US Army Corps of Engineers
St Paul District

**SPONSOR:** **Minnesota Board of Water and Soil Resources**

# Public Notice

**ISSUED: May 31, 2013**
**EXPIRES: July 1, 2013**

**REFER TO: MVP-2013-01341-TSM**

**SECTION:404 - Clean Water Act**

1. IN-LIEU FEE PROGRAM PROPOSAL. Interested parties are hereby notified that a complete prospectus has been received by the U.S. Army Corps of Engineers St. Paul District (District) proposing the establishment of an In Lieu Fee Program (ILFP) to provide mitigation for authorized impacts to waters of the United States under Section 404 of the Clean Water Act (Section 404) and/or Section 10 of the Rivers and Harbors Act of 1899. The ILFP would provide mitigation for authorized wetland impacts resulting from public transportation impacts within the State of Minnesota. If approved, this ILFP agreement would become the federal mechanism for review and approval of compensatory mitigation projects under Minnesota's Local Road Wetland Replacement Program (LRWRP). Currently, this program is managed and operated as a mitigation banking program by the Minnesota Board of Water & Soil Resources (BWSR) on a bank-by-bank basis. The District and the BWSR have agreed that the LRWRP is more appropriately viewed as an ILFP under the Federal Mitigation Rule (Mitigation Rule).[1] The purpose of this public notice is to solicit comments from the public on the proposed ILFP.

This is not an application for work in federally regulated waters; however, authorization under Section 404 may be required for implementation of particular mitigation sites proposed under the ILFP. Such sites would be advertised under separate public notices in accordance with the procedures in the Mitigation Rue. No decision has been made as to whether this ILFP will be approved.

2. IN-LIEU FEE PROGRAM DEFINITION AND REVIEW PROCESS**:** An ILFP is a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an ILFP provides third-party compensatory mitigation credits to permittees, such as transportation authorities. The permittee's obligation to provide compensatory mitigation is then transferred to the ILFP sponsor.

An ILFP has two mechanisms for generating mitigation credits. Many ILFP credits are based the promise of a future mitigation project – these are commonly called "advance credits" and are released based on watershed-based comprehensive planning framework, a rigorous program oversight process, and other risk-reduction mechanisms that can include financial guarantees such as proof that project funding is secured. ILFPs can also have credits based on projects that have been constructed, these credits are commonly referred to as "secured " or "realized" credits and are based on meeting the same technical requirements as bank credits. Like permittee-responsible mitigation, advance ILFP credits are based commonly on a project to be constructed concurrent with or after impacts occur. Regardless of the mechanism, all credits generated by an ILFP must be developed in the context of a watershed-based conservation planning framework or CPF. The CPF is a part of the instrument for the ILFP and

[1] 33 CFR 332

is used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities.

The ILFP review and approval process will adhere to the procedures in the Mitigation Rule. The review process for this ILFP will first solicit comments on the prospectus from the interagency review team (IRT) and the general public. With the publication of this public notice, that public comment process has been formally initiated. At the close of the public comment period, the Corps will review and share all comments with the sponsor and the IRT, and then develop an initial project evaluation in consultation with the IRT. Based on the comments received and the initial evaluation, the ILFP sponsor may then choose to prepare and submit a draft instrument for the ILFP. The instrument is the legal document for the establishment, operation, and use of the ILFP and must include the CPF described in the preceding paragraph. After review and coordination with the IRT, the District must provide feedback to the sponsor regarding the adequacy of the draft instrument and the likelihood that the proposal would provide suitable mitigation to offset authorized impacts. Based on feedback from the draft instrument review process, the sponsor may then choose to submit a final ILFP instrument for the District's consideration.

3. SPECIFIC INFORMATION.

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| SPONSOR'S ADDRESS | Minnesota Board of Water & Soil Resources<br>520 Lafayette Road North<br>Saint Paul, Minnesota 55155 |
| SPONSOR'S POC | Mr. Ken Powell, BWSR<br>520 Lafayette Road North<br>Saint Paul, Minnesota 55155<br>Phone: 651-215-1703<br>Email: Ken.Powell@state.mn.us |

4. GEOGRAPHIC SERVICE AREAS: The ILFP is proposed to include the entire state of Minnesota as the geographic area within which ILFP wetland compensation credits could be provided. Within the state of Minnesota, 11 geographic service areas are proposed, corresponding with the existing wetland mitigation bank service areas (BSAs) in Minnesota. The existing BSAs are BSA 1 (Lake Superior), BSA 2 (Rainy River), BSA 3 (Red River North), BSA 4 (Red River South), BSA 5 (Upper Mississippi North), BSA 6 (St. Croix River), BSA 7 (Upper Mississippi South), BSA 8 (Lower Mississippi), BSA 9 (Minnesota River), BSA 10 (Missouri River), and BSA 11 (the Metro BSA , the 7-county Twin Cities metro area plus the 8-digit HUCs that overlap the metro area) . These service areas are primarily based on 6-digit hydrologic unit codes (HUC). The bank service areas each lie within one of four larger 4-digit HUC drainage basins, including Lake Superior (BSA 1), Hudson Bay (BSA 2, BSA 3, and BSA 4), Missouri River (BSA 10), and Mississippi River (BSA 5, BSA 6, BSA 7, BSA 8, BSA 9, and Metro BSA). A map of the bank service areas in Minnesota is provided in the prospectus.

5. BACKGROUND: Since 1996, the state has run the LRWRP that provides compensatory mitigation (wetland replacement) for qualifying public transportation maintenance impacts using funding provided for in state bonding bills. As explained in the prospectus, the state's road mitigation

program has generated approximately 4,200 wetland compensation credits that have been used to provide compensation for 2,800 acres of wetland impacts from transportation projects in Minnesota. The compensatory mitigation obligations of qualifying public transportation maintenance projects (based on administrative standards set by BWSR) are then provided by the LRWRP at no out-of-pocket cost to the local transportation authority that proposes a qualifying project. In accordance with subsequent state statute changes, the LRWRP was also allowed to provide wetland compensation credits to non-qualifying public transportation projects, provided that a) the administrator determined sufficient credits were available for qualifying projects; and b) the sponsoring local road authority reimbursed the LRWRP for the costs of credit development. For state wetland regulation purposes, the LRWRP has been run by BWSR as a *de facto* umbrella bank program. After evaluating potential options for managing the LRWRP in accordance with the federal mitigation requirements, the state has determined that it desires to seek federal authorization of the LRWRP as an ILFP. If the ILFP was approved by the District, federal review of future individual ILFP mitigation projects would be accomplished using the IRT review process outlined in the rule except that the review would focus specifically on the mitigation plan for the site. The end result of the federal review process for an approved mitigation project would be a modification of the ILFP instrument that appends each new mitigation site.

6. DESCRIPTION OF PROPOSED ACTIVITY: The ILFP sponsor, BWSR, proposes to identify wetland mitigation sites in Minnesota suitable for and capable of providing compensatory mitigation through the enhancement, restoration, creation, and preservation of wetlands and their associated buffers. The BWSR has submitted a prospectus that describes how the LRWRP would function as an ILFP within the framework of the 2008 federal mitigation rule. The Corps has determined that the BWSR's prospectus is complete. Information required for a complete ILFP prospectus is outlined in 33 CFR 332.8(d) (2). A complete copy of the ILF prospectus for the LRWRP is attached to this public notice. The following paragraphs highlight several of the aspects of the prospectus that are unique to the BWSR proposal and warrant additional explanation.

*Source of Funds for Mitigation Projects.* Different from many ILFPs, all or almost all of the "fee" revenue for the ILFP proposed by BWSR would be paid periodically by the state on behalf of local transportation authorities for future projects that meet state funding requirements. Under this model, a large amount of revenue will come in from the state based on projected transportation needs for the coming years, with actual requests for credits following later as projects move through the local road design and regulatory review process. Less commonly, a transportation authority proposing a project that does not meet state funding requirements may purchase credits from the ILFP.

*Transfer of Existing Bank Credits and Use of Advanced Credits.* The BWSR has indicated that they do not intend to seek advanced credits for the ILFP but will instead rely upon existing credits in their approved mitigation banks to provide credits for authorized impacts. These existing credits would be "transferred" into the ILFP via a process/mechanism that currently has not been defined but is anticipated to be a component of the ILFP instrument. BWSR has further proposed that should advanced credits be used, that the advance credits be based on funds already allocated through the legislative process for the LRWRP.

7. COORDINATION WITH RESOURCE AGENCIES: This ILFP proposal is being coordinated with the members of the IRT including the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service (USFWS), and the Minnesota Department of Natural Resources in accordance with the federal mitigation rule. Any comments provided by the IRT members will be considered by the District during our review and evaluation of the ILFP proposal. If the ILFP is ultimately approved, proposals for specific mitigation sites also will be coordinated with previously identified IRT members as well as other local and state agencies that are commonly involved in bank reviews in the area of the proposed project. Each individual proposal will have a separate federal Public Notice and opportunity for agency comments.

Since the proposed ILFP does not identify specific sites as part of the program review and evaluation, the District will not be conducting any project level coordination under the Endangered Species Act or Section 106 of the National Historic Preservation Act (NHPA). If the ILFP is approved, project level coordination will occur as sites are identified and proposed by the BWSR. The public notice for each mitigation site will request input from the USFWS concerning Federally-listed threatened or endangered wildlife or plants or their critical habitat at that location. The Corps also will review information on known cultural resources and/or historic properties within and adjacent to any mitigation site and consider the potential effects of subsequently-proposed projects on any properties that have yet to be identified. The results of this review and the Corps' determination of effect for each future ILF project proposal will be coordinated with the State Historic Preservation Officer as determined necessary by the Corps.

8. REPLIES/COMMENTS.

Interested parties are invited to submit to this office written facts, arguments, or objections within 30 days of the date of this notice. These statements should bear upon the suitability and adequacy of the proposal and should, if appropriate, suggest any changes believed to be desirable. Comments received will be considered by the Corps in our review of the adequacy of the proposal for providing compensatory mitigation for impacts to waters of the United States under Section 404 of the Clean Water Act. All written comments will be made part of the administrative record which is available to the public under the Freedom of Information Act. The administrative record or portions thereof may also be posted on a Corps internet website. Copies of comments received will be forwarded to the sponsor and to the members of the Interagency Review Team.

Replies may be addressed to Mr. Tom Mings, Regulatory Branch, St. Paul District, Corps of Engineers, 180 Fifth Street East, Suite 700, Saint Paul, MN 55101-1678.

Or, IF YOU HAVE QUESTIONS ABOUT THE PROPOSED ILFP call Tom Mings at the (651) 290-5365.

9. PUBLIC HEARING REQUESTS.

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this application. Requests for public hearings shall state, in detail, the reasons for holding a public hearing. A request may be denied if substantive reasons for holding a hearing are not provided or if there is otherwise no valid interest to be served.

Tamara E. Cameron,
Chief, Regulatory Branch

# Minnesota Local Road Wetland Replacement Program

# Federal In-Lieu Fee Prospectus

**Prepared by:** Minnesota Board of Water and Soil Resources

**Contact:** Ken Powell, State Wetland Bank Coordinator

**Date Submitted:** May 1, 2013, revision submitted May 15, 2013

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# Executive Summary

The Minnesota Board of Water and Soil Resources (BWSR) is proposing an in-lieu fee (ILF) program to provide compensatory wetland mitigation for impacts resulting from public road projects conducted by local public road authorities in Minnesota. The program is proposed to operate over the entire State and must serve the dual purpose of satisfying both State and Federal wetland mitigation requirements. This proposed ILF program would serve to formally recognize an existing program that has operated in a similar fashion since 1996. This proposal is not a typical ILF program because it will operate like a large wetland bank with compensatory mitigation wetland credit debiting coming from existing wetland banks with existing wetland credits. In-advance credits will only be utilized if adequate funding is secured to produce those credits prior to eligible project impacts. Credits will be established through standard wetland bank procedures. Management and accounting of the program would be conducted by BWSR. Wetland bank projects and project sites would be selected by BWSR in consultation with the Minnesota Interagency Review Team (IRT) for wetland banking. All wetland bank projects selected for the ILF would require both State and Federal approval under existing regulatory processes. The program proposes specific siting criteria for credit use and flexibility in the timing of project-specific credit debiting.

# 1. Introduction and Background

Before describing the proposed In-Lieu Fee (ILF) program, it is important and necessary to provide a summary of the regulatory background and context in Minnesota for those who are unfamiliar with the wetland regulatory system that currently exists. This information is necessary to understand the reasoning behind some aspects of the proposed ILF program as well as the need for the ILF program.

The physical alteration of water bodies in Minnesota, including wetlands, is regulated by Federal and State statutes under Section 401 (Certification) and Section 404 (Permits) of the Federal Clean Water Act. Under Section 404 of the Clean Water Act (404), the U.S. Army Corps of Engineers (Corps) regulates the discharge of dredged and/or fill material in waters of the U.S. The Corps' permitting program allows certain activities affecting aquatic resources after attempts to avoid and minimize adverse impacts to waters of the U.S. A permit holder must provide compensatory mitigation to offset the aquatic resource impacts associated with a specific project.

On March 31, 2008, the U.S. Environmental Protection Agency (EPA) and the Corps issued revised regulations governing compensatory mitigation for authorized impacts to wetlands, streams, and other waters of the U.S. under 404: *Compensatory Mitigation for Losses of Aquatic Resources* - Corps: 33 CFR Parts 325 and 332, EPA: 40 CFR Part 230 (Rule). These regulations are designed to improve the effectiveness of compensatory mitigation to replace lost aquatic resource functions and area, expand public participation in compensatory mitigation decision making, and increase the efficiency and predictability of the mitigation project review process.

The new wetland compensatory mitigation standards increase the effective use of wetland mitigation banks and strengthen the requirements for the use of ILF mitigation. The Federal Rule follows the recommendations of the National Research Council by establishing equivalent, effective standards for all forms of wetland replacement projects under the Clean Water Act. In accordance with the Rule, the U.S. Army Corps of Engineers, St. Paul District has the authority to establish an ILF compensatory planning framework to select, secure, and implement wetland restoration, establishment, enhancement, and/or preservation.

Minnesota Wetland Conservation Act

A significant new chapter in wetland management began in Minnesota with passage of the Wetland Conservation Act (WCA) in 1991. A key provision of WCA was the legislature's finding that, according to Minnesota Statute § 103A.201, Subd. 2, "it is in the public interest to:

- achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands;
- increase the quantity, quality, and biological diversity of Minnesota's wetlands by restoring or enhancing diminished or drained wetlands;
- avoid direct or indirect impacts from activities that destroy or diminish the quantity, quality, and biological diversity of wetlands; and
- replace wetland values where avoidance of activity is not feasible and prudent."

The original WCA legislation included both the establishment of a comprehensive wetland regulatory program and funding for voluntary wetland preservation and restoration programs to advance the public interest findings contained in statute. WCA statutes have been amended several times since its initial passage, most recently in 2010. The law is implemented through Minnesota Rule 8420, developed and administered by the Board of Water and Soil Resources (BWSR), a State agency. Implementation responsibility lies primarily with the State's local government units (LGUs) with BWSR providing oversight, assistance, and administration of the associated wetland banking program. A unique feature of the program is the use of Technical Evaluation Panels (TEPs) that consist of technical representatives from BWSR, the local Soil and Water Conservation District (SWCD), the LGU, and in some instances the Minnesota Department of Natural Resources (DNR). The TEP primarily provides recommendations to the LGU and in some instances must make decisions on certain regulatory items.

Nationally, WCA is somewhat unique as it is similar to but entirely separate from 404. WCA regulates impacts to wetlands in Minnesota regardless of 404 jurisdiction, and its regulations generally apply regardless of 404 requirements. The program is comprehensive, including specifications for the avoidance and minimization of wetland impacts, wetland mitigation, wetland planning, and administrative procedures.

It also includes a well-established wetland banking program that has provided 300 sites and 10,000 acres of wetland mitigation since the program's inception.

The ILF program described in this prospectus must comply with WCA as well as 404. For more information about WCA, including current WCA Rule, a summary of WCA Statutes, program guidance, and other information, see the BWSR website at: http://www.bwsr.state.mn.us/wetlands/

The Minnesota Local Government Roads Wetland Replacement Program

As part of the 1996 legislative amendments to WCA, BWSR was directed to supply wetland replacement for impacts associated with the repair, rehabilitation, reconstruction, or replacement of currently serviceable existing state, city, county, or town public roads to meet state or federal design or safety standards. This obligation was satisfied by the creation of the Local Road Wetland Replacement Program (Road Program). Benefits of the Road Program include:

- Regulatory simplification for local road authorities.
- Consolidated wetland mitigation, providing larger, more sustainable wetland resources.
- Greater coordination and consistency with local, state, and federal water management goals.
- Interagency participation during project solicitation and prioritization efforts.
- Improved efficiencies and reduced costs for the citizens of Minnesota.

The program began with an initial purchase of 60 acres of wetland credit from existing approved private wetland bank accounts. In the fifteen years that followed startup, the program was funded primarily through State legislative bonding appropriations for the establishment of wetland bank sites. In 2006, the scope of the LGRWRP expanded to include an agreement with the Minnesota Department of Transportation (MnDOT), allowing each agency to share resources to increase program efficiencies. Since inception, the program has provided approximately 4,200 acres of wetland replacement credit for 2,800 acres of wetlands impacted by eligible public road projects at a cost of $27.7 million dollars.

Purpose and Need for the In-Lieu Fee Program

The purpose of this prospectus, and the subsequent ILF instrument, is to describe and formally recognize the existing Road Program as an ILF program in accordance with the Federal Rule. The program is not a typical ILF program, however. It is more accurately described as a wetland banking program with the flexibility to act similar to an ILF program when necessary to manage fluctuations in credit availability and program demand. A consistent supply of credit is necessary for local road authorities to successfully plan and implement safety improvements to public roads. This flexibility also provides BWSR with the ability to better match wetland impacts with preferred mitigation sites which have been approved and funded, but for which credits have not yet been released.

The road program will continue to operate in accordance with relevant State statutes and the WCA Rule, providing compensatory mitigation for wetland impacts resulting from eligible public road projects in order to satisfy the requirements of WCA and 404. No substantive changes to the program's current operations are proposed.

## 2. Objectives of the Proposed In-Lieu Fee Program

The State of Minnesota acting through BWSR is proposing an ILF program as an option to provide compensatory mitigation for local public road authorities. The objectives of the program are as follows:

- Officially recognize existing Road Program as an ILF under the Federal Mitigation Rule.
- Provide compensatory mitigation for road projects conducted by local public road authorities.
- Provide larger, more sustainable, and higher quality compensatory mitigation for numerous and predominantly small wetland impacts associated with road improvement projects.
- Provide increased opportunities for compensatory mitigation closer to wetland impacts.
- Provide an efficient and effective regulatory mechanism for satisfying compensatory mitigation requirements of Section 404 permits required for local public road projects.

## 3. How the Program will be Established and Operated

The Road Program was established in 1996 and has been operated by BWSR as an agent of the State of Minnesota ever since. The proposed ILF program will continue to operate largely the same as the existing Road Program. BWSR will establish wetland banks and procure wetland bank credits in various bank service areas (BSAs) throughout the State (Figure 1). These credits will be used exclusively for compensatory mitigation for wetland impacts associated with local public road projects in the State of Minnesota. BWSR will control and manage these credits for the purposes of operating this ILF program in cooperation with the St. Paul District Army Corps of Engineers (Corps). Below is a proposed outline of how the program will operate.

Establishing Credits

- BWSR will develop compensatory mitigation sites (wetland banks) or contract with others to secure wetland credits for the ILF program. The approval criteria for wetland banks and wetland credit releases will be the same as any other wetland bank in the State that is approved under both State and Federal regulatory programs. Wetland banks that are developed solely by BWSR will utilize the ILF instrument in place of a mitigation banking instrument (MBI) required for other Federally-approved banks. Other banks and associated credits procured by BWSR for the ILF program will be required to have an approved MBI between the Sponsor and the Corps.

- Approval of wetland banks to be used in the ILF program will follow a State-Federal coordinated three step approval process consistent with the State's Wetland Conservation Act (WCA) and Corps Saint Paul District procedures. For banks developed solely by BWSR utilizing the ILF instrument, BWSR will not be an official member of the Interagency Review Team (IRT) charged with reviewing wetland banks under the Federal Mitigation Rule.

- Wetland credit releases will be deposited into a BWSR-owned account in both the State and Federal banking database systems. These credits will be identified by location and type consistent with State and Federal rules and policies that are in force at the time of deposit. Figure 2 provides a graphic illustration of the credit establishment process for the ILF program.

- Existing Corps-approved wetland credits currently being utilized by BWSR to satisfy mitigation requirements of local public road authorities will be automatically incorporated into the ILF program. Subsequent credit releases from wetland banks that BWSR has sponsored or has a contract with for credit purchase will be incorporated into the ILF program.

Credit Use

- Credits will be used exclusively to replace wetland impacts associated with public road projects conducted by local public road authorities such as county highway departments, cities, and townships.

- BWSR has set rules and policies to determine the types of public road projects eligible for utilizing the ILF program to satisfy compensatory mitigation requirements. Local public road authorities will apply to BWSR to utilize the ILF program for specific projects. BWSR, working through local technical evaluation panels (TEPs), will determine the eligibility of specific project wetland impacts for compensatory mitigation via the ILF program. The Corps will make an independent determination on whether or not a project meets Federal wetland avoidance and minimization requirements, what type of permit it can be authorized under, and what impacts require replacement. Once project wetland impacts are determined eligible for compensatory mitigation via the ILF program and Federal wetland avoidance and minimization requirements have been met , BWSR will apply State and Federal mitigation rules and policies to the eligible project impacts and determine the required form and amount of compensatory mitigation. Existing credits in the ILF program will be debited accordingly. See Figure 3 for a graphical depiction of credit use.

- BWSR will have a two-year window from the time of project acceptance into the ILF program until debiting of credits is completed. If credits are not available in the BSA at the end of the two-year window but there are pending credit deposits from approved ILF-designated projects or sufficient funding secured for completing projects or purchasing credits in the BSA, then BWSR will have up to an additional two years to debit the necessary credits in the BSA. If no credits are available in the BSA and there are no pending credits per above, then credits will be debited from another BSA at an increased replacement ratio per State and Federal compensatory mitigation rules and policies. Because Federal and State compensatory mitigation standards differ slightly in terms of replacement

ratios and other factors, the most conservative policy in terms of maximum compensatory mitigation will dictate.

- BWSR will provide semi-annual reports to the Corps detailing qualifying project impacts, bank credit debits, and how compensatory mitigation requirements under State and Federal programs were satisfied. Alternately, Corps staff or a BWSR delegate to the Corps will debit ILF credits using a Corps database (currently RIBITS). In this case, reporting will be available as needed according to federal information technology requests.

- BWSR may at their discretion limit the use of the ILF program for local road authorities in certain BSAs if funding and/or credit production decreases to the point where compensatory mitigation can no longer be effectively provided. The Corps would be notified of any temporary changes to ILF program use, and permit authorizations would be adjusted accordingly.

## 4. Proposed Service Area

The service area of the ILF will be the State of Minnesota. Currently, both State and Federal wetland regulatory agencies have divided the State into ten BSAs for the purposes of locating compensatory mitigation in relation to wetland impact locations (Figure 1). This ILF will utilize this BSA structure unless and until they are modified by both BWSR and the Corps. The BSA will serve as the overall basis for compensatory replacement siting under the ILF, with logical subareas within the BSAs providing further refinement as discussed later in this document.

## 5. General Need for and Technical Feasibility of the Proposed Program

The need for this ILF program is based on the following:

- A 1996 State of Minnesota Statute 103G.222, Subd. 1(l) transferred responsibility for providing compensatory mitigation for certain types of road projects from local public road authorities to BWSR.

- In general, most local road projects are associated with existing roads and road right-of-ways. These projects result in numerous, small wetland impacts along existing road corridors. Compensatory mitigation for these small impacts is difficult to develop effectively and efficiently near the impact site.

- Processing permits for numerous small impacts associated with many road improvement projects requires more government resources compared to a programmatic approach that addresses compensatory mitigation comprehensively.

- The private wetland banking market cannot meet the demand of road authorities when proximity to impacts is a consideration. Land values heavily influence the location of private wetland banks, thereby not providing a diversity of wetland banks in all BSAs.

- Project-specific mitigation conducted by public road authorities is a hardship for many local road authorities and often results in lower quality mitigation compared to wetland mitigation banks. Road authorities are generally not skilled at developing compensatory mitigation and many need it so infrequently and in such small amounts that a significant investment in resources is not warranted. Furthermore, public road authorities typically own or have control over only narrow corridors of land that do not easily lend themselves to effective compensatory wetland restoration.

- Many public road projects are time sensitive, with some involving emergency fixes that are vital to the health and safety of the general public such as bridge repairs and road failures the cutoff people from public health and safety services. Streamlining projects and associated permit processing allows local road authorities to focus on maintaining the public road infrastructure while allowing another entity to focus on providing appropriate compensatory mitigation.

The technical feasibility of generating ILF program credits in all BSAs and utilizing those credits for public road project impacts has been demonstrated in the past. The Road Program was established in 1996 and has demonstrated success in providing compensatory mitigation in a manner described in this proposed ILF prospectus. While the Road Program is a not a traditional ILF in which fees collected from program users are then utilized to conduct compensatory mitigation measures, the concept of providing strategic, robust, and functional compensatory mitigation sites on a programmatic basis has been successfully demonstrated

(further details in Section 6). No substantive changes to the program's current operations are proposed via this ILF proposal.

## 6. Ownership and Long-Term Management Strategy for Project Sites

Compensatory mitigation credits for the ILF program will be obtained or generated through different means including the following:

**A.** ILF sponsor (BWSR) enters into an agreement with a landowner to complete a project on their land that generates compensatory mitigation credits for the ILF program. The ILF sponsor is the bank sponsor of the project site.

**B.** ILF sponsor enters into an agreement with a landowner whereby the landowner (or another entity that has secured the appropriate rights from the landowner) completes a project that generates compensatory mitigation credits and subsequently sells those credits to the ILF sponsor. The landowner or entity completing the project would be a bank sponsor of the project site.

**C.** ILF sponsor purchases existing compensatory mitigation credits from an approved wetland bank and transfers them to the ILF program account. The seller of the credits to the ILF program would remain as the bank sponsor of the project site.

**D.** ILF sponsor purchases land and completes a project that generates compensatory mitigation credits for the ILF program. The ILF sponsor would also be sponsor of the project site. The sponsor may subsequently sell the land or transfer to another government entity.

In A through C above, the land on which the project is conducted will not be owned by the ILF sponsor. However, all of these project sites would be required to have a recorded, perpetual conservation easement giving both the State and U.S. Government the right to enforce the easement conditions. In D above, the ILF sponsor would also be the landowner. However, the ILF sponsor could sell or transfer the land. This type of project site would also be required to have a conservation easement as described above.

All project plans will include provisions that adequately foster achievement of full restoration goals within a specified time period while minimizing the need for long-term maintenance. Stipulations in the perpetual conservation easement will address long-term sustainability issues such as structural failures and noxious weed invasion. The landowner will be responsible for maintenance of the project site in concert with the conservation easement. Enforcement of easement conditions will be the responsibility of the ILF sponsor. This system is identical to the current wetland banking system in the State.

## 7. Qualifications of the Sponsor

BWSR is the State's soil and water conservation agency. It administers programs that prevent sediment and nutrients from entering the State's lakes, rivers, and streams; enhance fish and wildlife habitat; and protect wetlands. The 20-member board, consisting of representatives of local and state government agencies and citizens, sets a policy agenda designed to enhance service delivery though partnerships with local governments. Board members, including the board chair, are appointed by the governor to four-year terms. The board is the state's administrative agency for 90 soil and water conservation districts, 46 watershed districts, 23 metropolitan watershed management organizations, and 80 county water managers.

The BWSR mission is to: "Improve and protect Minnesota's water and soil resources by working in partnership with local organizations and private landowners." Core functions include implementing the State's soil and water conservation policy, comprehensive local water management, and the Wetland Conservation Act. For more information, see the BWSR website at: http://www.bwsr.state.mn.us/

As a State agency, BWSR has the authority administer an ILF program, establish compensatory wetland mitigation sites, and accept conservation easements on behalf of the State of Minnesota. BWSR also has specific statutory authority to develop rules for the implementation of WCA and the State wetland banking program, and to provide compensatory wetland mitigation for eligible public road projects using bonding funds allocated by the legislature.

BWSR has hired and retained a pool of highly experienced staff to plan, design, construct, and manage wetland restoration projects. BWSR staff are located in nine field offices throughout the state. In addition to administrative and management positions, BWSR technical staff positions directly related to the implementation of wetland conservation and mitigation programs include: Wetland Specialists, Wetland

Banking Specialists, Conservation Engineers and Technicians, Soils Scientists, Native Vegetation Specialist, Hydrologist, Easement Acquisition and Development Specialists, and Monitoring Specialists.

BWSR's local-state conservation delivery system also provides an opportunity to partner with and draw upon the expertise of local government staff with unique knowledge of local resource conditions and needs. This network includes over 400 local governments with various responsibilities in implementing State wetland conservation and/or regulatory programs. BWSR, together with the various local governments, have over 25 years of experience in restoring wetlands.

Reinvest in Minnesota Program

In 1986, the Reinvest in Minnesota (RIM) Resources Act (M.S. 103F.505) was enacted to restore certain marginal and environmentally sensitive agricultural land to protect soil and water quality and restore fish and wildlife habitat. The RIM Reserve program, administered at the state level by BWSR, compensates private landowners for granting permanent conservation easements to restore and protect wetlands, adjacent native grassland wildlife habitat complexes, and riparian buffers on environmentally sensitive lands. RIM is the premier wetland restoration program in the State, and Minnesota is a national leader in wetland restoration. This program partners with public and private landowners, state, federal and local government entities, non-profit organizations, and the citizens of Minnesota. The Conservation Reserve Enhancement Program and the RIM-Wetland Reserve Program are examples of extremely successful state-federal program partnerships involving RIM.

BWSR is responsible for accepting applications, developing and accepting conservation easements, developing sustainable restoration design plans, project management and construction oversight, and long term monitoring and site inspections. Since 1986, BWSR staff have been involved with the establishment of more than 5,500 permanent easements, restoring and protecting over 230,000 acres of wetland and related habitat through the RIM program. For more information, see the BWSR website at: http://www.bwsr.state.mn.us/easements/index.html


Minnesota Wetland Bank

The current State wetland banking system was authorized in 1993 by MN Stat. 103G.2242. Specific requirements and procedures for the bank are established in the WCA Rules (MN Rule 8420). BWSR is the State agency responsible for administration of the Minnesota Wetland Bank. There are two primary subdivisions of the Minnesota Wetland Bank: the private bank which provides wetland mitigation for development and agriculture related activities regulated by WCA; and the Road Program described in Section 1.

Specific BWSR staff responsibilities include ensuring compliance with WCA (including sustainable construction design standards), establishing and accepting permanent conservation easements, accepting credit deposits, recording transactions and accounting of credits, collecting transaction fees, and performing long-term inspections. For the Local Road Wetland Replacement Program, BWSR staff also identify suitable sites that meet the needs of the program, develop restoration plans, and provide construction oversight and overall project management. Since 1993, over 300 bank sites have been approved for a total of over 10,000 acres of wetland mitigation credit.

MN Wetland Delineator Certification Program

Established in 2005, the Minnesota Wetland Delineator Certification Program (WDCP) is a cooperative partnership between the University of MN, BWSR, and the Corps to provide technical training and certification for wetland delineation professionals in Minnesota. The program includes testing and certification of wetland delineators along with offering formal field-based training classes in all aspects of wetland delineation science. BWSR has assumed a lead role with a BWSR employee serving as co-director of the program.

Currently, there are over 200 individuals certified by the program, including BWSR's wetland technical staff. The WDCP helps to ensure a high level of technical expertise of staff with responsibilities related to the implementing wetland mitigation activities under the Road Program. For more information on the WDCP, see the University of MN website at: http://www.mnwetlands.umn.edu/

# 8. Compensation Planning Framework

## 8.1 **Geographic Service Area, Including a Watershed-Based Rationale for Each Service Area**

As described in Section 3, the geographic service area is the entire State of Minnesota. The State is further divided into ten BSAs for the purposes of siting compensatory mitigation (Figure1). The ten BSAs are based on USGS Hydrologic Unit Codes (HUC) that code different watershed boundaries with the number of digits corresponding to the scale of the watershed delineation (fewer digits, larger scale). As detailed in the *St. Paul District Policy for Wetland Compensatory Mitigation in Minnesota* (2009), the ten BSAs are based on modifications of the 6-digit HUC watersheds in Minnesota. The BSAs will serve as the basis for compensatory mitigation within the ILF program, unless and until changes to the service areas are made via mutual consent of BWSR and the Corps.

The goal of providing compensatory mitigation for eligible project impacts will be to utilize ILF program credits that are as close to the wetland impact site as possible. Rather than measuring exact distances from ILF project sites to sometimes scattered impacts along road corridors, BWSR will utilize the following priority order siting sequence that is in conformance with State and Federal compensatory mitigation standards:

1. Same 8-digit HUC (major watershed)
2. Adjacent 8-digit HUC within the same BSA
3. Within the same BSA
4. Same 4-digit HUC
5. Statewide

As detailed in the *St. Paul District Policy for Wetland Compensatory Mitigation in Minnesota* (2009), credits located in a portion of the State where >80% of pre-settlement wetlands are remaining cannot be debited for impacts occurring in a portion of the State where <80% of pre-settlement wetlands are remaining (Figure 4). In addition, for the purpose of encouraging some compensatory mitigation in the high land value metropolitan area of the Minneapolis-St. Paul (seven Counties, see Figure 5), the following priority siting sequence will apply for ILF qualifying impacts in the metropolitan area:

1. Same 8-digit HUC (major watershed)
2. Adjacent 8-digit HUC that is located in one or more of the seven metropolitan Counties (Figure 5)
3. Same 4-digit HUC
4. Statewide

The type of wetland impacted will be a consideration when determining a wetland bank to withdrawal credits from for compensatory mitigation purposes. Because the ILF program will seek to replicate historic wetland conditions with each project, historic wetland types in each particular BSA will be developed for compensatory mitigation. In most cases this will adequately replace functions lost to impacted wetlands. However, some wetland types in the State are now rare and/or difficult to restore, including floodplain forests, wooded swamps, bogs, and fens. Therefore, special attention is warranted when these wetland types require compensatory mitigation. If applicable, wetland banks in the ILF program will be identified as having a certain percentage of their credits associated with one of more of these special wetland types. When any of these special wetland types are impacted and there is a corresponding wetland type in an ILF bank with available credits, then that wetland bank will be debited regardless of the priority siting sequence. No other wetland types will be tracked in the ILF credit system.

### 8.2 **Aquatic Resource Threats and How the ILF Program will Offset Impacts from those Threats**

This ILF program will be limited to impacts associated with local road projects. As such, most wetland impacts are linear encroachments along existing road corridors where wetlands have been degraded. In many instances the impacted wetland areas are and have been degraded by the effects of salting, sanding, runoff and periodic roadside maintenance activities. There are exceptions, particularly when road alignments are changed and new fill and excavation impacts non-degraded wetland areas.

Current wetland regulations focus on protection from functional losses as a result of direct impacts to wetlands. Previous conventional wisdom assumed that replacement of the wetland area lost due to direct wetland impacts would adequately serve to mitigate functional losses. Under this assumption, allowing local public road authorities to replace their lost wetland area is feasible. Further study and development in the field of wetland science and compensatory mitigation resulted in recommendations that focused on replacing not only wetland area, but also on replacing specific wetland characteristics, particular plant community type. Current science-based study and research has found that neither of these approaches

adequately mitigates wetland impacts. A modern approach to compensatory mitigation focuses on replacing wetland functions that are threatened and/or have been lost in a watershed. In Minnesota where many wetlands have been lost or degraded, focusing on restoring naturally-occurring wetlands in a manner that restores their previous functioning is recommended. This ILF program is consistent with this approach by restoring entire wetland basins and wetland complexes in a more functional and sustainable way as compared to simple direct replacement of wetland area and plant community type each time a small wetland impact is incurred by a road project. In addition, the ILF program will be at a large enough scale to facilitate more careful and strategic selection of project sites and restoration strategies that will ultimately benefit watersheds and better offset functional losses. Further, this program has the resources and technical expertise to tackle restorations of rare, unique, and difficult to restore wetland types.

### 8.3 **Historic Aquatic Resource Loss in Service Areas**

Figure 4 shows the extent of wetland loss across the State from pre-settlement conditions to modern times. This data provides the basis for both State and Federal wetland regulatory rules and policies. The southern and western portions of the State have incurred significant wetland losses due to drainage and conversion to agricultural uses, primarily row cropping. Wetland losses decrease to the northeast as land becomes less conducive to crop production because of geologic and climatic factors that make drainage for agricultural uses difficult to impossible.

Using pre-settlement conditions as a basis for comparison, wetlands and wetland characteristics that were maintained by natural processes like fire and flooding have been lost in greater proportion than most other types. In particular, wet prairies in the southern and western portions of the State have been lost not only from direct conversion to agriculture, but also due to suppression of natural disturbances such as fire that served to maintain and perpetuate them. Floodplain forests have also been lost in greater proportion due to manipulation of rivers for navigation, drastic changes in watershed drainage volume and intensity that effects flooding, and conversion of floodplains to agricultural uses. In the northern portion of the State, logging and conversion to agriculture has decimated white cedar swamps mainly due to the inability of cedar to regenerate because of grazing from increased deer populations. There are also declines in tamarack and black spruce forested wetlands due to logging, lack of natural regeneration, and other factors.

Each project in the ILF program will be selected and designed to mimic historic conditions. As such, projects in each BSA will serve to replace historic functional losses. In addition, projects that have the potential to replace rare and/or difficult to restore wetland types such as white cedar swamps, fens, floodplains, etc. will be prioritized during site selection.

### 8.4 **Current Aquatic Resource Conditions**

This ILF program will be limited to impacts associated with local road projects. As such, most wetland impacts are linear encroachments along existing road corridors where wetlands have been degraded. In many instances the impacted wetland areas are and have been degraded by the effects of salting, sanding, runoff and periodic roadside maintenance activities. There are exceptions, particularly when road alignments are changed and new fill and excavation impacts non-degraded wetland areas. Project selection for the ILF program will consider current aquatic resource conditions in order to prioritize site and project selection, develop restoration goals, and monitor outcomes.

### 8.5 **Aquatic Resource Goals and Objectives for Each Service Area**

The ILF program seeks to restore important historic wetland functions and conditions to the extent feasible in each BSA to mitigate wetland losses due to road impacts. This goal applies to all of the service areas of the ILF program. Instead of defining a specific goal for each service area, the program will select projects and sites that meet criteria that facilitate the overall goal of the program. The criteria are as follows:

- Restore historic wetland conditions (to the extent ascertainable and feasible).

- Ability to provide important wetland functions in context of the surrounding landscape, current land use, and foreseeable future land uses.

- Self-sustaining (to the extent possible), permanent restorations with high probability of providing important wetland functions in perpetuity with minimal maintenance.

8.6 **Prioritization Strategy for Selecting and Implementing Compensatory Mitigation**

As stated in 8.5 above, technical criteria will be used to select sites and projects for the ILF program. In addition, the following factors will be considered in prioritizing sites and projects:

- Cost
- Functional benefit for the watershed (i.e. functional lift)
- Wetland type in terms of rarity - extra consideration for projects that would restore wetlands that are particularly rare or rarely restored once impacted.
- Potential for success – includes such aspects as qualification of identified contractors/consultants, level of technical difficulty, potential for high cost fixes, ability to justify credit allocation amounts, etc.

BWSR will annually assess current credit status in each BSA including credits available, anticipated pending credits, and predicted credit use based on past data. Compensatory mitigation will be prioritized in areas with the most credit deficiency based on this assessment of credit needs.

As ILF funds are secured, projects and project sites will typically be solicited through a request for proposal (RFP) and/or easement acquisition process. This process will utilize the State Interagency Review Team (IRT) to vet proposals in concert with the stated criteria.

8.7 **Explanation of How Any Preservation Objectives Satisfy the Use Criteria**

The ILF program will prioritize projects that involve a restoration component rather than straight preservation. However, the northeast portion of the State (specifically BSA 1 and 2) typically lack restoration opportunities because over 80% of pre-settlement wetland area remains intact. Therefore, preservation will be an option for generating credits in these BSAs. When and if preservation is pursued for credit, BWSR will adhere to the Saint Paul Corps District guidance on the use of preservation for compensatory mitigation.

## 8.8 **Public-Private Stakeholder Involvement in the Program**

This proposed ILF program is consistent with the current Road Program as discussed previously. The Road Program was developed through a State stakeholder involvement process in 1996 and again in 2000. This ILF proposal will provide another opportunity for stakeholder input through the Corps public notice and comment process.

## 8.9 **Long-Term Protection and Management Strategies**

Each wetland bank site selected for the ILF program will be required to have an establishment, maintenance, and management plan to achieve the identified goals of the project. The management strategies will be specific to the project and will include standard, recognized strategies such as those identified in the *Minnesota Wetland Restoration Guide* (BWSR online guide, 2012). All project sites will have long-term protection through the recording and enforcement of a perpetual conservation easement. After an initial establishment and maintenance period (typically 5 years), the easement will be periodically monitored by BWSR staff to ensure easement compliance. The landowner will be responsible for maintenance of the project site in concert with the conservation easement. Enforcement of easement conditions will be the responsibility of the ILF sponsor. This system is identical to the current wetland banking system in the State.

## 8.10 **Evaluation, Reporting, and Revision Strategy and Process**

All projects in the ILF program will be annually monitored for a minimum of 5 years during the initial establishment phase. This will be followed by periodic long-term easement monitoring by BWSR staff. Summaries of credit availability and use will be provided to the Corps semi-annually. An annual report will include details on projected credits in each BSA, project development status, available funds, planned management activities, and projected credit use. These reports will be provided to the Corps and discussed with the IRT as warranted.

Changes to the ILF planning framework may be necessary to accommodate programmatic changes in rules or policies for compensatory mitigation by the State or the Corps. Such changes in rules or policies that warrant changes to the ILF program will be submitted to the Corps and reviewed by the IRT. An amendment to the ILF instrument will formalize acceptance of any proposed changes.

## 9. Description of ILF Program Account

The Road Program as it currently functions does not be accept funds from permittees directly, as with most ILF programs, but rather is funded from money provided by the state, e.g., periodically approved bonding. The ILF funds are provided on behalf of local transportation authorities that are anticipated to need mitigation credits to meet permitting obligations for future transportation projects. The ILF funds are used for selection, design, acquisition, implementation and management of ILF projects by the sponsor and by other entities under contract to the sponsor. The ILF funds are typically spent on projects generating compensation credit in advance of most of the transportation impacts that would create the need for compensation credit. This proposed ILF will initially function in this same manner. However, the sponsor may in the future propose an alternative or supplementary means of program funding. Such a change in the program account mechanism would necessitate an amendment to the ILF instrument.

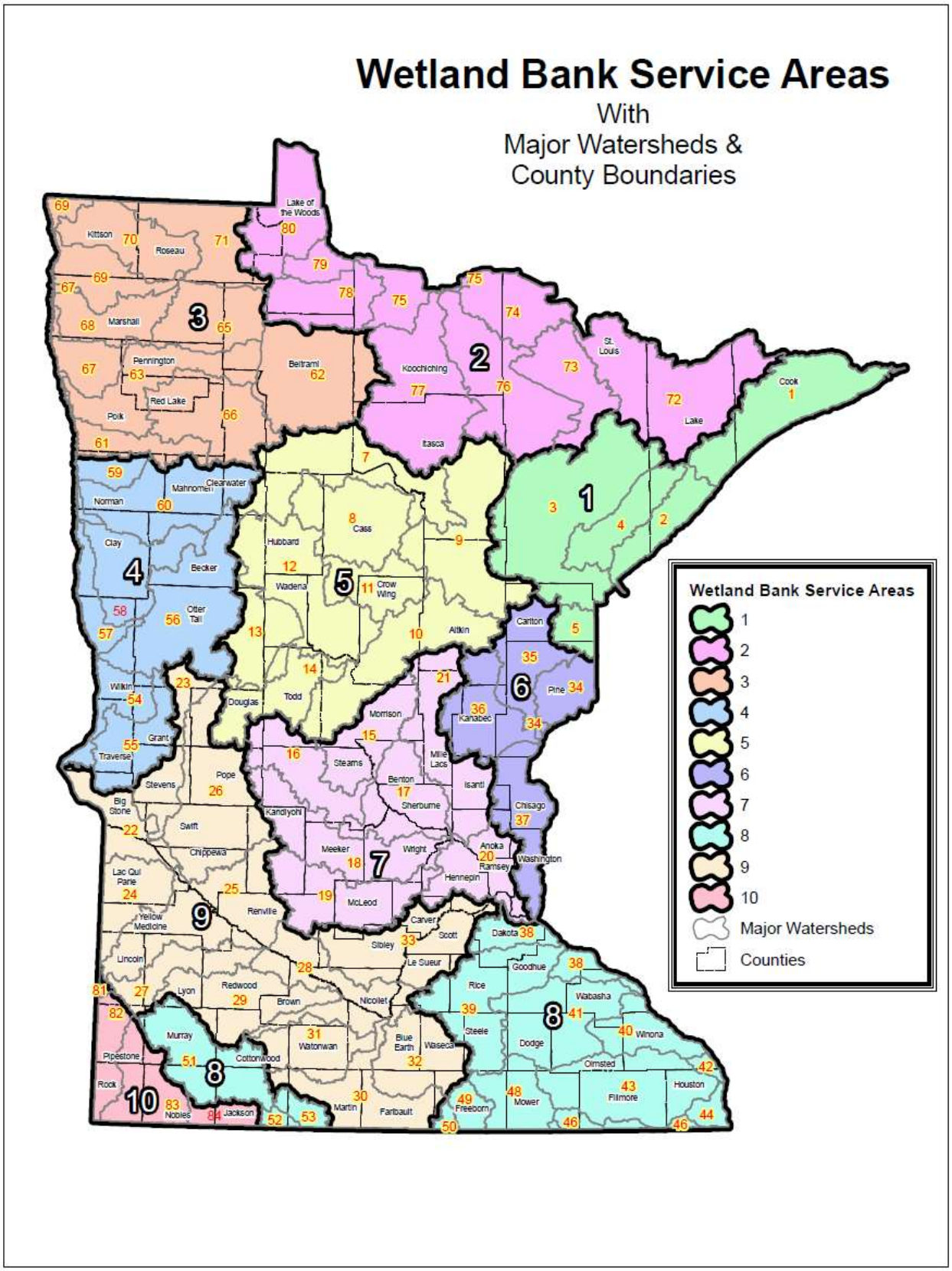



**Figure 1. Bank Service Area Map of Minnesota**

**Figure 2. Credit Establishment Process for ILF Program**

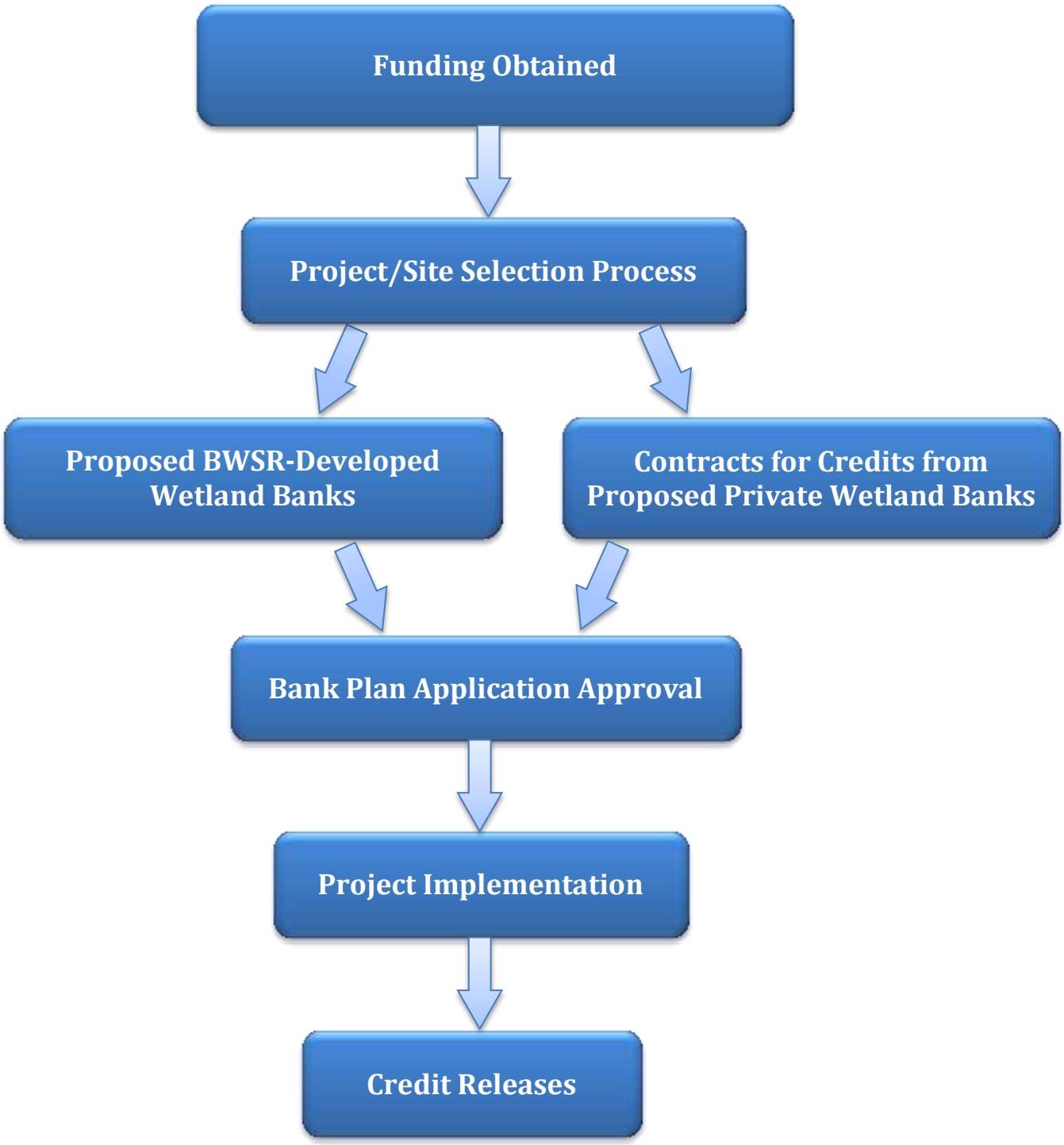
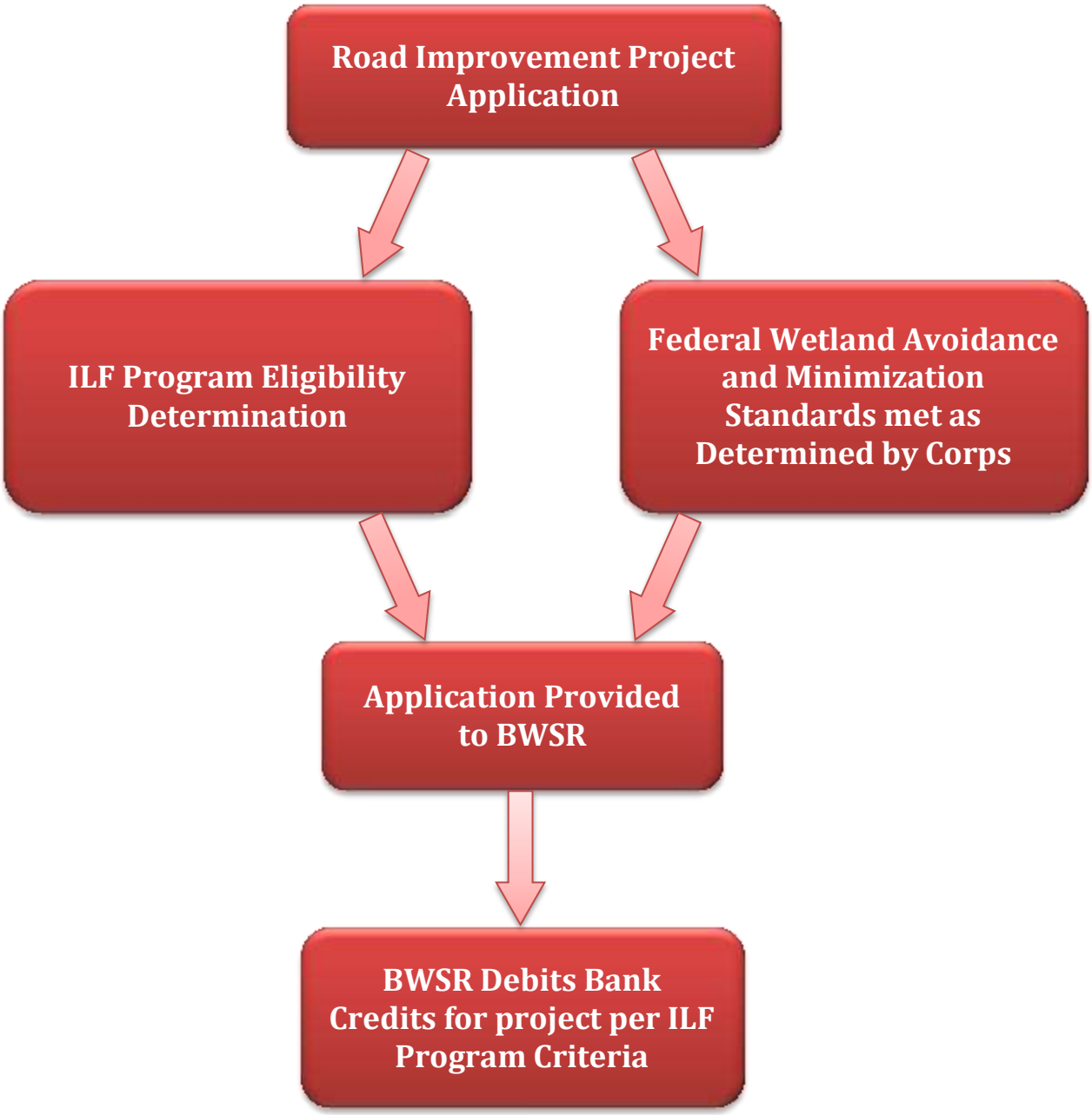


**Figure 3. Credit Use Process for ILF Program**



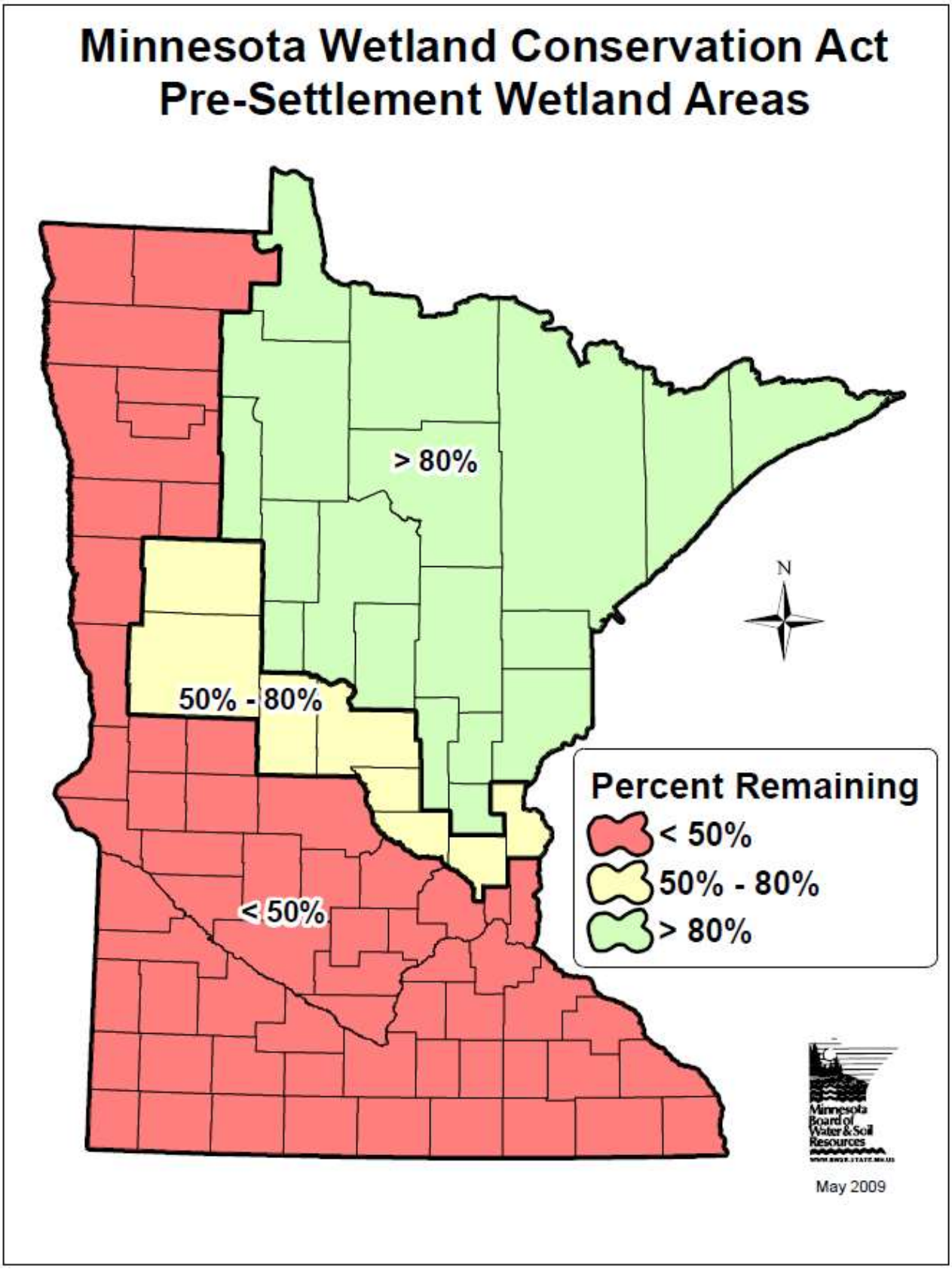



**Figure 4. Pre-settlement Wetland Area Map**

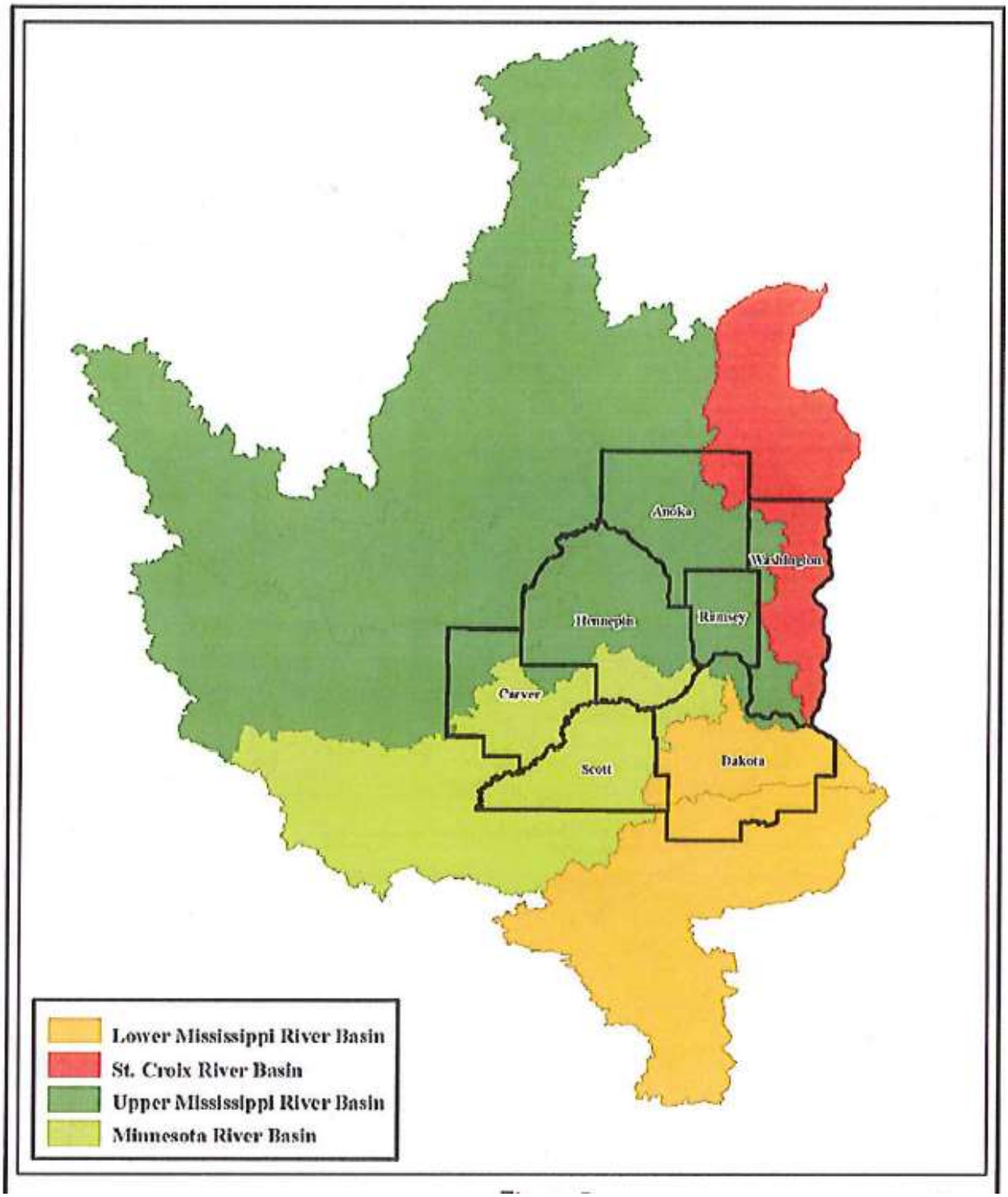



**Figure 5. Minneapolis-Saint Paul Metropolitan Special Service Area Map (*from St. Paul District Policy for Wetland Compensatory Mitigation*, 2009)**