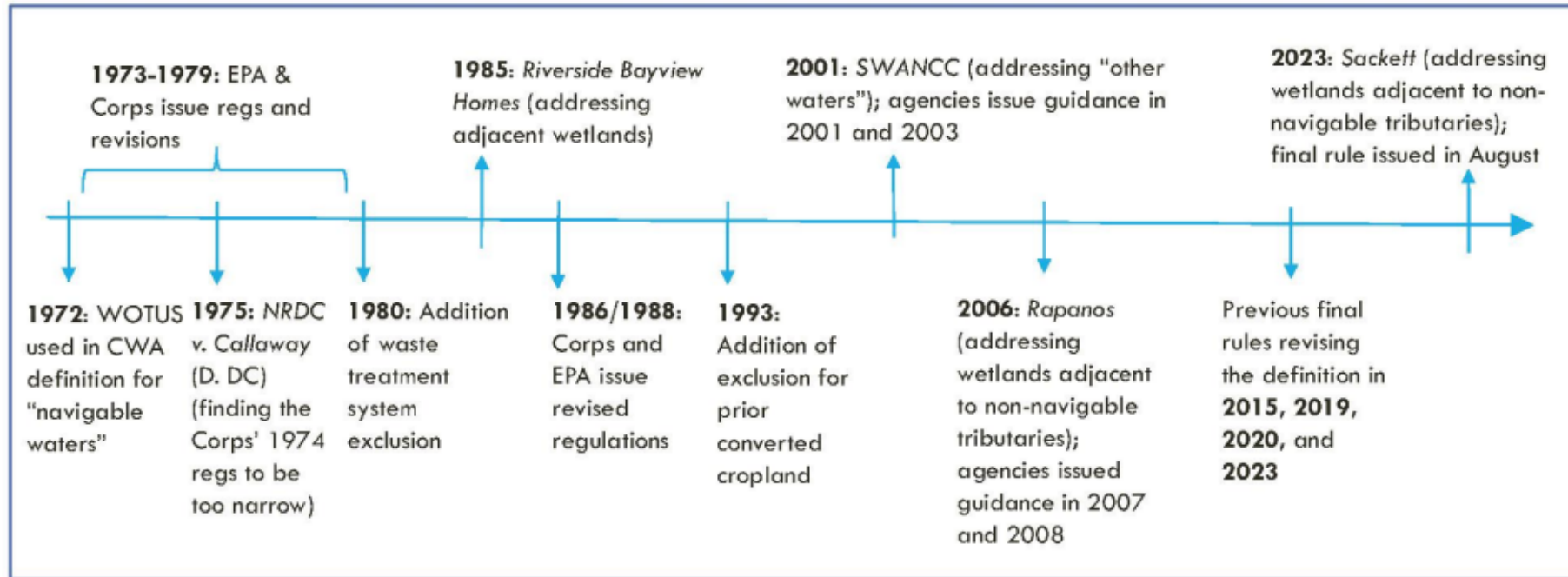
Waters of the United States - Background

- Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States (WOTUS), including wetlands.
- WOTUS is defined by the Environmental Protection Agency (EPA) and US Army Corps of Engineers (USACE) in regulation.
- WOTUS has been redefined several times and has been subjected to multiple legal challenges.
 - Most recently, via the *Sackett* SCOTUS decision and resulting “conforming rule”, effective September 8, 2023.

WOTUS Definition Timeline

The takeaway: It's complicated

The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be addressed in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.

Amended (“Conforming”) WOTUS Rule

- ❖ *Sackett* decision issued → EPA amends WOTUS rule. Most notable amendments are:
- ❖ Elimination of the “Significant Nexus” standard/test for all waters.
- ❖ For wetlands, the definition of “adjacent” is revised to mean “having a continuous surface connection” to WOTUS.
 - There can be “no clear demarcation between [other WOTUS] and wetlands.”

Potential Impacts to Federal Jurisdiction/Regulation

- ❖ Full implications remain unclear in the absence of specific guidance. There may be:
 - ❑ Reduced EPA/USACE jurisdiction over wetlands due to the invalidation of the significant nexus standard and clarification of the requirement for a “continuous surface connection” between “adjacent” wetlands and WOTUS.
 - ❑ Reduced EPA/USACE jurisdiction over streams due to the loss of the significant nexus standard.

Potential Impacts to Minnesota Waters

☐ Newly created **jurisdictional voids** over some waters:

- Non-PW streams and stream reaches that would have been jurisdictional under the significant nexus standard.
- Deepwater features (>6.6') that would have been jurisdictional under the significant nexus standard.

☐ **Loss of State Water Quality Standard Review** (401 Certification) on:

- Wetlands no longer considered “adjacent” to other WOTUS (e.g., those separated by a river berm)
- Wetlands and streams that were previously jurisdictional under the significant nexus standard.

The SCOTUS decision and conforming rule do not affect:

- The activities regulated under the CWA.
- The procedures for identifying wetlands under the CWA ('87 Manual and Regional Supplements).
- The extent of state jurisdiction.
- The States' and Tribes' authority to be more, or less, environmentally protective than the federal program.

Questions?

- **EPA Presentation:** <http://bit.ly/WOTUSpres> -or- <https://www.epa.gov/wotus/revising-definition-waters-united-states> and click on “Final Rule Trainings”.
- A draft state analysis of the Waters of the US Rule changes and potential impacts to Minnesota will be available on the Wetlands page of the BWSR website soon. <https://bwsr.state.mn.us>

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Status Update

Local Government Roads Wetland Replacement Program

Les Lemm, Wetlands Section Manager

January 2024

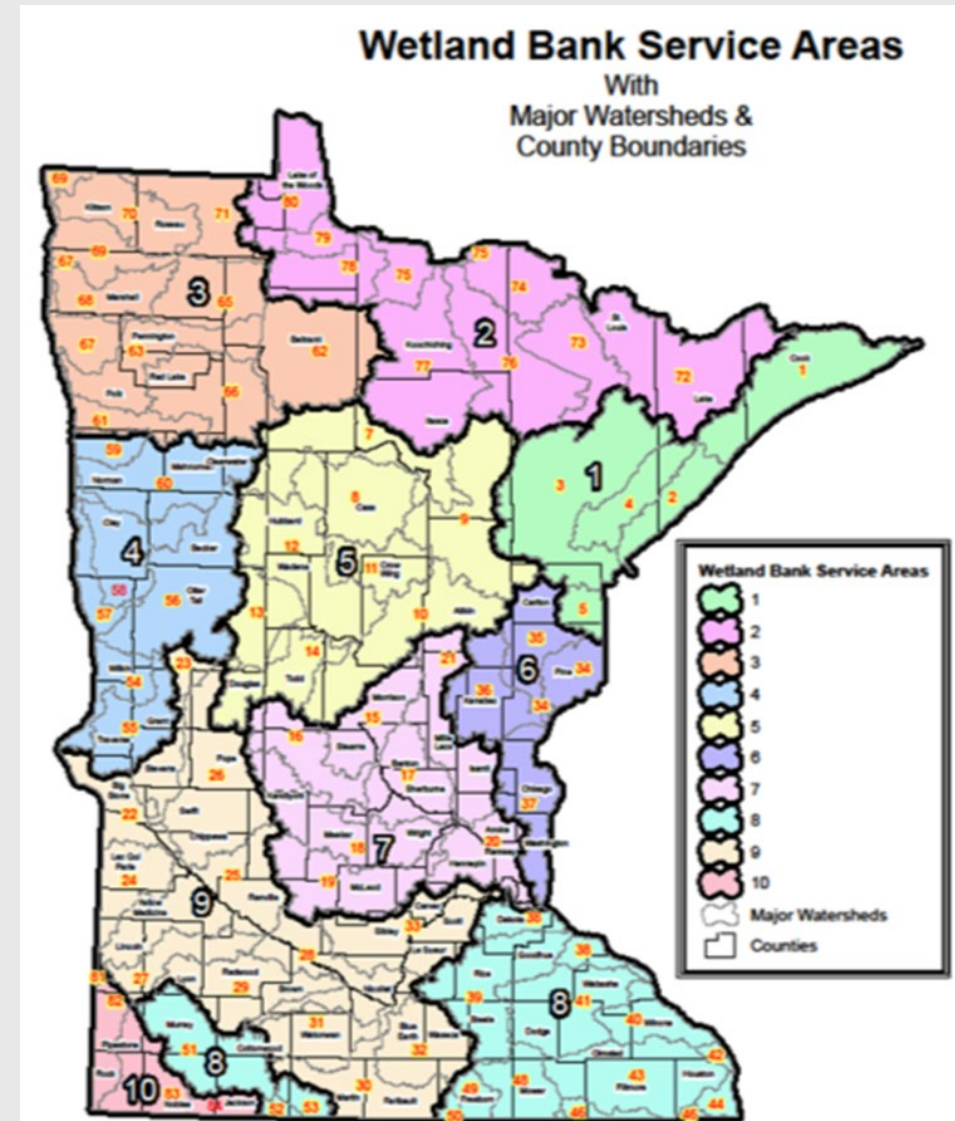
LGRWRP Background

- The Wetland Conservation Act exempts certain local road projects from state wetland replacement requirements.
- BWSR is required to replace the affected wetlands, so the local governments don't have to.
- BWSR has generated approximately 5,000 credits to offset over 3,400 acres of wetlands impacted by local road projects since 1996.
- These wetland credits also satisfy U.S. Army Corps of Engineers' Section 404 permit requirements.

Looking Back - Fall 2016

- Inadequate long-term funding resulted in wetland credit balances at or near zero in several BSAs.
- BWSR closed the LGRWRP in four BSAs due to lack of credits.*
- Statewide credit balance at or near zero was expected by late 2017.

**Subsequent legislative direction reversed the partial program closure.*



How did we get there?



Year	Agency Budget Request (millions)	Appropriation
2008	\$8.5	\$3.48
2010	\$8.42	\$2.5
2012	\$13.1	\$6
2014	\$5.4	\$2
2016	\$10.3	\$0

What's Happened Since 2016?

Year	Agency Budget Request (millions)	Appropriation
2017	\$15.3	\$10*
2018	\$16.38	\$6.7
2019	\$26.4	\$0
2020	\$26.4	\$23**
2021	-	-
2022	\$20	\$0
2023	\$24	\$12
2024	\$36.5	?***

*Includes \$5m from the general fund.

**Includes \$8m from the general fund.

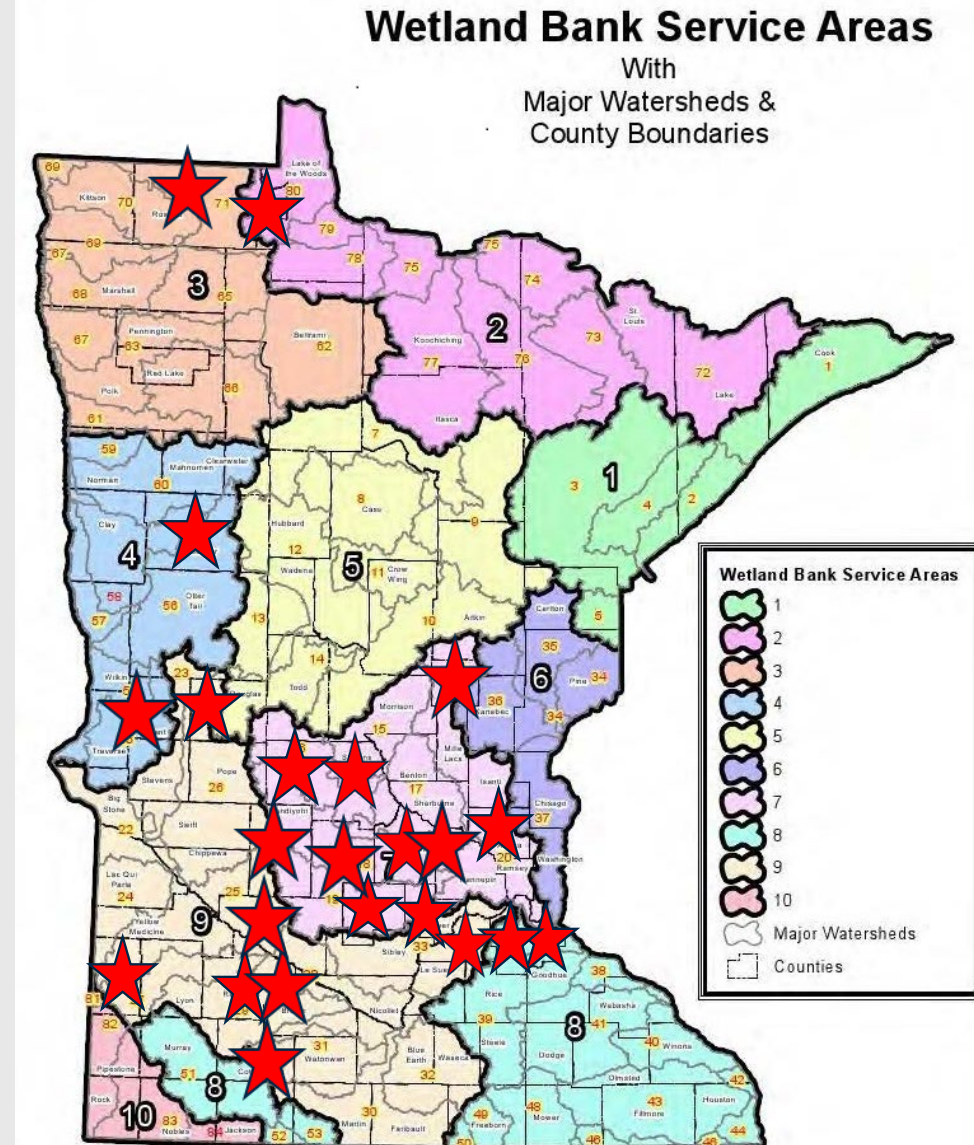
2020: Program again nearing default, 0 balance in 6 BSAs.

The 2020 approp kept the program afloat, but insufficient funding since then again means that we are closer to a future credit shortage.

***Governor's 2024 capital budget recommendation: \$4.5m (2.5m bonds, 2m GF).

Summary of Current Credit Development Projects

- 26 current projects in various stages:
 - 14 projects in design/review/construction.
 - 12 projects in monitoring/credit generation.
- The majority of these are from the 2020 approp.

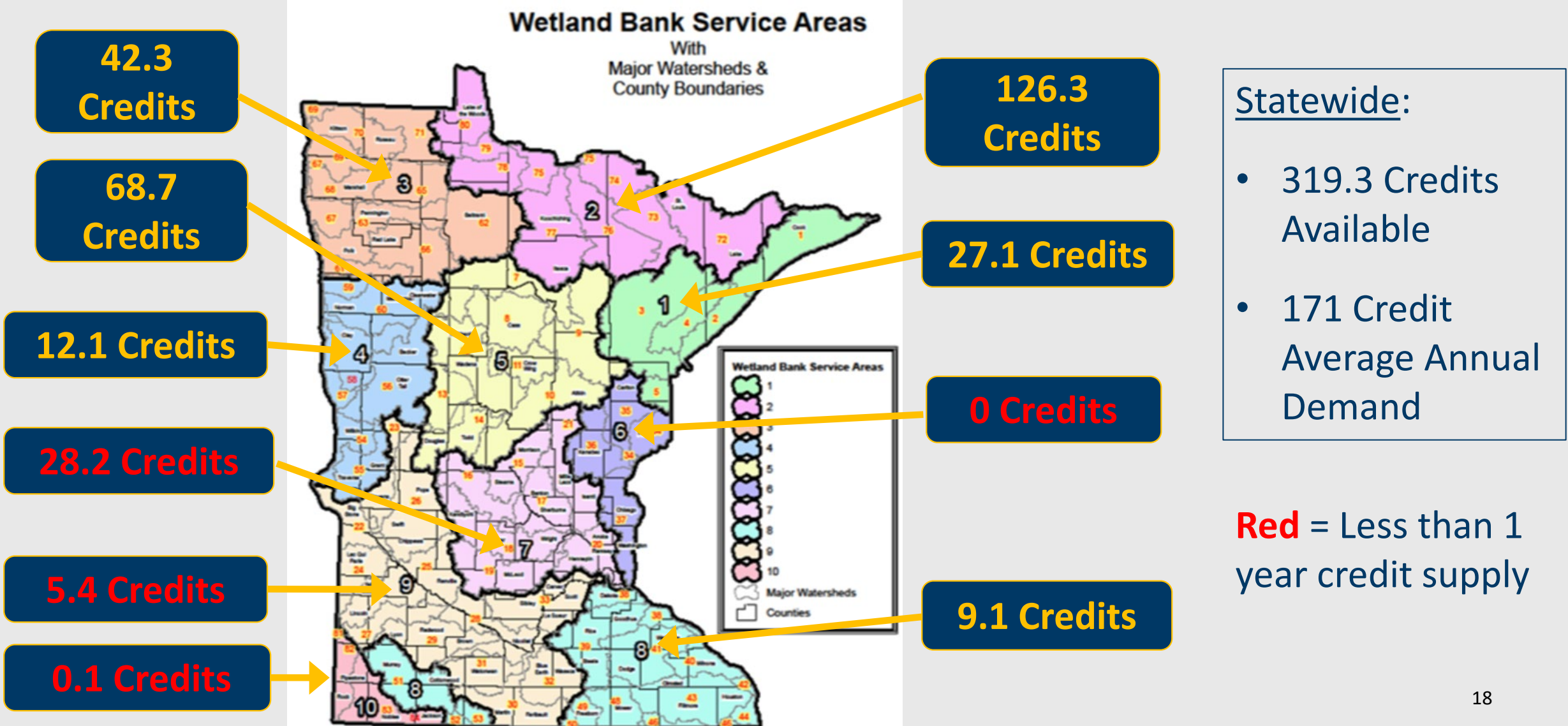


Wetland Bank Project Development Timeline



- 7 to 10 years from appropriation to final credit release.
- **Funding must be based on credit needs 3 to 10 years into the future.**
- Goal: minimum credit balance of *at least* 5 times the average annual need/BSA.

Current Credit Balance by BSA (12-31-23)



2027 Credit Balance Projections

(3-year *minimum* planning horizon)

Bank Service Area	# Credits	Ave Annual Need
1 - Great Lakes	0	7
2 – Rainy River	66.4	7
3 – Red River North	104.2	29
4 – Red River South	39.2	10
5 – Upper Mississippi North	0	22
6 – St. Croix River	0	13
7 – Upper Mississippi South	23.2	50
8 – Lower Mississippi	0	5
9 – Minnesota River	0	28
10 – Missouri River	0	2

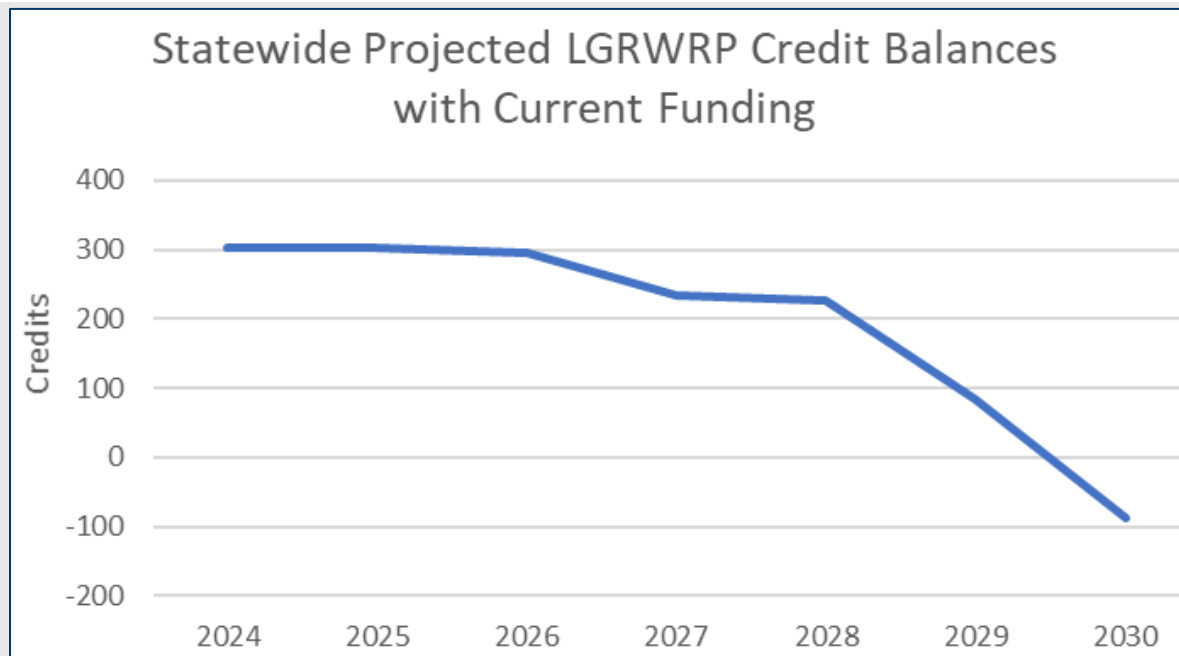
Context:

- “Best-case” credit allocation & timing.
- Local needs fluctuate substantially.
- Upcoming credit needs could be significantly higher due to increases in federal funding.

Long Term Projections

Projected Credit Balances with Current Funding							
BSA	2024	2025	2026	2027	2028	2029	2030
1	15.9	7.9	0.0	0.0	0.0	0.0	0.0
2	117.9	119.8	86.5	66.4	37.3	1.9	0.0
3	40.5	70.1	87.2	104.2	115.6	82.2	0.0
4	10.2	27.3	43.3	39.2	47.1	0.0	0.0
5	43.4	18.1	0.0	0.0	0.0	0.0	-11.5
6	0.0	0.0	0.0	0.0	0.0	0.0	-9.0
7	57.2	60.0	66.1	23.2	0.0	0.0	-52.5
8	17.3	0.0	6.3	0.0	15.7	0.0	0.0
9	0.5	0.0	6.3	0.0	12.0	0.0	-15.4
10	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Totals:	302.8	303.2	295.7	233.0	227.6	84.1	-88.3

- ❖ Potential to not have sufficient credits available for all projects starting in 2027 or 2028, essentially shut down by 2029.
- ❖ Compare to the 7 to 10 year project completion timeline and typical 3-year minimum for receiving any credits.



What does this all mean?

History Repeats Itself:

- The program has neared default (i.e. been unable to provide the necessary mitigation for local road projects) twice in recent history.
- Projections show we are nearing another such situation.

Program Needs:

- 1) A substantial amount of funding (incl. general fund dollars) in the very near future.
- 2) A serious discussion about the program's future and, if there is one, identifying a stable funding mechanism.

Questions?

<https://bwsr.state.mn.us/local-government-road-wetland-replacement-program>



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Minnesota Wetland Conservation Act Rulemaking MN Rules Chapter 8420

Les Lemm, Wetlands Section Manager

January 2024

Scope of WCA Rulemaking

2011, 2012, 2015, & 2017 statute changes:

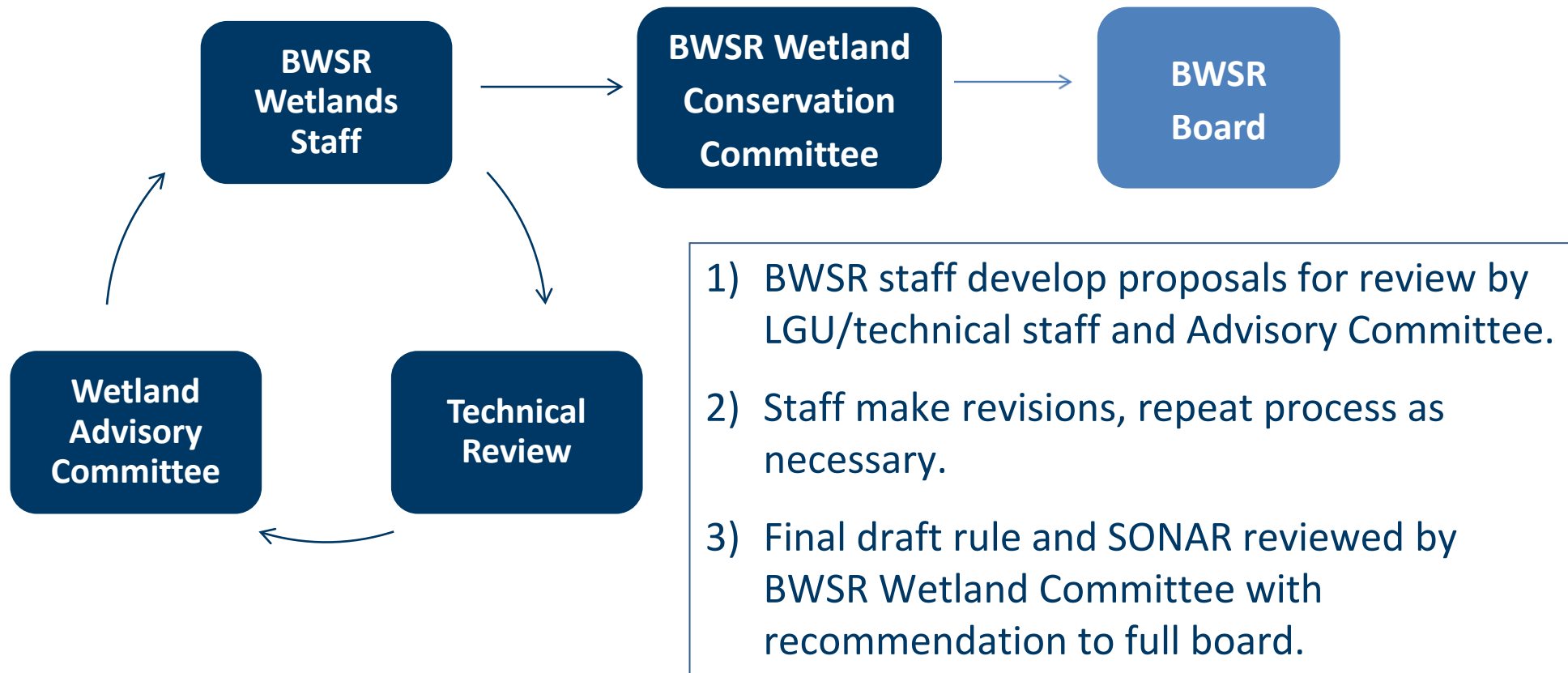
- Some of the statute changes can be incorporated into rule as-is, or with a realistic amount of work.
- Several of the statute changes require substantial additional program development work to implement – these items will be held for a future rulemaking.

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

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



Rule Development Process

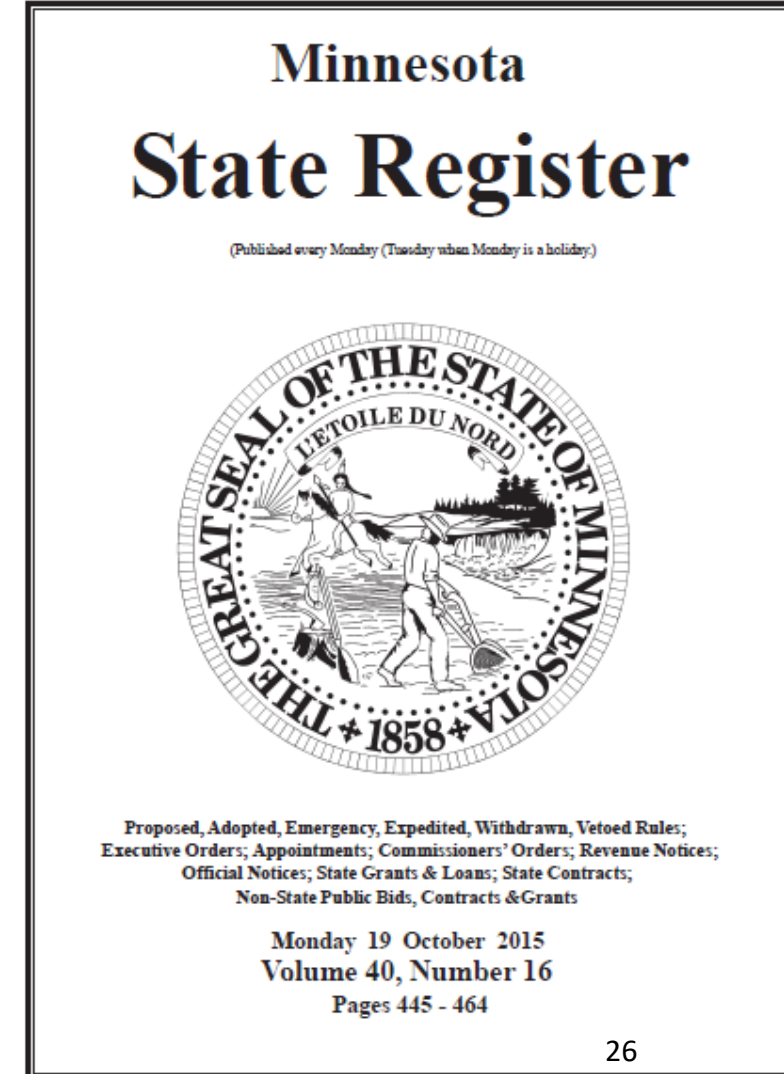


Note: All information will be shared publicly and other stakeholders & interested individuals will be provided ongoing opportunity throughout the rule development process to provide input.

WCA Rulemaking Requests for Comments

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

 - 2) Second Request for Comments (1/18/22).
 - Renewal of rulemaking.
 - 8 comment letters received.
- ❖ All comments posted on BWSR website.



Rulemaking Background/History

2015 Request for Comments – official start of rulemaking.

- 2016: Two Stakeholder Meetings.
- 2016: WCA Report to the Legislature.
- 2018: Three meetings of Technical Review Team.
- 2019-2222: 404 Assumption work (relevant to future rulemaking effort if the state moves forward with assumption).
- 2015-2022: Program development work on multiple topics, coordination with other agencies (e.g. USACE), meetings/presentations with local government staff and wetland professionals, etc.

2022 Request for Comments – renewal of rulemaking.

Rulemaking Background/History (Cont'd)

Since the 2022 Request for Comments:

- Wetlands Advisory Committee formed, 3 meetings held.
- BWSR Wetlands Conservation Committee meetings.
- Staff coordination with other agencies.
- Meetings with other stakeholders (wetland bankers, etc.).
- Staff have begun initial drafting of language.

- Continue development of “First Draft” proposed rule language.
- Obtain additional feedback from Advisory Committee and stakeholders.
- Develop second draft of rule language (entire rule).
- Obtain additional feedback.
- Begin formal rulemaking public input and adoption process.
- ❖ *All rulemaking information (mtgs, drafts, etc.) will be posted on the BWSR website.*

Questions or Comments?

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