



Effect of WOTUS Changes on Minnesota and 404 Assumption

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“Disclaimers”

This is not intended to be a detailed analysis of 404 jurisdiction, but rather some impressions on what the proposed changes may mean for Minnesota - a state with comprehensive resource protection programs that has explored “404 assumption” in-depth.

- Much will depend on the details of the final rule and how it is interpreted and implemented by the US Army Corps of Engineers.
- Effects could vary considerably between states.
- Limitations to offsite mapping analysis.
 - Estimates not final determinations.
 - Helpful to draw “big picture” conclusions or make general comparisons.
- Differences in jurisdiction depend on which previous rule we are comparing.

“404 Assumption” and “Assumable Waters”

- Section 404 of the Federal Clean Water Act allows for state implementation of an equivalent program (aka “404 Assumption”), eliminating the need for separate federal permits.
- However, when a state assumes 404, the assumption authority does not apply to all waters; the Corps “retains” permitting authority over certain waters.

CWA Section 404(g)(1): “...other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce..., including wetlands adjacent thereto...”

Recent Efforts to Explore 404 Assumption in Minnesota

- 1) Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study – January 17, 2017.
- 2) Analysis of Retained and Assumable Waters in Minnesota – May 3, 2018.
 - ❖ This analysis included a statewide mapping application based on:
 - a 2017 interpretation of Corps-retained waters; and
 - predicted federal jurisdiction using Rapanos guidance (necessary to inform the legislature of the potential scope of 404 assumption).
 - ❖ This map can also provide a basis for WOTUS comparisons.

Potential Changes to Federal Jurisdiction in Minnesota?

We will look at a few examples relating to:

1) **Certain adjacent wetlands.**

- Rapanos: “bordering, contiguous, and neighboring”
- Proposed: “abut or have a direct hydrologic surface connection”

2) **Ephemeral streams.***

- Rapanos: Significant nexus (Kennedy) or seasonal flow (Scalia)
- Proposed: “surface water channel that contributes perennial or intermittent flow” (ephemeral features are not waters of the U.S.)

**Our mapping analysis did not differentiate between ephemeral, intermittent, or perennial streams but, combined with experience, we can draw some general conclusions.*

Potential Changes to Federal Jurisdiction in Minnesota?

Example of Hydrologic Connectivity

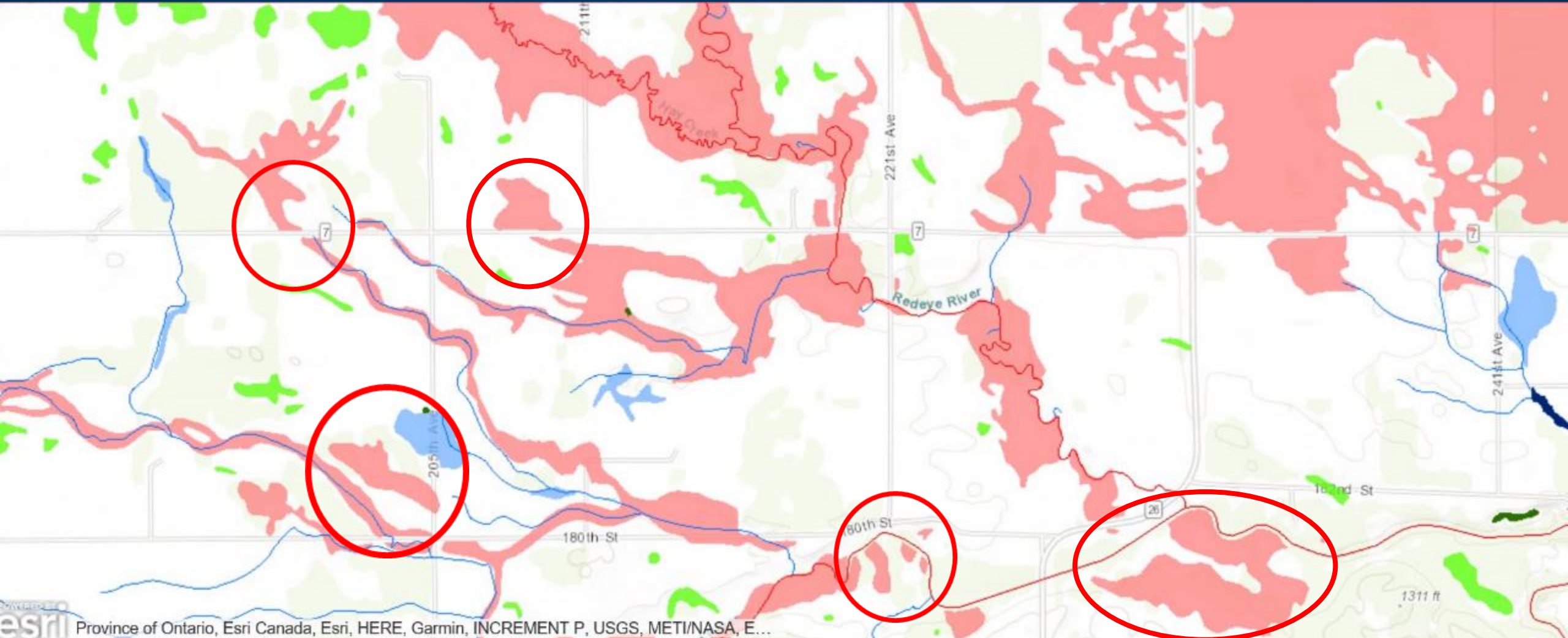


Green = Non-jurisdictional/State-only

Shades of Red or Blue = Likely 404 Jurisdictional

Potential Changes to Federal Jurisdiction in Minnesota?

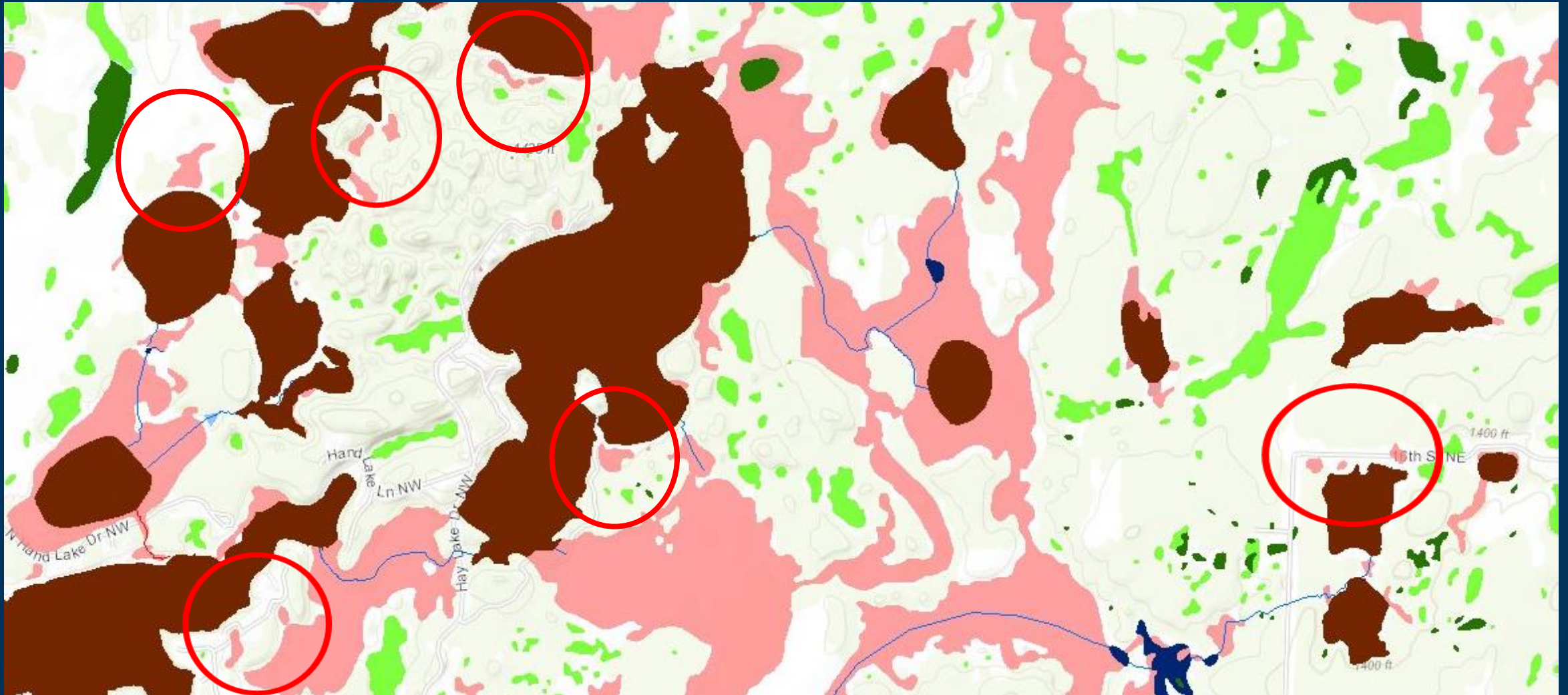
Hydrologic Connectivity?



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Potential Changes to Federal Jurisdiction in Minnesota? Hydrologic Connectivity?

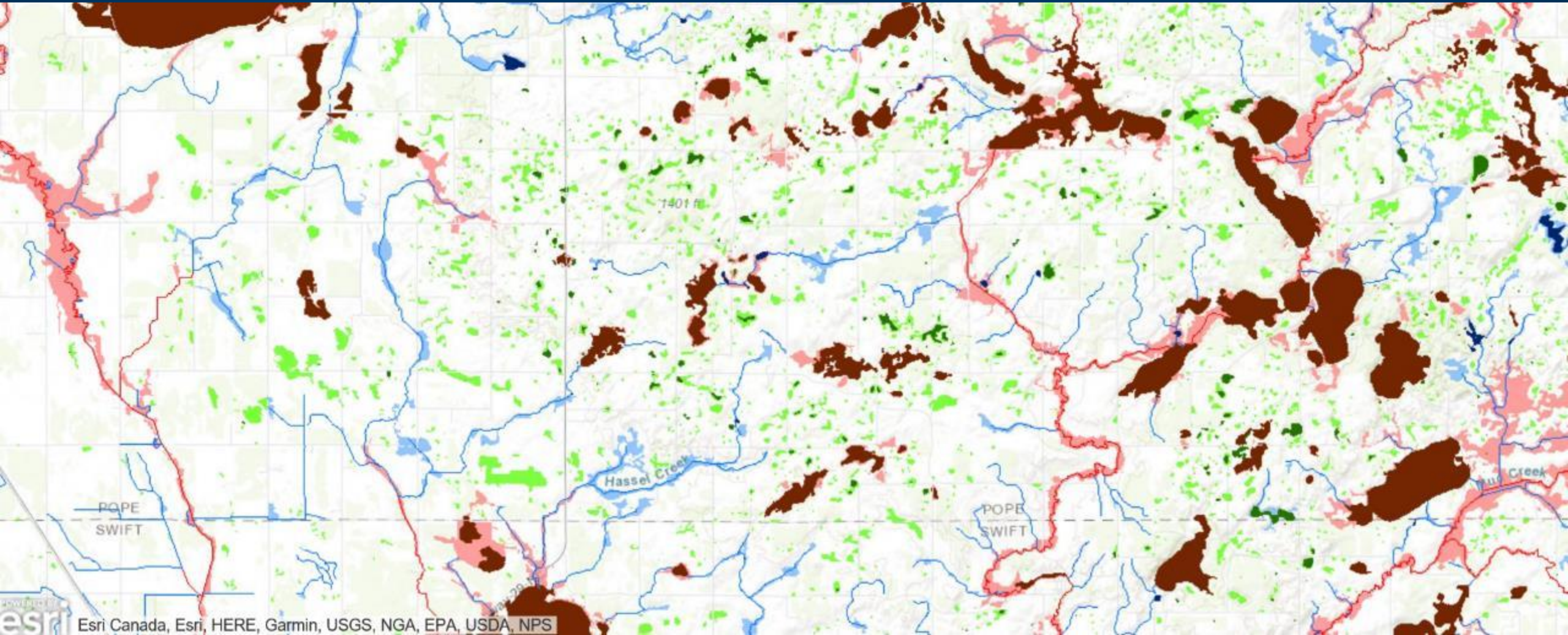


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Potential Changes to Federal Jurisdiction in Minnesota?

Prairie Potholes (More Relevant to 2015 Rule)

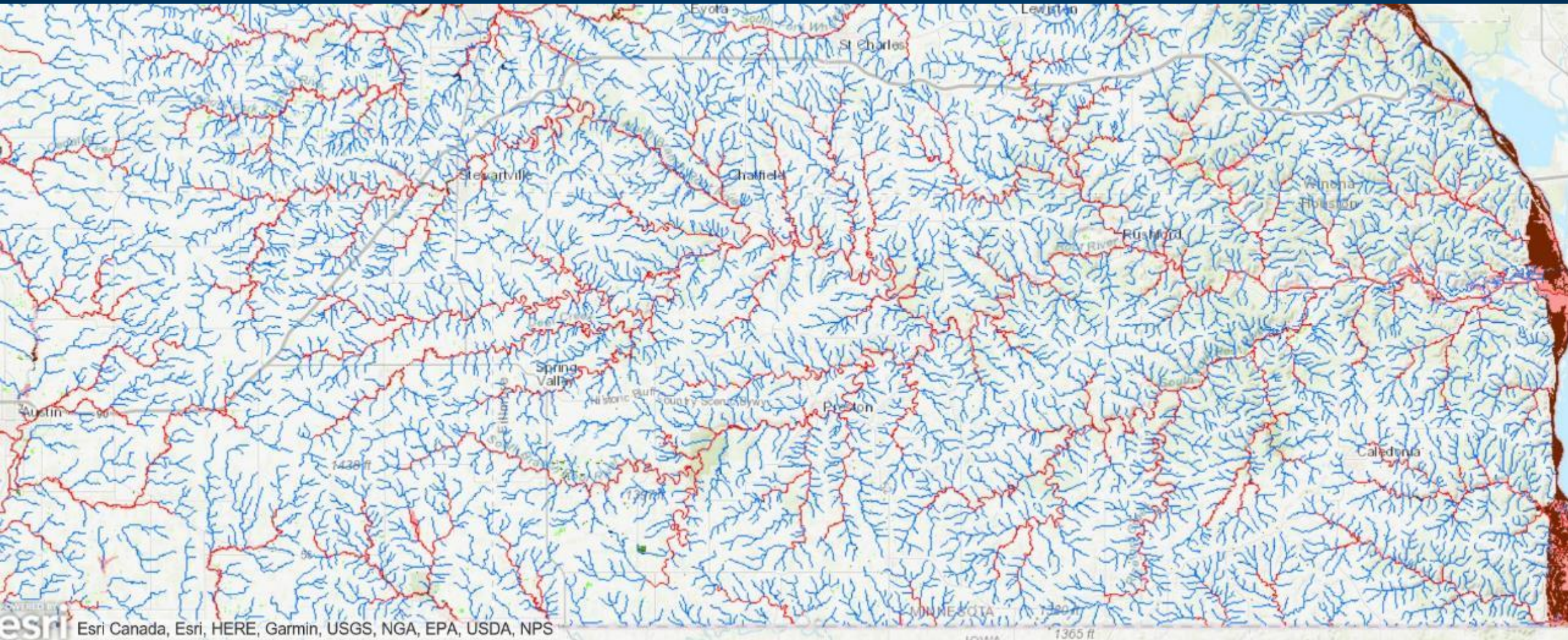


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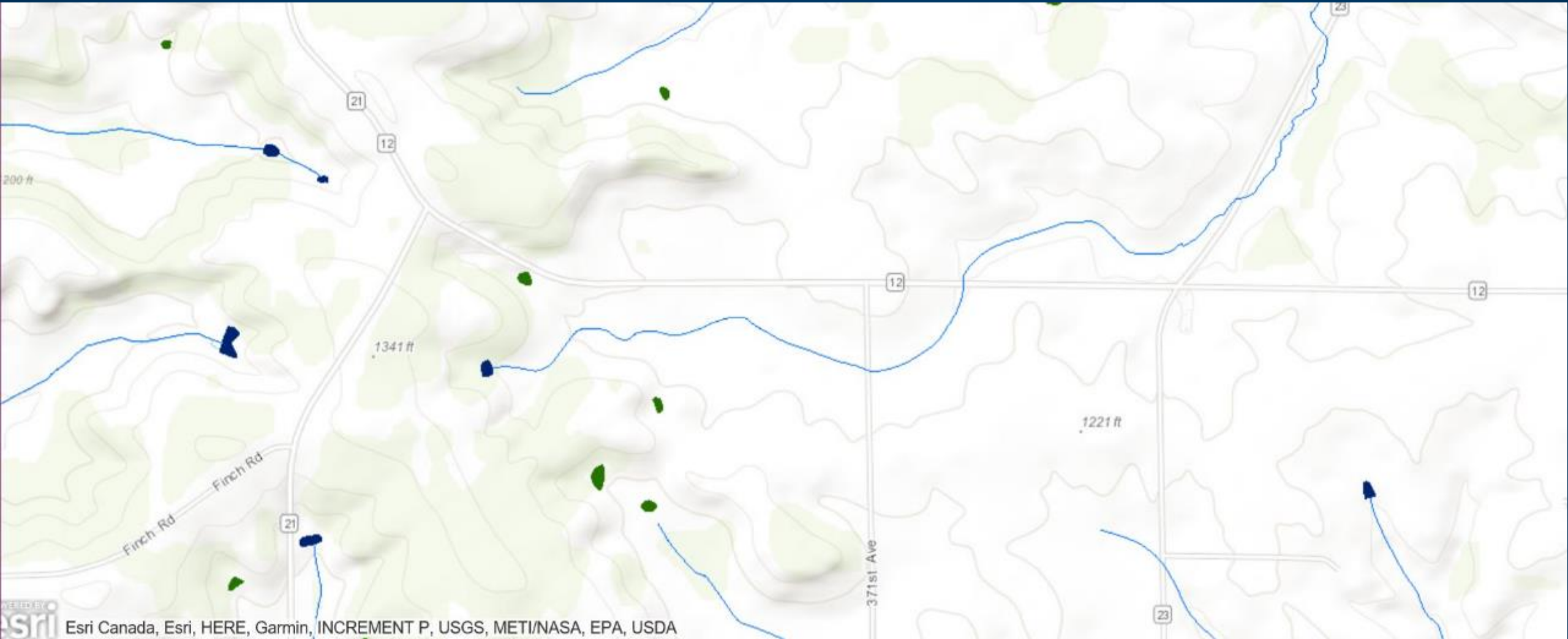
Potential Changes to Federal Jurisdiction in Minnesota?

Streams – Perennial, Intermittent, or Ephemeral?



❖ We assumed all mapped streams were 404 jurisdictional under the Rapanos guidance.

Potential Changes to Federal Jurisdiction in Minnesota? Ephemeral Streams?



❖ Even in SW Minnesota, many streams originate from wetlands.

Potential Changes to Federal Jurisdiction in Minnesota?

Conclusions

Some reduction in federal jurisdiction likely for:

1) Some “neighboring” wetlands that lack hydrologic connectivity.

- Amount of change may not be significant due to the degree of connectivity in Minnesota.

2) Truly ephemeral, high gradient streams.

- Many Minnesota streams originate in wetlands, increasing the potential for the flow regime in those streams to be wetter than ephemeral.

❖ If jurisdiction is removed over *intermittent* streams, the amount of waters affected would be substantially greater.

Potential Effect on Resource Protection in Minnesota?

Primary State Water Regulatory Authorities in Minnesota:

1) Wetland Conservation Act

- All wetlands in the state, regardless of federal jurisdiction.

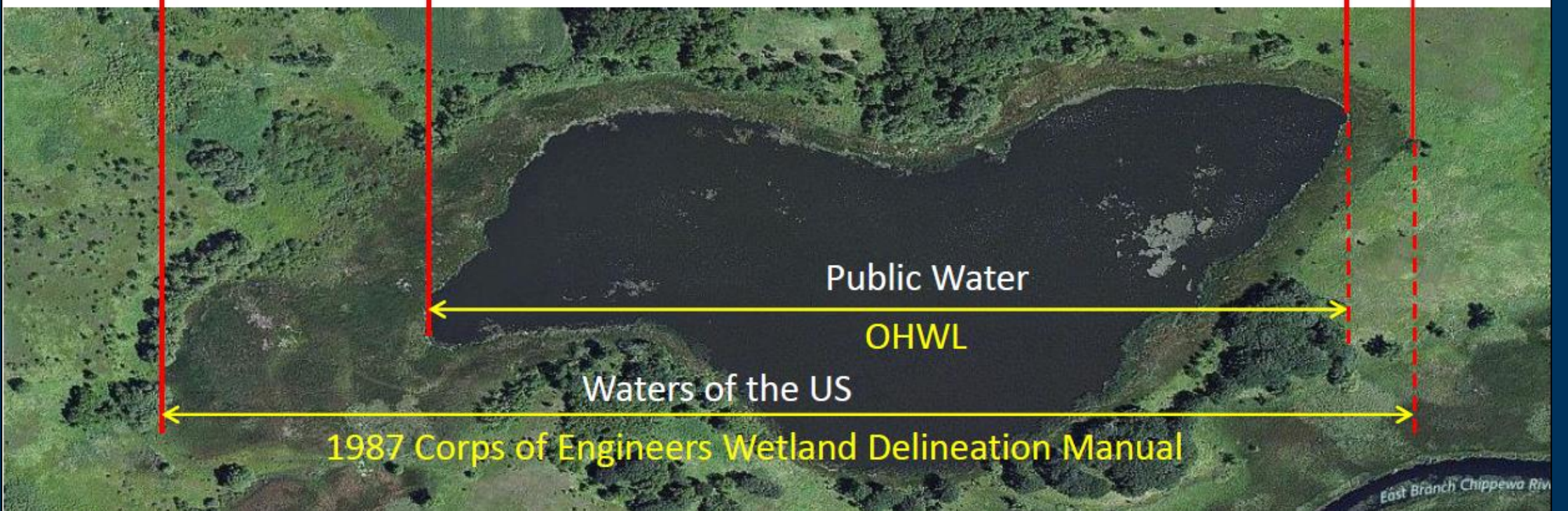
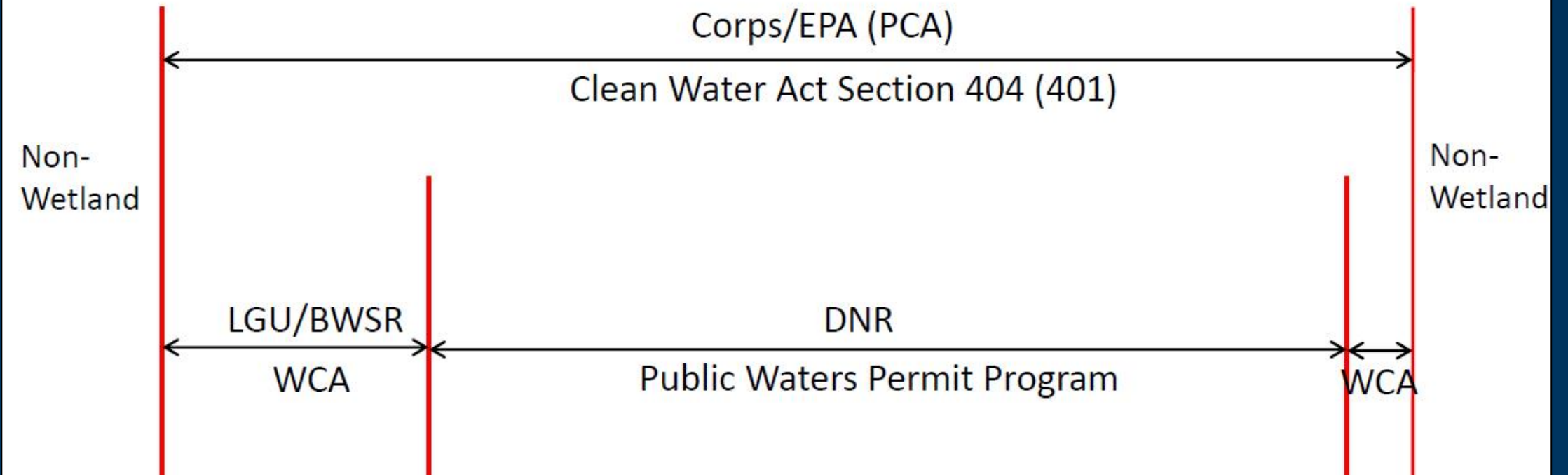
2) Public Waters Permit Program

- Lakes, rivers, and streams, regardless of federal jurisdiction.

3) Water Quality Standards

- All waters of the state.

Combined program implementation consists of more than 100 state and local staff (FTEs) and over \$10 million in annual funding.



Potential Effect on Resource Protection in Minnesota?

- 1) Little to no effect on wetland protection due to the MN Wetland Conservation Act.
- 2) Little effect on lakes and streams due to the MN Public Waters Permit Program.

Exception: Some high gradient ephemeral streams that lack associated wetlands would not be protected under the PWPP or WCA. However:

- Not a lot of permitting activity in these areas.
- State water quality standards may apply to projects affecting these streams.

404 Jurisdiction vs. 404 Assumption

How does the extent of jurisdiction affect assumable waters?

- If a water is non-jurisdictional, there is no Section 404 authority for a state or tribe to assume.
- Reduced jurisdiction could mean fewer waters to assume.
- ❖ Minnesota's 2018 Assumable Waters Analysis was based on a 2017 Corps of Engineers interpretation of retained wetlands.

Analysis of Retained and Assumable Waters in Minnesota

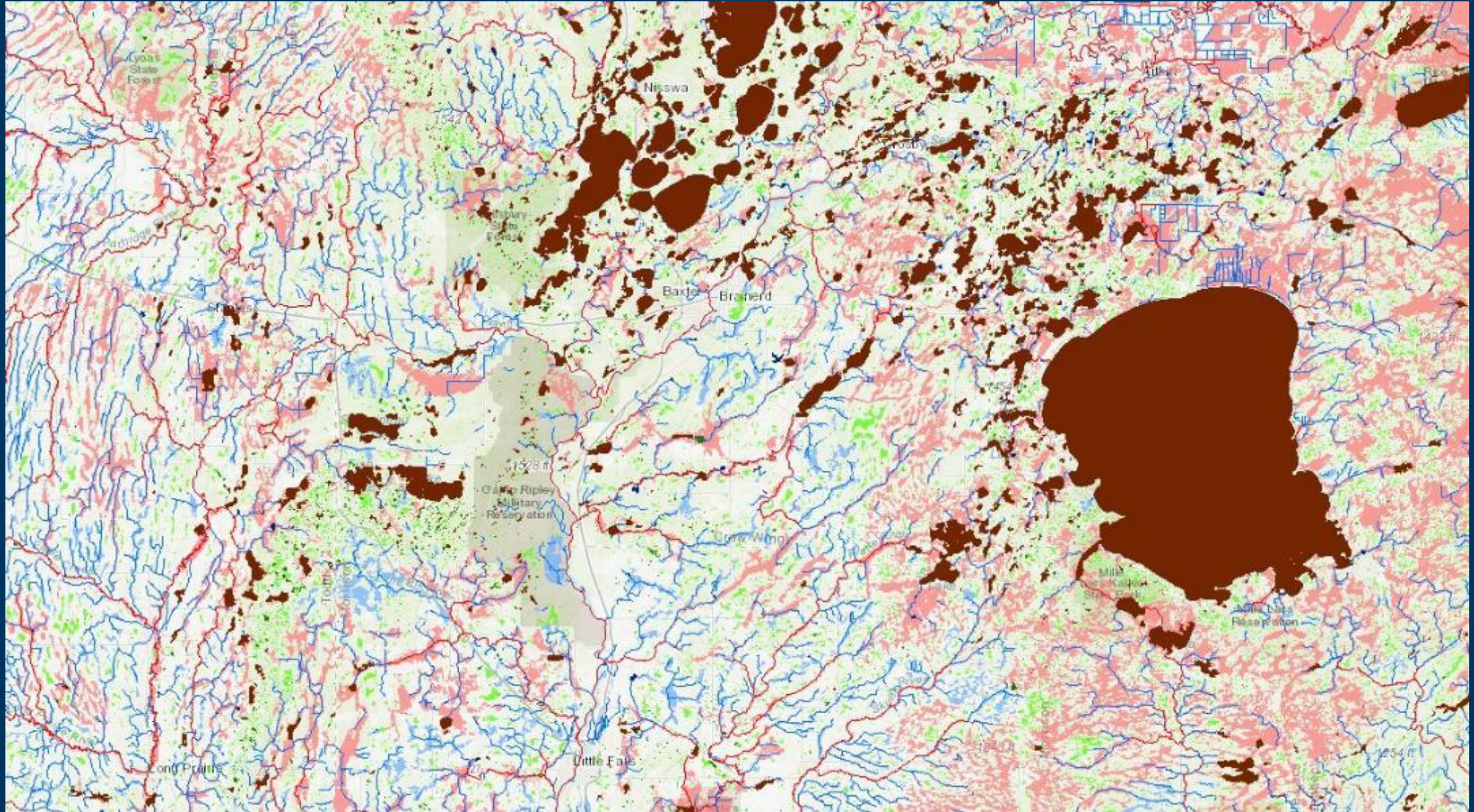
A Supplement to the January 17, 2017 Minnesota Federal Clean Water Act
Section 404 Permit Program Feasibility Study Report to the Legislature

May 3, 2018



mi MINNESOTA

Findings: 2018 Assumable Waters Analysis



Red = Corps-retained

Blue = State-assumable

Green = Non-jurisdictional/State-only

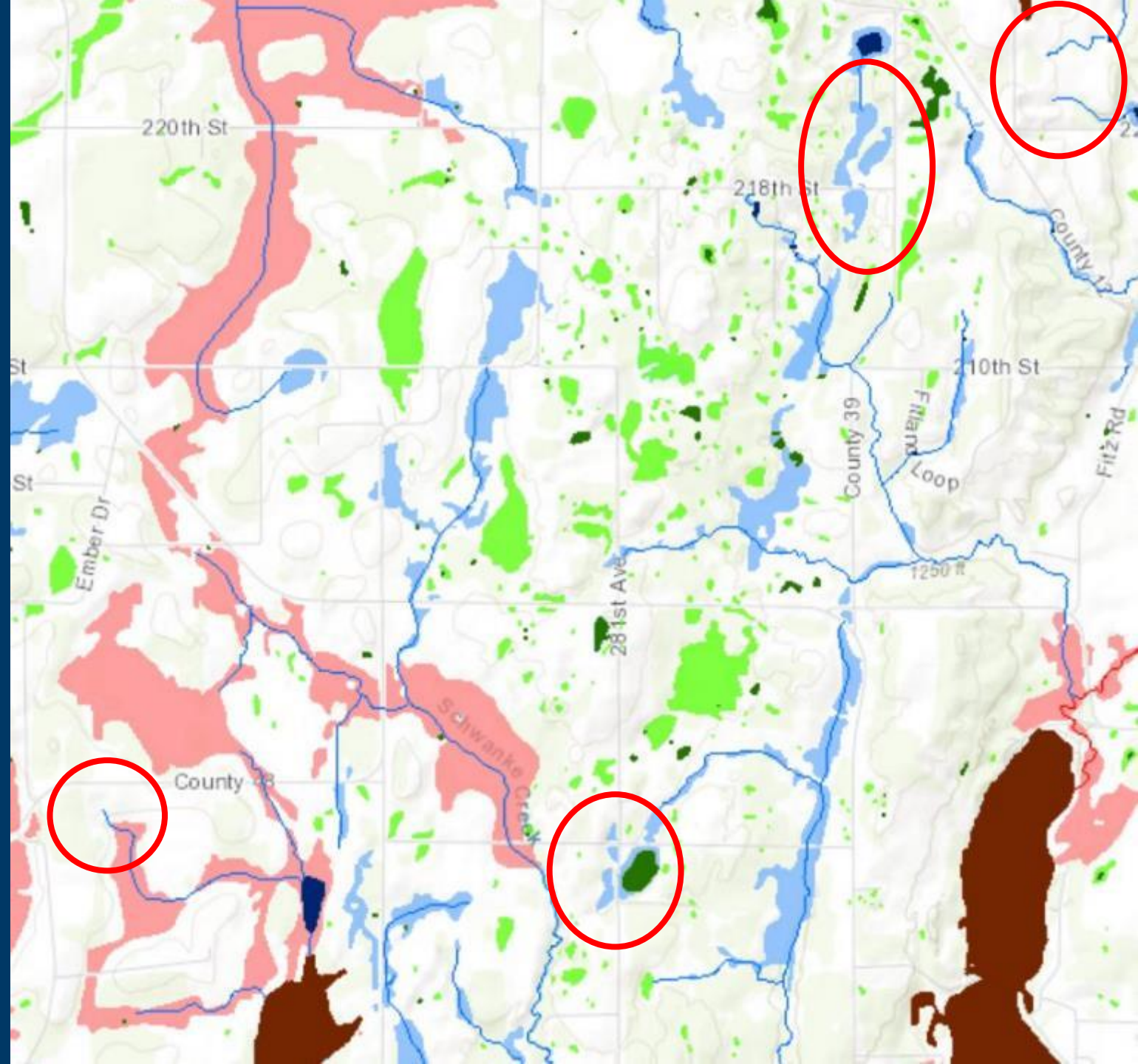
Potential Reductions in Assumable Waters?

- Certain “neighboring” assumable wetlands that lack a hydrologic connection to a jurisdictional water.
- Ephemeral streams.

Shades of Red = Corps-retained

Shades of Blue = State-assumable

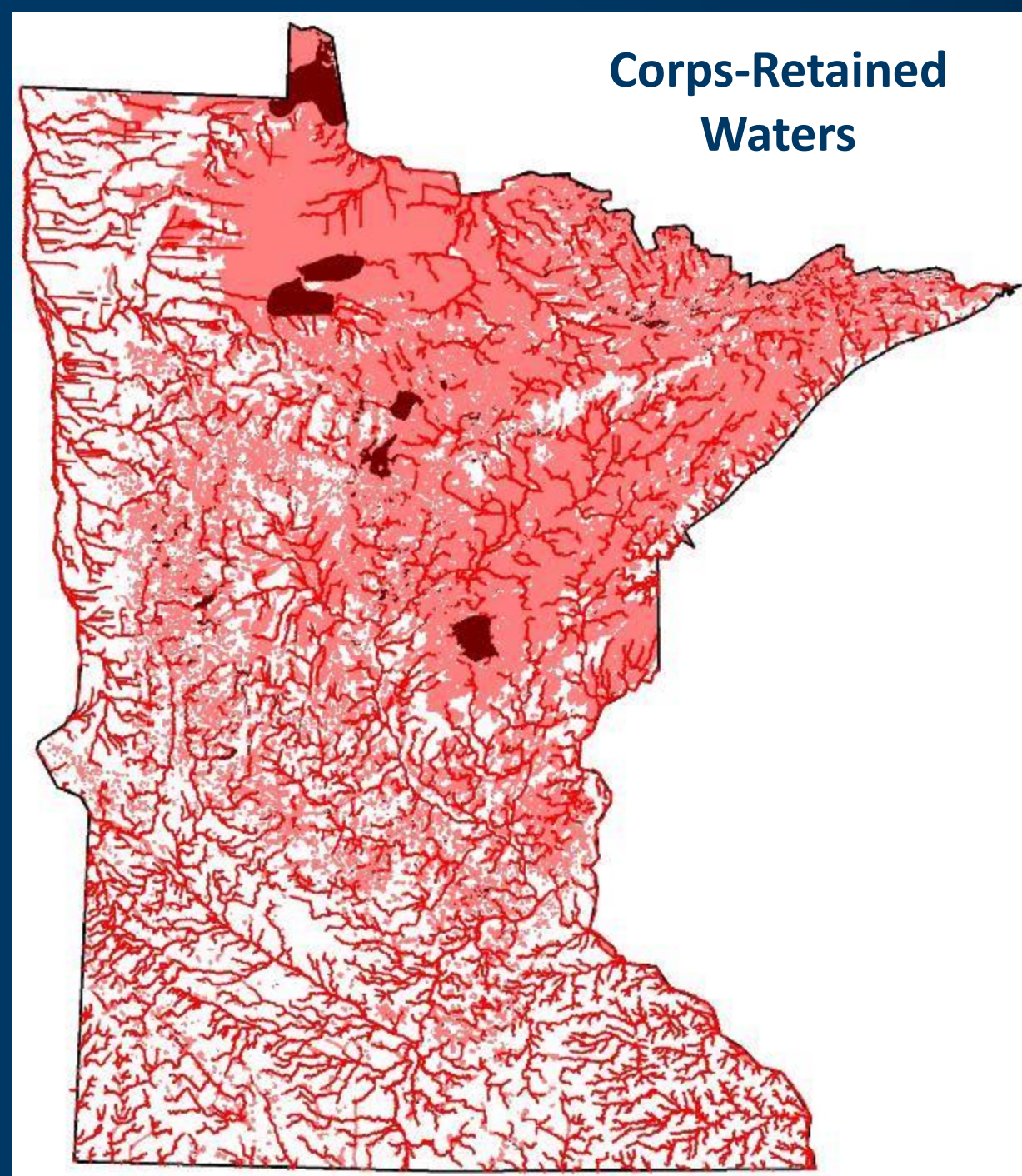
Green = Non-jurisdictional/State-only



Findings: 2018 Assumable Waters Analysis

Type of Water	% COE-Retained	% State-Assumable
Wetlands (acres)	91.5%	8.5%
Lakes/Basins (acres)	98.7%	1.3%
Streams (miles)	12.0%	88.0%

- 1) The relative proportions of wetlands would not likely change much.
- 2) The relative proportions of streams could change to some degree as all ephemeral streams were assumable.



What's changed?

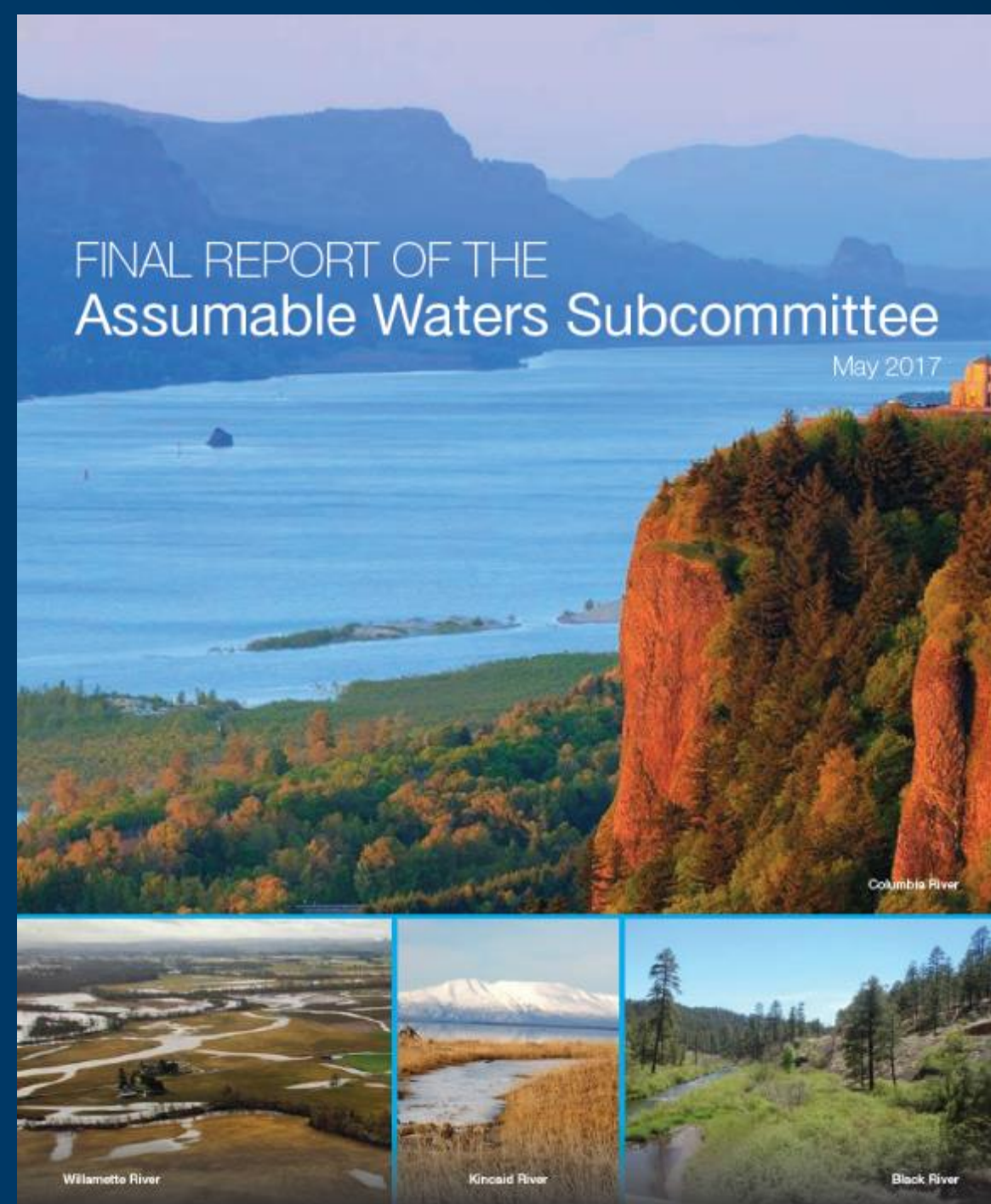
- 1) Assumable Waters Subcommittee recommendations to EPA.

Corps-retained waters =

- a) "Section 10" waters*
- b) Adjacent wetlands to administrative boundary (e.g. 300 feet)

*Except those listed for historic use only

- 2) July 30, 2018 Corps memo adopting subcommittee recommendations.
- 3) EPA 404 assumption rulemaking.



Current Assumable Waters Status (Post-Corps Memo)

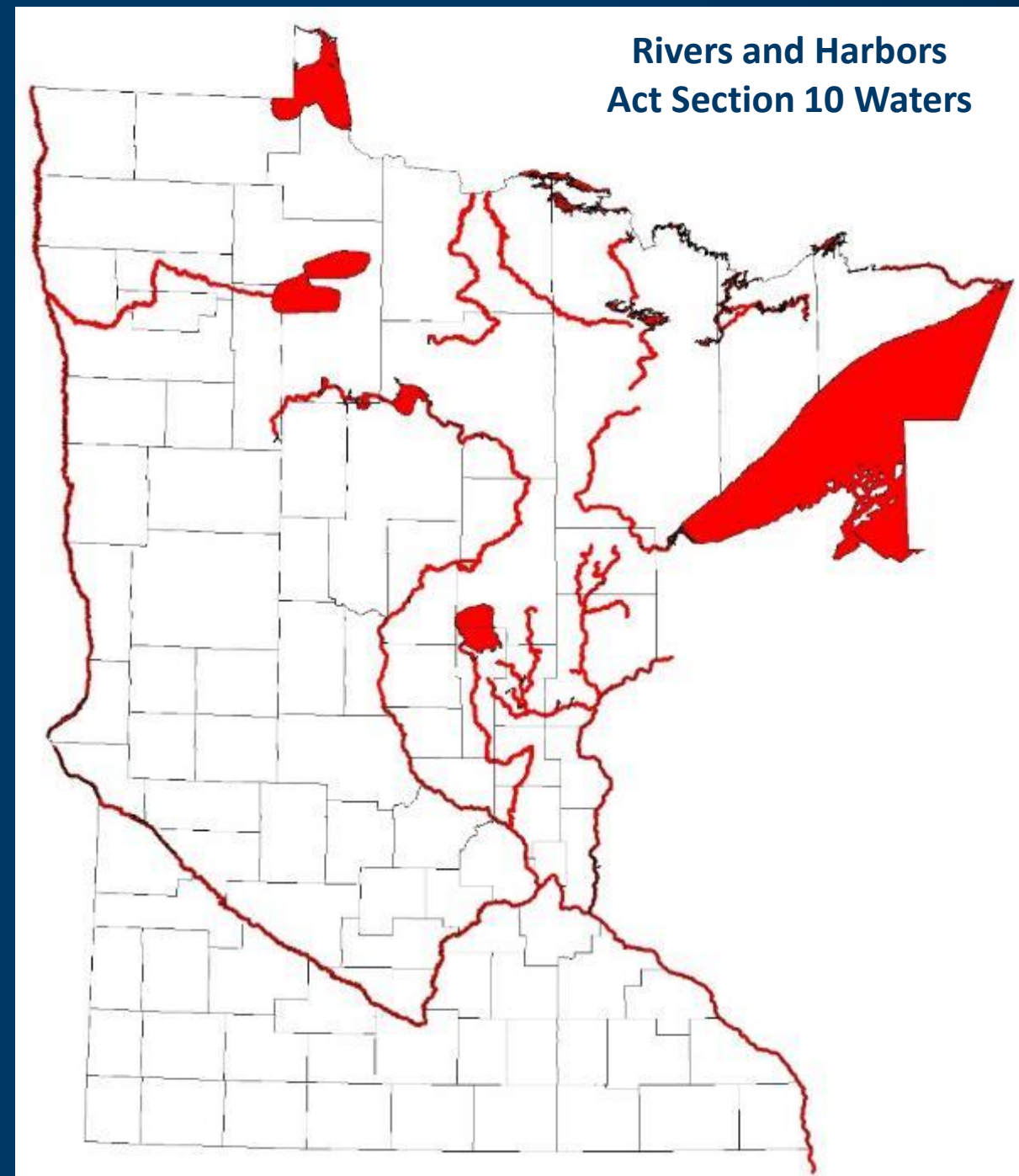
Red = Section 10 waters and adjacent wetlands to 300 ft, most of which would be Corps-retained.*

❖ The state can assume 404 authority over all other waters and wetlands.

Approximate proportion of wetland acres:

- Corps-retained = 1.5%
- State-assumable = 98.5%

*May include waters listed for historic use only.



Effect of Jurisdictional Changes on 404 Assumption?

- ❖ In neither case (pre or post Corps memo) would the proposed changes to federal jurisdiction affect the feasibility of 404 assumption in Minnesota.
- ❖ For Minnesota, the proposed changes to federal jurisdiction are inconsequential to 404 assumption feasibility compared to the changes in assumable waters.
- ❖ For other states with a greater proportion of ephemeral features and less connectivity, the affect could be greater.

Perspectives from State Agency Staff

Proposed WOTUS rule:

- Little to no effect on Minnesota's programs.
- Little effect on Minnesota's resources due to connectivity and strength of state programs (this could be very different in other states).
- Is clearer, and clarity is important to landowners and to state-federal coordination.
- Aligns better with current Minnesota law in some cases (stormwater ponds, ditches, gravel pits and "incidental" wetlands, etc.).

404 assumption:

- Is now feasible and can serve as an incentive for states to develop or expand state programs, minimizing the effects of changes to 404 jurisdiction.

Thank You!

Minnesota's 404 assumption feasibility study, assumable waters analysis, and statewide mapping application are available on the wetlands page of the BWSR website at:
<http://www.bwsr.state.mn.us/wetlands/index.html>

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