



**Integrating Stormwater Permitting  
and  
Watershed Management**

*A Report to the Minnesota Board of Water and Soil Resources*



*and the  
Minnesota Stormwater Steering Committee*

April 2008

**INTEGRATING STORMWATER PERMITTING  
AND WATERSHED MANAGEMENT**

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## I. EXECUTIVE SUMMARY

The Minnesota Board of Water and Soil Resources (BWSR), in cooperation with the Minnesota Stormwater Steering Committee (SSC), commissioned this study to examine the feasibility of approaching stormwater and watershed planning through a watershed-based approach. The study's goal is to streamline federal, state, and local surface water management mandates (planning and permitting) through the development of a detailed watershed-based management planning and implementation framework utilizing empowered watershed entities. Phase One of this study developed a framework outline of options to integrate federal stormwater permit requirements into metropolitan water management plans.

This report presents the work of Phases Two and Three of the study. Phase Two involved the preparation of a detailed framework implementation suite of options for presentation to pilot area watershed organizations and their member municipalities. Phase Three involved selection of two pilot area watershed organizations to explore the application of this framework, and the identification of plan, permit, state law and rule changes necessary to accomplish a more integrated, watershed-based approach to stormwater permitting and watershed planning.

The following Conclusions and Recommendations were extensively reviewed by the study's Advisory Committee, and also presented to the Stormwater Steering Committee on January 17, 2008.

### A. Conclusions

1. ***No significant legal barriers:*** While the requirements of NPDES Phase II, the Minnesota Watershed District Act, and the Metropolitan Surface Water Management Act place an array of water management obligations on MS4s and watershed organizations, there are no significant legal barriers in state law to integrated, watershed-based permitting. Practical barriers do exist, however, such as the challenges faced by MS4s that lie within the boundaries of more than one WMO, each with its own plans and regulatory standards.
2. ***Increased liability exposure from collaboration is manageable:*** MS4s and watershed organizations that choose to collaborate in implementing a SWPPP (or elements of a SWPPP) assume additional risks of liability exposure under the Clean Water Act and state tort law. The degree of risk varies with the MCM. Third party lawsuits are a legitimate and significant concern. Good faith efforts to share responsibilities are unlikely to result in substantial compliance liabilities and third party liabilities may be substantially mitigated or managed through municipal immunities, liability limits and insurance. Cooperative agreements between MS4s and watershed organizations can provide important legal structure to these collaborations by clarifying roles and allocating risks. Further MPCA guidance could help to allay fears of compliance liability exposure. MS4 perceptions of increased liability risk may exceed actual risk.

3. **Cost savings are likely:** While the MPCA would incur additional costs in revising the stormwater program, over the longer term strong local participation will likely decrease MPCA costs as collaboration increases due to fewer total permits and improved review efficiency; MS4 costs would also likely decrease when responsibilities for Minimum Control Measures are shared with other entities. WMO costs likely would increase through engagement in collaboration with MS4s, but many WMOs seem willing to bear such costs, and collaboration should result in overall cost savings.

4. **Options Explored:** The Phase 1 Framework for Integrated Watershed-Based Stormwater Permitting in Minnesota suggested that five options be considered for streamlining and integrating stormwater permitting requirements on a watershed-basis, as follows:

**a. Recognize Another NPDES-Regulated Entity with Implementation**

**Responsibility:** This option was not included because of the need to limit the scope of the study and BWSR’s perception that this approach would not be selected as feasible because of the potential liability issues it raises with the MPCA and EPA.

**b. Individual Applicants (without and with WMO/MS4 partnering):** This option if strictly applied without partnering is the “no change” option. However, if the collaboration of work outside of a permit is considered, it becomes part of the recommended approach that seems to fit the Minnesota situation, especially when combined with the next option on co-permitting.

**c. Co-permittee:** This option was the basis for an in-depth look at opportunities for WMO/MS4 community collaboration or “Shared Responsibilities,” which were identified as abundant whether within the permit or not. Evaluation of stormwater management and planning activities in pilot watersheds and communities revealed that significant collaboration is already occurring, and further collaboration opportunities exist, including:

1) Education and Outreach: MS4s and WMOs are already sharing stormwater education responsibilities, and some of these activities can be implemented on a larger watershed, county, or regional scale and provide greater service and economy.

2) Public Participation: Joint WMO-MS4 annual meetings and combined volunteer and citizen advisory activities present good opportunities for collaboration.

3) Inspection: MS4s are required to conduct inspections for construction sites, illicit discharge detection and elimination programs and at outfalls and structural controls devices. Inspections are frequently duplicated by MS4s

and WMOs, although construction site compliance remains a significant issue that impacts water resources. Further coordination of inspection activities could be achieved through creation of more uniform inspections forms and procedures.

- 4) Maintenance of BMPs: Long term operation and maintenance of stormwater BMPs is a significant concern, and generally opportunities for MS4 – WMO collaboration have not been pursued.
- 5) Illicit Discharge Detection and Elimination: Aspects of IDDE are potentially well-suited for collaboration, especially for MS4/WMO sharing or having upstream/downstream stormwater conveyance systems. However ambiguity about MS4 responsibility for non-stormwater discharges and response discourages exploring collaboration.
- 6) MPCA–Local Assumption: Further gains in resource protection and collaboration efficiencies could be gained through MPCA cooperating with WMOs and MS4s in some inspection and enforcement activities in the construction and industrial stormwater permit programs. Further attention on construction is needed to address the problems that remain, as highlighted also by the SSC’s NPDES Construction Site Erosion Control Permit Compliance Workgroup.

- d. **Sole permittee approach**: While EPA Implementation Guidance allows a sole watershed entity to be an NPDES permittee on behalf of MS4s within that watershed, WMOs generally are not equipped with the staff, equipment, or authority to manage municipal infrastructure or operations (e.g. MCM #6). Local MS4s and watersheds generally are not interested in pursuing this approach because it means a loss of local autonomy in stormwater management. The liabilities and legal responsibilities inherent in the NPDES permit create practical obstacles for the sole permittee approach. MS4s and WMOs are interested in other forms of collaboration that enhance the effectiveness of MCM implementation.
- e. **Qualifying Local Program**: QLP is a means by which the MPCA may recognize a local construction site erosion and sediment control program and deem it a minimum control measure approved in advance for use by MS4s. The MPCA has entered into joint powers agreements with some WMOs and LGUs to start a process of sharing the construction site inspection workload. However, QLP is not recommended for other MCMs. Applying this approach at a state level to the other five minimum control measures likely would require extensive MPCA resources to establish each qualifying program through rulemaking. It also would discourage the desirable tailoring of programs to local needs, especially as those local needs may also reflect implementation of local TMDLs and nondegradation plans in the future. The federal concept of “equivalency,” allowing the state program to vary from U.S. EPA municipal stormwater regulations under certain

circumstances, could offer a more practical route to a standardized baseline for particular minimum control measures.

5. ***Planning processes are not well aligned:*** Duplicative and poorly coordinated water planning obligations result in ongoing overlaps and inefficiencies; comprehensive realignment of these planning processes, and related reporting obligations, would promote greater voluntary collaboration among MS4s and watershed organizations.
6. ***MPCA review resources are limited:*** The agency's ability to review individual SWPPPs and oversee SWPPP implementation is seriously constrained by lack of personnel. Because many municipalities and watershed management organizations within the metropolitan area already implement extensive stormwater programs independent of the federal mandate, the MPCA has the opportunity to explore program structures that allow a shift of resources from higher- to lower-performing MS4's.
7. ***2008 represents an important "Window of Opportunity":*** State agencies' plans to update the watershed planning rules, the NPDES industrial and construction stormwater permit, and the December 2008 deadline for local comprehensive land use plan revisions together present a unique opportunity to adopt reforms that encourage greater collaboration.

## **B. Recommendations**

1. **Local collaboration among MS4s and watershed organizations should continue and expand:** Education, outreach and public participation are the stormwater activities most easily shared among MS4s and WMOs, but important collaboration in inspections and BMP maintenance also should be pursued. MPCA and BWSR guidance, and local initiatives to structure effective cooperation through formal agreements can serve to address MS4 concerns about enforcement and third party liability exposure. Model programs, agreements, and success stories should be developed and distributed systematically. MS4s and WMOs should pursue opportunities to collaborate with BMP maintenance, and should resolve ambiguities concerning response duties for third-party non-stormwater discharges in order to advance collaboration in IDDE programs.
2. **BWSR, the MPCA, the Metropolitan Council, and the Minnesota Department of Health should collaborate to provide improved alignment of water planning processes:**
  - a. BWSR should take administrative steps and pursue rule changes as necessary, to adjust the metropolitan water resource management plan revision schedule so that WMO plans are adopted two to three years in advance of the municipal comprehensive land use plan revision deadline; the obligation for local water plans to be revised within two years of WMO plan approval would remain,

but the process would be better aligned to inform municipal comprehensive land use plan revisions.

- b. BWSR should take administrative steps and pursue rule changes as necessary to place all WMO plan revisions in the same cycle, thereby allowing municipalities with multiple WMOs to undertake a single local water plan revision effort; or WMO plan revisions could be staggered for the benefit of reviewing agencies, but scheduled by regional sectors, and still timed to coordinate with the land use planning process.
- c. BWSR should take administrative steps and pursue rule changes as necessary to supplement the 10-year WMO plan review cycle with review at five-year intervals to incorporate SWPPP changes resulting from the five-year municipal stormwater permit cycle, while assuring that local water plans continued to comply with the WMO plans.
- d. MPCA should take administrative steps to adjust the five year cycle of the municipal stormwater permit to align with the WMO planning cycle for metropolitan watersheds.
- e. MDH should participate in agency and stakeholder discussions to explore how wellhead protection plans could best coordinate with the review and updates of local water plans.

3. **MPCA should evaluate potential changes to the General Permit to allow SWPPPs to be integrated into local water plans:** MPCA could allow a municipal MS4 to incorporate its SWPPP into its local water plan, and submit both for WMO review and approval. Under this alternative MPCA general permit, WMO approval of a local plan with required SWPPP elements would constitute an MPCA authorization of MS4 stormwater discharges. This Alternative General Permit could create administrative efficiencies; allow the MPCA to shift resources to higher-priority MS4s; and foster collaborative, watershed-based stormwater management by MS4s and WMOs.
4. **The MPCA Commissioner and BWSR Executive Director should convene a Work Group to review and implement these recommendations through an interagency memorandum of understanding.** The leaders of these two agencies can provide critical direction to exploit the window of opportunity that exists in 2008. Implementation of these recommendations can greatly ease the administrative burdens of cities, the Metropolitan Council, and state agencies, while also offering greater protection to water resources. The agency leaders should charge a work group to integrate revisions of the stormwater general permit and watershed planning rules and coordinate with the Stormwater Steering Committee to implement a program responding to the recommendations of both this study, and the “Recommended Solutions to Enhance Compliance with the NPDES Construction Permit” from the NPDES Construction Site Erosion Control Permit Compliance Work Group.

## II. INTRODUCTION AND BACKGROUND

### A. Formation of Advisory Committee

BWSR appointed an Advisory Committee for Phases Two and Three of this study, with broad representation from local municipalities, watershed organizations, private developer and conservation non-governmental organizations, and state agencies:

Art Persons, Minnesota Department of Health;  
Beth Neundorff, Minnesota Department of Transportation;  
Brian Nerbonne, Minnesota Department of Natural Resources;  
Cliff Aichinger, Ramsey Washington Metro Watershed District;  
Craig Johnson, League of Minnesota Cities;  
David Weirens, Board of Soil and Water Resources;  
Don Jakes, Minnesota Pollution Control Agency;  
Doug Thomas, Board of Soil and Water Resources, Rice Creek Watershed District;  
Eric Macbeth, City of Eagan;  
Jack Frost, Metropolitan Council;  
Nate Duoss, Builders Association of the Twin Cities;  
Jason Moeckl, Minnesota Department of Natural Resources;  
Jay Riggs, Washington Conservation District;  
Jim Grube, Hennepin County Transportation;  
Judy Sventek, Metropolitan Council alternate;  
Karen Harder, Sierra Club of Minnesota;  
Matt Moore, South Washington Watershed District;  
Michael Findorff, Minnesota Pollution Control Agency;  
Paul Nelson, Scott County;  
Nick Tiedeken, Minnesota Department of Transportation;  
Phil Belfiori, WSB Engineering;  
Randy Neprash, Minnesota Stormwater Coalition;  
Steve Klein, Barr Engineering;  
Steve Woods, Board of Water and Soil Resources;  
Tim Kelly, Coon Creek Watershed District;  
Tim Larson, Minnesota Pollution Control Agency.

### B. Listening Sessions: Issues Identification

Five “listening sessions” were held for the BWSR Watershed Based Management and Planning study. The sessions were held for the following key stakeholder groups:

- State agencies, January 10, 2007; 12 state agency participants
- Regional agencies, January 11, 2007: 11 participants representing the Metropolitan Council, counties and SWCDs

- WMOs, January 16, 2007: 17 participants representing WDs, JPAs and County WMOs
- Cities, January 23, 2007: 20 participants representing cities and the MN Cities Stormwater Coalition
- Private interests, January 25, 2007: 5 participants representing industrial permittees (MN Chamber of Commerce) and the Builders Association of the Twin Cities (BATC)

Detailed notes from each of these sessions are provided in **Appendix A**. The information that follows is an attempt to summarize the main issues and themes that were heard during the session. The intent of this section is to capture those points and use them as a basis for further analysis. The listed items are not presented in any priority. The individual items are reported rather than evaluated; that is, some items were broadly expressed and some were individually expressed. The study team did not interject its judgment, but tried to instead comprise a list of issues the stakeholders wanted entered into the study record.

In addition to the five formal listening sessions, less formal sessions were held at the 2006 MAWD conference (approximately 45 attendees) and the December 2006 meeting of the Metro Water Coordinators Group (a cities perspective with about 25 attendees). Brad Wozney and Dave Weirens of BWSR together attended four of the five formal sessions representing the sponsoring agency.

1) A “Qualifying Local Program” (QLP) approach is needed to recognize all of the good stormwater management (SWM) programs currently being implemented. However, MPCA recommends a customized approach for MN to get from under the costly USEPA requirements for using its QLP approach. We would need to identify a process to institutionalize this in MN as a “QLP-like” program.

2) Even a watershed-wide, consistent SWM program will not help with linear (e.g. roadway) projects that transcend watershed boundaries. WMOs will be reluctant to adopt the same program as adjacent watersheds that might not share the same priorities. This could be addressed by the adoption of baseline uniform regulations such as for construction consistent with the state program or by new authority at a state level for regulating linear projects. Watershed interests must continue to be recognized by project proposers. Solving linear project problems will not be a focus of this study because of the wide scope of the issues involved.

3) There are many issues related to the various construction permitting programs:

- too many permitting layers and costly, clumsy repetition of different standards
- erratic enforcement
- lack of personnel at MPCA to have an on-site presence
- slow WMO enforcement process (more on-site presence and quickness to respond to problems at the LGU level)

The SSC’s “NPDES Construction Site Erosion Control Compliance Workgroup” will be making recommendations for construction program improvements later this year. Also, the MPCA pilot enforcement JPAs with 10 LGU/county programs will be finished by November 2007 and could be used for program evaluation. Although the BWSR study listening sessions yielded many comments on this program, this study should refer to the Workgroup product in its deliberations,

but leave major recommendations on construction permitting changes to the SSC and its Workgroup.

4) SWM requirements are too numerous and out of phase for reporting. They need to be better coordinated and linked in an understandable manner. Programs to include would be: MS4 SWPPPs, nondegradation and annual reports; local surface water management plans; watershed management plans; TMDL's; and drinking water source protection plans. Related programs that should also be considered for inclusion include NPDES construction and industrial permitting, and county groundwater plans. Revisions to MN Rules 8410 and/or MN Statute 103B seem to be the best vehicle to reform SWM program coordination.

5) TMDL implementation is a huge unknown. Because there are not enough approved TMDL load allocations in place, WMOs and LGUs are concerned about how these could influence SWM programs. For example, how will load allocations for nonpoint sources be implemented at the watershed or LGU level? Every interest group attending a listening session identified this issue. Industrial permittees are hopeful that the TMDL process will help identify whether stormwater is a problem in waterbody impairments, thus placing their industrial stormwater discharges in perspective.

6) Local governmental unit implementation of SWM programs has benefits in local knowledge of all factors related to growth, knowledge of local water resources, elected official responsibility, enforcement tools and maintenance of autonomy. However, they can lack watershed perspective outside of their borders, consistent and qualified water resource staffing, and proper attention to resource protection. The shared MS4 responsibility could focus attention on coordinating LGU and watershed perspectives.

7) WMO implementation of SWM programs has benefits in resource focus, watershed perspective, and added revenue. However, these appointed officials can lack local sensitivity, scope beyond water management and a sense of urgency when issuing permits. WMOs might be in a better position to own and maintain SWM facilities because of their water-based focus and available funds. As above, the shared MS4 responsibility could focus attention on coordinating LGU and watershed perspectives.

8) The connection between SWM and drinking water is often overlooked or ignored. It should be an integral part of SWM programs at every level, and should be addressed in the 8410/103B review. There is also a connection here between SWM and groundwater protection, which could link the SWM planning program and the county groundwater plans.

9) Many attendees believe that all of the SWM programs we need are in place right now, we just need to recognize them and get the word out on how they can be used. Small adjustments might be needed, but major new programs are not. Refer to item #4 above for related comments.

10) Success stories for WMO/LGU cooperation include:

- the East Metro Water Resources Education Program
- the St. Croix Basin's 20% TP reduction effort
- shared MCM responsibility between many WMOs and MS4s and some non-profits

- the Ramsey-Washington Metro Watershed District’s Public Works Forum

11) Although past review of SWPPPs by the MPCA was essentially non-existent, the agency has become more active in its review of MS4 SWPPPs. This is an important indicator to MS4s that the agency will be engaged in the effort and looking for results. Many attendees felt that SWPPPs have been meaningless documents prepared only to fulfill a state requirement and of little effectiveness. Revising SWM programs through 8410/103B could re-focus the importance of SWPPPs and perhaps address content and timing issues.

12) Counties and SWCDs should have a role in the SWM institutional mix. Although some are very active in WMO administration (Scott, Carver and Dakota), others have SWCDs that assist, but have no real implementation role. All metro counties are also MS4s, but they mostly focus this effort on their transportation system and not on other SWM activities. Some counties believe they are the proper political entity to deal with SWM because of their scale (transcending smaller watershed boundaries). However, others point out that the county geographic structure is entirely inappropriate to address watersheds. County relationships with MS4s and WMOs are widely variable. The use of one of the county WMOs as a pilot for the BWSR study could be of interest.

13) The desire for local autonomy cannot be underestimated. Larger political units imposing their programs on smaller municipal, township and even WMO programs is not well received by any of those units. Hostility usually results when local prerogatives and interests are placed in a position of lower priority. Local elected officials recognize the need for good SWM, but see it as only one of many factors in their daily decisions. It is generally for this reason that municipal support for a sole WMO permit approach never garnered LGU support. In the course of the listening sessions, only one entity (a long-established WMO) spoke in favor of trying the sole permittee approach as a pilot to see how it could work. The support needed by the LGUs within that WMO to become a pilot is unknown.

14) Cooperation between WMOs and MS4s relies on their ability to work together. Giving a more stringent regulatory role to the WMO will only detract from this relationship. Many attendees (even some WMOs) spoke adamantly in favor of shared roles rather than a sole WMO permit. Many believe that collectively developing overall standards and watershed goals makes sense, but permitting should occur only at the LGU level. MCM development might be something that could be easily shared for some elements, like education, construction and public input.

15) Planning was identified by many as a more important facet of total SWM than permitting. Without an effective and coordinated plan, the permitting function is not focused on a resource goal. The plan is where the multi-program coordination occurs, not at the permitting phase. For example, combining the requirements for MS4 SWPPP content with those of a local surface water management plan<sup>1</sup> (LSWMP) would lay the framework for how SW permits are issued and

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<sup>1</sup> MN Statutes 103B.235 actually refers to “local water management plans” or LSWMPs. The adaptation to “local surface water management plans” or LSWMPs is one commonly made by stormwater managers to avoid confusion over what these actually involve. That is, it avoids confusion over whether these are water supply plans, as well. For this report, the term LSWMP will be used in lieu of LWMP.

how they are related to LGU land use and development decisions. The LSWMPs prepared under 8410/103B could be the best vehicle to get this coordination under way and describe how others (state agencies, Met Council, counties, WMOs, special units) fit into the process. Maybe just explaining this in a guidance document would be a more effective approach than revisions to 8410/103B. [Study team note: the 8410/103B revision could augment what WMOs must do in their plans or implementation programs to create the material that MS4s need to comply with their SWPPPs relative to, for example, MCMs or nondegradation.]

16) An MPCA oversight and ultimate authority role in the construction program was supported by almost all attendees. The importance of MPCA enforcement over large projects (over 50 acres), discharges into sensitive waters, and difficult enforcement cases was recognized and supported. Disagreement with the MPCA role emerged when its relationship to LGU and WMO programs was discussed. A layered program with MPCA having ultimate enforcement and oversight, but hands-off day-to-day decisions, WMO standards development, and local (primarily municipal, although county also raised as a possibility) permitting seemed to be a popular model for the construction program. Refer also to comment #3 and reliance on the SSC Workgroup for recommendations.

17) Any approach recommended by this BWSR study must result in saving time and money for the SWM participants in order to be taken seriously; however, the ultimate resource protection goal must not be lost. There might be good reason to increase costs in some areas where more effort is needed, like local inspection and enforcement. Efficiencies and cooperation possibilities supportive of a shared MS4 program approach must be an outcome of any change to be successful.

18) Abundant state, WMO and local ordinances and regulations currently exist in the stormwater management arena, but the combined programs threaten to collapse under their own weight. The focus should be on streamlining, not on creating more levels. The shared approach would work provided responsibilities are divided and streamlined, not duplicated.

19) This whole discussion gets very complex once it is applied to a community that is located within numerous WMOs. Many different approaches are used by municipalities to deal with this situation, varying from adopting WMO programs based on where they fall within a city to adopting the most stringent WMO approach for all WMO coverage. Sharing MS4 responsibility with a single WMO does not serve the municipality well if it still has to prepare an entire set of MCMs for the rest of the city because other WMOs have not adopted the same approach.

20) Some WMOs suggested that all MS4 SWPPPs within its border would go to the WMO for approval on behalf of MPCA. WMOs currently approve LSWMPs for consistency with the watershed plan. WMO approval of MS4 SWPPPs would help coordinate LGU and WMO efforts and relieve MPCA from the review burden. Needless to say, LGUs were not supportive of this approach because of placing the WMO in a position of more regulatory control. Some improvements in the reporting and coordination elements of SWM could be improved through the 8410/103B review or an implementation guidance document.

21) Some WMOs have chosen not to develop a permitting program, but instead chose to develop standards that communities within the WMO are expected to adopt via ordinances and local regulatory programs. This is similar to the model suggested above (#16) for the construction program. The WMO could also play a major watershed role in monitoring (as water crosses LGU borders or flows to a regional resource like a lake) and resource assessment.

22) The SWM field has been very “evolutionary”. Many MS4s have prepared numerous products over the past 20 years that are now much better products than at the start. This should continue, with this watershed-based evaluation being part of the evolution, even though some differences of opinion are evident. In the end, a better SWM program will result. The regulatory framework also seems to be evolving to more of a uniform approach, ex. the MN Stormwater Manual. Continued efforts to standardize (to the extent that some flexibility is still left) should make it easier for cities within multiple WMOs.

23) Cities are very interested in avoiding preferential development that could result if standards vary between local units or WMOs. A consistent set of base SWM standards is the best tool to prevent this.

24) Although cities and WMOs are under 60 day timelines to approve permits, either entity can extend this time by extending it another 60 days or declaring an application incomplete. This detracts from a permittee’s reliance on a set project timeline and adds to SWM criticism.

25) Many permitting entities exercise flexibility in meeting permit requirements through adoption of performance standards. In this way a watershed-wide standard can be set with MS4 input, but the means used to achieve the standard are the choice of the implementing party. This was suggested by many as the way in which WMO standards could most easily be met with LGU permitting programs.

26) Industrial NPDES permittees do not fit easily into BWSR’s watershed-based analysis because they typically operate at a single small site within a single community and operate under another set of state and federal rules. They should, therefore, not be considered in the MS4/WMO institutional mix, but certainly are a related program consideration.

27) Some commenting parties stated that for development to proceed smoothly and on schedule, the MS4 community and any WMO, or group of WMOs if they overlap a development, must have a coordinated review and permitting process that the development community can rely upon. Imposing “excess” WMO requirements beyond what communities require maybe opposed as a costly regulatory expense by builders. Any movement to streamline local SW permitting would be welcome by the development community.

### **III. LEGAL BARRIERS ANALYSIS**

#### **A. Introduction**

This chapter of the report investigates potential barriers preventing integration of NPDES Phase II requirements with state and local watershed management authorities in Minnesota. To explore the existence of such barriers, we compare the NPDES Phase II requirements (33 U.S.C §1342 (p)) imposed on municipal separate storm sewer systems (MS4s) with the legal authorities of Minnesota watershed districts (Chapter 103D), and the surface water management planning authorities of metropolitan watershed management organizations (Chapter 103B). This comparison, described in detail below, reveals no significant legal barriers to integrated watershed-based permitting.

The absence of legal barriers shifts the focus to addressing the practical barriers – gaining efficiency through integrating the complex web of federal, state, regional and local legal requirements and authorities involved in water management in the state. We then review alternative forms of legal instruments for shared NPDES II permitting responsibilities.

#### **B. Minimum Control Measures (MCMs) and Watershed Organization Authority**

NPDES Phase II requires MS4s to prepare stormwater pollution prevention plans that contain six minimum control measures. Minnesota has equipped its watershed management organizations with substantial authority to manage surface water and this authority covers most if not all of the MCMs. It should also be noted that local government units have a corresponding obligation to update their water management plans to bring them into conformance with the watershed organization plan. Minn. Stat. § 103B.235, subd. 1.

##### **1. Education and Outreach**

MS4s under the federal regulation have a simple open-ended requirement to “distribute educational materials to the community or conduct equivalent outreach activities” on stormwater. EPA’s guidance on the matter is similarly flexible, 40 CFR § 122.34(b)(1)(i-ii). Minnesota’s General Permit for MS4 includes detailed specifications for education and outreach, requiring education programs for each of the six MCMs, calling for identification of the target audience, the goals for each audience, activities that will be used to reach the goals, implementation plans and performance measures. Minn. Gen. Permit 040000, Part V.G.1.c. Further, MS4s must coordinate their education programs with appropriate community groups, nonprofits, lake conservation districts and the like – including watershed districts and organizations. Minn. Gen. Permit 040000, Part V.G.1.d. The permit also requires an annual public meeting, duly noticed, on the MS4’s SWPPP. Minn. Gen. Permit 040000, Part V.G.1.e.

All watershed organizations – watershed districts and joint powers organizations – are required to publish and communicate to residents information about their programs and management. Minn. Stat. § 103B.227, subd. 4. More important, WMO plans must include public information programs. Minn. R. 8410.0080, and 8410.0100 subd. 4. While the WMO educational

requirements are general in nature, there is no legal obstacle for WMO plans to incorporate the educational activities MS4s must undertake under their SWPPPs. 40 CFR 122.34(b); MN Gen. Permit V.G.1.c.

## 2. Public Participation

The public participation and involvement MCM is, like the education requirement, generally stated in regulation and covered in specific detail in the general permit. 40 CFR 122.34(b)(2)(i-ii); Minn. Gen. Permit 040000, Part V.G.2. MS4s are required to comply with notice provisions and solicit public “input and opinion on the adequacy” of their SWPPPs. Minn. Gen. Permit 040000, Part V.G.2.b. Oral and written comments must be taken and considered, and adjustments made to the SWPPP. *Id.*

Watershed districts must annually appoint an advisory committee. 103D.331. The statutory planning requirements for WMOs also have specific public involvement components. 103B.231, subd. 7(c). Joint powers organizations are required to have citizens and technical advisory groups or some other advisory procedures. Minn. R. 8410.0030, subp. 1(G). Most WMOs maintain technical and/or citizens advisory committees.

MS4 public participation plans can be integrated into the public participation goals and policies in WMOs management plans, which in turn will be incorporated into the local surface water management plans of MS4s.

## 3. Illicit Discharge Detection and Elimination

The federal regulations contain specific requirements regarding illicit discharges. 40 CFR § 122.34(b)(3). They require a storm sewer system map; effective prohibition “through ordinance, or other regulatory mechanism,” of non-stormwater discharges into the system, with enforcement; development and implementation of a plan to detect and address such discharges and illegal dumping; and an information program aimed at public employees, business and the public. 40 CFR § 122.34(b)(3)(ii)(A-D). The regulation also includes a long list of categories of non-stormwater discharges that must be addressed if found to be significant contributors to an MS4’s pollution problem. 40 CFR § 122.34(b)(3)(iii). The MPCA general permit adds specifics regarding the storm sewer system map, requiring it to show: ponds, streams, lakes and wetlands that are part of the system; structural pollution control devices such as grit chambers and separators; pipes and conveyances 24 inches in diameter or larger and *all* pipes and conveyances if possible; outfalls, including discharges into other MS4s or waters and wetlands that are not part of the system, structures that discharge stormwater directly into groundwater, overland discharge points and all other points of discharge that are outlets but not diffuse flow areas. Minn. Gen. Permit 040000, Part V.G.3.a.1-4.

Watershed districts’ statutorily defined purposes include providing for sanitation and public health, and regulating the use of streams, ditches, or watercourses to dispose of waste; protecting or enhancing the water quality in watercourses or water basins; providing for the protection of groundwater and regulating its use to preserve it for beneficial purposes. Minn. Stat. § 103D.201, subd. 2 (8), (13), (14). Watershed district managers have authority to acquire data

through surveys and to establish and maintain devices for acquiring and recording hydrological and water quality data. Minn. Stat. § 103D.335, subd. 5. They are also authorized to regulate, conserve, and control the use of water within the watershed district; enter lands inside or outside the watershed district to make surveys and investigations; provide for sanitation and public health and regulate the use of streams, ditches, or watercourses to dispose of waste and prevent pollution. Minn. Stat. § 103D.335, subds. 10, 14, & 16. Joint Powers WMO authorities are addressed by their joint powers agreements. Districts also can take enforcement action, by criminal prosecution, injunction, action to compel performance, restoration, abatement or other appropriate action. Minn. Stat. § 103D.545, subd. 2.

Watershed plans must include maps showing the areas served by each existing stormwater system that identify existing stormwater ponds and the location of all stormwater outfalls, and must identify pollutant sources. Minn. R. 8410.0060, subps. 4(E), 11. They must set water quality goals and policies, and include analysis of public ditch systems.<sup>2</sup> Minn. R. 8410.0080, subps. 3, 6. Plans must include an assessment of the impacts of stormwater discharges on water quality and fish and wildlife resources, Minn. R. 8410.0090, and implementation programs that include identification of nuisance land uses that interfere with water quality goals, 8410.0100, subp. 2. Plans also are required to contain stormwater and drainage design performance standards that provide for establishment of design criteria for stormwater outlet structures and compliance with pollutant loading for specific subwatersheds consistent with local, regional, and statewide plans in consideration of Pollution Control Agency water quality standards. Minn. R. 8410.0100, subp. 3. Plans must assure maintenance of stormwater facilities, assess the need and frequency for inspecting stormwater outfalls, sumps, and ponds, and the need to establish spill containment plans. Minn. R. 8410.0100, subp. 6. Finally, WMOs' watershed plans must provide for regulatory controls and adequate enforcement. Minn. R. 8410.0130.

The extent of a joint powers watershed organizations' authority is dictated by the agreement by which it is constituted. A joint powers organization could take on the charge of developing an illicit discharge program if the member MS4s so agree.

#### 4. Construction Site Stormwater Runoff Control

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<sup>2</sup> By virtue of assuming drainage authority to manage ditch systems, 11 watershed districts in the metro area are also MS4s. 11 of the 14 metro watershed districts in the Twin Cities metropolitan area are MS4s themselves: Capitol Region, Coon Creek, Lower Minnesota River, Minnehaha Creek, **Nine Mile Creek**, Prior Lake-Spring Lake, Ramsey-Washington Metro, Rice Creek, Riley Purgatory Bluff Creek, South Washington and Valley Branch. Minnesota Pollution Control Agency, Minnesota's Mandatory Small MS4s, June 22, 2006, *at* <http://www.pca.state.mn.us/publications/wq-strm4-74.pdf>. The Brown's Creek, Carnelian Marine and Comfort Lake-Forest Lake watershed districts are not MS4s. Minnesota Board of Water and Soil Resources, Watershed Management Organizations in the Twin Cities Metropolitan Area, March 2005, *at* <http://www.bwsr.state.mn.us/relatedlinks/wmowd02.pdf>.

Consistent with the construction stormwater program, EPA requires MS4s to reduce pollutants in stormwater runoff from land disturbances of 1 acre or larger. 40 CFR § 122.34(b)(4).<sup>3</sup> MS4s must develop, implement and enforce a program that includes an ordinance or other regulatory control requiring erosion and sediment control; implementation of BMPs for erosion and sediment control at construction sites; requirements to control waste such as discarded building materials, concrete truck washout, chemicals, litter and sanitary waste; site-plan review procedures that incorporate consideration of water quality impacts; procedures for the receipt and consideration of information from the public; and procedures for site inspection and enforcement of control measures.

Erosion and sediment control are included in WMO authority and watershed-planning efforts. Among watershed districts' statutory purposes is "to control or alleviate soil erosion and siltation of watercourses or water basins." Minn. Stat. § 103D.201, subd. 2(10); *see also* 103B.201(5) (establishing prevention of soil erosion into surface water systems as a primary purpose of the Metropolitan Surface Water Management Act). Metro watershed districts must adopt and enforce rules to implement their watershed plans (103D.341), which must include controls or programs to reduce erosion and sedimentation. Minn. 8410.0100, subp. 2(B). Districts have permitting authority to effect their rules (103D.345). Most districts require BMPs on land alterations, often for disturbances of less than 1 acre, and have site-inspection programs to ensure compliance.

#### 5. Runoff Control for New Development and Redevelopment

EPA's requirements for MS4s also call for the development, implementation and enforcement of a regulatory program to address post-construction stormwater management. 40 CFR § 122.34(b)(5). For stormwater management, EPA and the state's General Permit for MS4 requires structural and/or nonstructural BMPs, an ordinance or other regulatory control that applies both to new development and redevelopment projects, plus long-term maintenance of BMPs. Minn. Gen. Permit 040000, Part V.G.5.a-c.

WMOs are authorized to regulate use of land in cooperation with local units of government to ensure proper water resources management. 103B.211, subd. 1. Watershed districts are authorized to require and enforce permits that implement their powers and purposes, and the goals and policies stated in their watershed plans. Minn. Stat. §§ 103D.245; 103D.545; Minn. R. 8410.0080, subp.2. Districts can tailor their programs to subwatersheds and levy a stormwater utility on that basis to fund such work. Minn. Stat. § §§ 444.075, 103D.729.

Watershed districts' were established by statute to:

*"...conserve the natural resources of the state by land use planning, flood control, and other conservation projects by using sound scientific principles for the protection of the public health and welfare and the provident use of the natural resources... ."*

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<sup>3</sup> Construction activity resulting in disturbance of less than 1 acre must be included in the program if the activity is part of a common plan of development or sale that would disturb 1 acre or more. 40 CFR § 122.34(b)(4)(i).

Minn. Stat. § 103D.201; *see also* subpart 1 of Minnesota Rule 8410.0080, indicating that the goals and policies of WMOs' watershed plans should recognize the relationship between water quality and land use.

When requested by the relevant local unit of government or in the absence of regulation by the local unit of government, WMOs can regulate the use of land to ensure proper water resources management. 103B.211, subd. 1. Watershed districts regulate stormwater management through rules, Minn. Stat. § 103D.243, and the issuance of permits for projects, Minn. Stat. § 103D.245.

Watershed district managers are authorized to enforce rules and orders through criminal prosecution, injunction, action to compel performance, restoration, abatement, and other appropriate action. Minn. Stat. § 103D.545, subd. 2. Districts can build, construct, reconstruct, repair, enlarge, improve, or in any other manner obtain stormwater systems, including mains, holding areas and ponds, and other appurtenances and related facilities for the collection and disposal of stormwater. Minn. Stat. § 103D.730. They can maintain and operate the facilities, and acquire by gift, purchase, lease, condemnation, or otherwise any and all land and easements required for that purpose. *Id.*

WMOs' watershed plans must assess the general impact of land-use practices, land development and wetland alteration on water quality and water quantity, and they must examine future potential problems based on growth projections and planned urbanization. Minn. R. 8410.0090(H)-(J). Plans must outline goals and policies describing how stormwater runoff will be managed, and the maximum allowable peak runoff rate must be established for appropriate subwatersheds. Minn. R. 8410.0080, subp. 2. Plans' implementation programs must include non-structural, structural and programmatic solutions to identified problems. Minn. R. 8410.0100, subp. 1. They must also must contain minimum standards and appropriate controls for the design of new stormwater conveyance, ponding and treatment systems consistent with the overall goals of the plan. Minn. R. 8410.0100, subp. 3. Plans must include performance standards that provide for the establishment of target in-lake nutrient concentrations and corresponding pollutant loadings for sediment and nutrients, maximum permissible runoff rates for selected design storms based on considerations such as expected increases in runoff volume with respect to impacts on downstream channels and adjacent development, and design criteria for stormwater outlet structures. *Id.* The performance standards must also provide for pond design methodology for nutrient entrapment consistent with subwatershed goals, and compliance with pollutant loading for specific subwatersheds consistent with local, regional, and statewide plans in consideration of Pollution Control Agency water quality standards. *Id.*

Again, the requirement for cities to develop local water management plans that comply with WMOs' watershed plans also should serve as an opportunity for this integration.

## 6. Pollution Prevention/Good Housekeeping

The MS4 housekeeping requirements are particularly suited to municipalities with diverse staff and a range of equipment and physical operations. 40 CFR § 122.34(b)(6).

Among the purposes of the Chapter 103B water management program are minimization of capital expenditures needed for water quality problems, protection and enhancement of fish and wildlife habitat and water recreational facilities and the securing other the benefits of proper water management. Minn. Stat. § 103B.201 (2), (7), (8). Watershed districts' purposes include regulation of the flow and conservation of stream water and protection of groundwater. 103D.201 (5), (14). District managers are granted specific authority in statute to regulate, conserve and control the use of water, and provide for sanitation and public health and regulate the use of watercourses to dispose of waste and prevent pollution. Minn. Stat. § 103D.335, subs. 10, 16.

Watershed plans must assess the need for periodic maintenance of public works, facilities, and natural conveyance systems, and specify any new programs or revisions to existing programs needed to accomplish its goals and objectives. Minn. R. 8410.0100, subp. 6. Each plan must further identify which units of government or private parties are responsible for maintenance. *Id.* Plans must also, at a minimum, assess or require local plans to assess: the need and frequency for sweeping of public and private streets and parking lots; the need and frequency for inspecting stormwater outfalls, sumps, and ponds; the need to establish local spill containment clean-up plans; and the need for other management programs as considered necessary. *Id.*

### **C. Intergovernmental Agreements**

MS4s seeking to have a WMO implement one or more MCMs on their behalf are advised to enter a “legally binding agreement ... to minimize any uncertainty about compliance.” 40 CFR § 122.35(a)(3). The advice is sound, because under this watershed-based permitting model, the MS4 remains the permittee responsible for performance of the permit requirement(s). 40 CFR § 122.36.

Minnesota statutes specifically provide watershed district managers with broad authority to work with other entities to accomplish the goals of the Watershed Law, including the capacity to “cooperate or contract with any state or subdivision of a state or federal agency, private corporation, political subdivision or cooperative association.” Minn. Stat. § 103D.335, subd. 7. Watershed districts are also specifically authorized to utilize the state’s joint powers statute, Minn. Stat. § 471.59 (discussed in more detail below). Minn. Stat. § 103D.335, subd. 2. Joint powers watershed management organizations similarly are authorized to enter into contracts with other governmental units to achieve the WMO’s statutory purposes. 103B.211, subd. 1(8).

As for municipal MS4s, “[o]rdinarily, the municipal power to contract includes power to contract with the state, or with the federal government or branches or agents of it, or with other political subdivisions, agencies, or municipal corporations.” McQuillan’s Municipal Corporations § 29.05.15, 269 (3d 1999). Cities have an inherent capacity to contract under their “all powers” clauses (whether in statute, Minn. Stat. § 412.221, subd. 32, or home rule charter). A city council has the power “to make such contracts as may be deemed necessary or desirable to make effective any power possessed by the [city] council.” Minn. Stat. § 412.221, subd. 2. Intergovernmental agreements are essentially contracts and are governed by common-law contract interpretation and enforcement principles. McQuillan’s, 29.05.15 (noting that contract “between municipalities stand on the same footing as contracts of natural persons, and are

governed by the same considerations in determining their validity and effect.”) EPA advises only that a MS4 permittee relying on another entity to implement a control measure should enter a “legally binding agreement,” 40 CFR 122.35(a)(3), without specifying a format.

Minnesota’s joint powers law gives cities specific authority to contract with other political subdivisions. Minn. Stat. § 471.59, subds. 1 (granting governmental units the power to jointly or cooperatively exercise any power common to them), 10 (allowing a governmental unit to perform any service it is authorized to perform for itself for another governmental unit). Under the joint powers act “cities can enter intergovernmental agreements with virtually any other governmental entity – other cities, counties, towns special districts, service cooperatives, even the state itself.” League of Minnesota Cities, “Combining Governmental Services: Issues to Consider.”<sup>4</sup>

Parties to a particular watershed-based permitting effort will have to memorialize their relationship and mutually bind each other under terms and structures that work best for the characteristics of their particular situation. Few collaborators may want to go so far, at least at the outset, as to form a separate joint powers entity, *see* Minn. Stat. § 471.59, subd. 1, but Minnesota’s joint powers statute provides some features that help facilitate collaboration on a watershed-based approach to accomplishing the goals of the Clean Water Act for municipal stormwater management, nondegradation, TMDLs and other water-quality efforts.<sup>5</sup>

#### 1. Memorandum of Understanding

Memoranda of understanding (MOU) are familiar tools in the environmental arena, as the term has been used by the Environmental Protection Agency for its agreements with states to promise (with reserved rights) not to step in with enforcement actions in situations where the state has entered a settlement agreement or otherwise come to terms with a particular entity to resolve and environmental problem. *See, e.g.,* State Memorandums of Understandings, <http://www.epa.gov/swerosps/rcrabf/mous.htm> (describing agreements with states regarding cleanups at treatment, storage and disposal facilities in Illinois, Missouri, Indiana, Michigan and Wyoming); Minnesota’s memorandum of understanding with EPA to recognize state-issued liability assurance letters for brownfields cleanups, [http://www.epa.gov/swerosps/bf/pdf/mn\\_moa.pdf](http://www.epa.gov/swerosps/bf/pdf/mn_moa.pdf).

While generally understood to be non-binding, a memorandum of understanding should not be entered into lightly. While the context matters (the statute under which the memorandum is being interpreted, if any), in certain circumstances courts have read a memorandum of understanding as a binding document. *See, e.g., Williams v. AgriBank, FCB*, 972 F.2d 962, 965 (8<sup>th</sup> Cir. Ct. App. (Mo.) 1992).

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<sup>4</sup> League materials imply that the joint powers act or some other statutory authorization is necessary for cities to contract with other governmental entities.

<sup>5</sup> It is worth noting the possibility of such simple arrangements as multiple MS4s (watershed organizations and cities) contributing resources to a broad-based education effort conducted by a nonprofit or academically affiliated entity. Such a collaborative, multi-stakeholder effort is required under MPCA’s general MS4 stormwater permit. MNR040000, Part IV.G.1.d.

An MOU could provide an effective introductory expression of parties' intent to proceed along a path toward cooperation on permitting, but likely would not be the most appropriate instrument to create enforceable rights, liability allocation or robust structure for collaboration.

## 2. Memorandum of Agreement

The term “memoranda of agreement” connotes a more durable, detailed and binding document. Like a cooperative agreement; an agreement to work together toward an agreed upon common objective and its enforceability is dictated by its terms interpreted in the context of contract law. What is most important is the language of the document itself. It is critical that the parties provide for:

- allocation of funds and costs;
- changes to the manner in which funds or costs are allocated;
- a term of life or conditions for the termination of the arrangement;
- distribution of property if and when the cooperative undertaking ends; and
- allocation of liability.

League of Minnesota Cities, *Handbook for Minnesota Cities*, 17:4-17:5 (2007). Regarding the final point, liability concerns related to watershed-based permitting approaches are addressed extensively elsewhere in this report (Liability Analysis chapter).

## 3. Minnesota's Joint Powers Act

Many metropolitan local government units are familiar with the structure and operation of JPOs for water management because there are 19 joint powers watershed management organizations in the Twin Cities area. *See* Minn. Stat. § 103B.211 (authorizing and describing joint powers organizations to “jointly or cooperatively manage or plan for the management of surface water in a watershed...,” subd. 1(a)).

The statute is well-suited to sharing responsibility for implementation of minimum control measures. “The agreement may provide for the exercise of [powers common to the contracting parties] by one or more of the participating governmental units on behalf of the other participating units.” Minn. Stat. § 471.59, subd. 1. Or “any governmental unit ... may enter into agreements with any other governmental unit to perform on behalf of that unit any service or function which the governmental unit providing the service or function is authorized to provide for itself.” 471.59, subd. 10. The parties to a joint powers agreement need not necessarily establish a joint powers board. *See* Minn. Stat. § 471.59, subd.2 (a board must be established if the joint powers entity is to separately enter contracts or issue bonds or other obligations). A joint powers organization, however, needs to be separately insured – it would not be covered under any of the governmental parties' insurance policies unless specifically added as a covered insured. League of Minnesota Cities, *Liability Coverage for Joint Powers Agreements*.

#### 4. Outline of an MS4/WMO Agreement for SWPPP Implementation

Advisory committee members have suggested that not all SWPPP implementation collaborations may merit extensive legal formality. As discussed above, the means of documenting commitments may range, from a nonbinding letter of understanding to a detailed and legally enforceable agreement. A primary consideration is the perceived liability risk that may follow from nonperformance (discussed in detail in the next Section). If the risk to one party as the result of nonperformance by the other is perceived as significant – e.g., because it will more likely prompt MPCA enforcement or create the conditions for injury to a third party -- a more formalized and detailed agreement may be desired to carefully spell out obligations, establish incentives for performance and specify remedies for nonperformance.

Other factors relevant to the level of formality may include:

- Is the SWPPP obligation detailed or more general?
- Can the element to be performed be described in detail, or does it involve the performing party's judgment and discretion?
- Are there peculiar risk issues involved (e.g., one party's use or control of the other's property, potential third-party inverse condemnation issues)?
- Is it important to delineate areas of responsibility to preserve immunity protections?
- Is monetary reimbursement involved?
- Is it desired to create certain remedies for a failure to perform?
- Will the political relationship of the parties benefit more from formalization or from informality?

The following outline lists terms that an SWPPP implementation agreement might contain. The inventory is intended to be fairly comprehensive and include terms that would appear in a highly formalized agreement. At the same time, it is illustrative only and each situation will call for its own specialized provisions. Legal counsel for collaborating MS4's and WMO's should be involved in deciding the appropriate level of formality and the specific terms of any SWPPP implementation agreement.

#### OUTLINE OF TERMS

1. Background
  - a. Identification of parties
  - b. Purpose of agreement
  - c. Authority to enter into agreement
  - d. Federal/state legal provisions to which agreement is addressed
  - e. Recital of consideration, binding nature

2. Relationship
  - a. Agreement form (e.g., joint powers)
  - b. Statement of independence and non-agency
  
3. Mutual rights and obligations
  - a. Obligations of each party (performance/reimbursement)
  - b. Clarification of obligations among multiple parties to agreement
  - c. TMDL-/nondegradation-dependent obligations (including mechanisms to adjust obligations in dynamic environment)
  - d. Responsibility for compliance with MCPA corrective order
  - e. Responsibility for inverse condemnation claim and remedy
  - f. Obligation to protect confidential data of other party
  - g. Terms of use for/obligation to protect property of other party
  - h. Statutory requirements for, e.g., document management, public data availability, civil rights, procurement
  - i. Funding commitments and limits
    - (i) Obligation to create stormwater utility/district
    - (ii) Contingent on appropriation/obligation to fund
  - j. Remedies for failure to perform
    - (i) Compel performance
    - (ii) Summary judicial process to compel performance
    - (iii) Self-help with reimbursement
    - (iv) Monetary damages
    - (v) Liquidated damages
    - (vi) Sanctions (e.g., monetary fine)
    - (vii) Explicit agreement as to certain remedies unavailable
  - k. Dispute resolution
  
4. Performance monitoring
  - a. Public process
  - b. Mutual communication/reporting
  - c. Auditing by one party of other's performance
  
5. Limiting risk
  - a. Preservation of immunities, defenses, liability limits
  - b. Policymaking aspects of tasks involved (description to help establish discretionary/official immunities)
  - c. Policy criteria to be considered in decisions (to support applicability of discretionary immunity)
  - d. Qualifications/training requirements
  - e. Limits on volunteer activity

- f. Who may act on behalf of contracting party
6. Risk allocation among parties
- a. Segregation of program elements and roles
  - b. Delineation of roles
  - c. Explicit non-assumption of responsibility for acts of other parties
  - d. Explicit exclusion from funding/control of others' responsibilities
  - e. Requiring public disclosure of independent role (to avoid inadvertent liability based on apparent agency)
  - f. Hold harmless (one party agrees not to sue other)
  - g. Indemnification (one party assumes costs for claims against other)
  - h. Defense (one party assumes legal defense costs of other for third-party claims)
  - i. Subrogation (one party assumes legal rights of other as against third party)
  - j. Performance surety
  - k. Insurance
7. Amendment and termination
- a. Duration of agreement/termination/renewal
  - b. Right of unilateral termination
  - c. Process to amend agreement
  - d. External events triggering amendment/termination (e.g., fundamental change in nature of obligation as result of regulatory change)
  - e. Discretion of future governing bodies to alter participation

#### **D. Conclusion**

While the array of governmental responsibilities for stormwater management are complex, there are no significant legal barriers to increased cooperation between MS4s and watershed organizations. Practical barriers remain a concern, and thus it will be critical to identify and resolve these practical barriers through effective, legally binding agreements that consider a range of options within Minnesota's joint powers statute.

## **IV. LIABILITY ANALYSIS**

### **A. Introduction**

This study explores partnering within the Twin Cities metropolitan area among owners and operators of “municipal separate storm sewer systems” (MS4’s) and watershed management organizations (WMO’s) to achieve more effective, efficient and streamlined implementation of stormwater pollution prevention programs (SWPPP’s). Partnering foremost involves WMO assistance in performing the stormwater management activities identified in SWPPP’s and required under Section 402 of the Clean Water Act. The great majority of MS4’s are cities and townships that own or operate municipal stormwater conveyance systems within their boundaries. Other MS4’s include state and county road authorities, colleges and universities, correctional facilities and watershed districts.

Each MS4 and WMO that explores collaboration will need to assess how this collaboration may affect its legal responsibilities and liabilities. Collaboration may increase its financial risk, or extend that risk into unfamiliar liability realms. It may require cooperation or otherwise constrain the discretion of the organization’s governing body in managing a liability as it arises. The purpose of this element of the study, identified in the scope of work as Task 2C, is to assess the legal ramifications of alternative structures for collaborative performance of SWPPP water tasks.

In performing SWPPP activities, an MS4 assumes potential liability of two sorts.

- The first is the risk of sanctions under the federal Clean Water Act and state statutes that could be levied for failing to comply with the municipal general permit (or, in the case of Minneapolis or St. Paul, the individual permit). These liabilities range from administrative, civil or criminal penalties imposed by the Minnesota Pollution Control Agency (MPCA) or U.S. Environmental Protection Agency (USEPA) to costs and disruptions incurred in responding to and complying with corrective orders issued by those agencies or a court.
- The second is tort liability to members of the public who are injured or suffer property damage due to the manner in which the MS4 performed, or failed to perform, an SWPPP activity.

An MS4 may already perform many SWPPP activities independent of the Clean Water Act regulatory framework, at or near the level to which it commits in the SWPPP. To the extent this is so, third-party tort liability exposure is not significantly increased by SWPPP implementation.

Similarly, when a WMO enters into an agreement with an MS4 to perform SWPPP activities on behalf of the MS4, it may meet its obligation by simply continuing to perform activities – such as public education, regulation, inspection and enforcement – that it already performs. Here, however, while the tort liability of the WMO may not change substantially, it is incurring the risk of Clean Water Act sanctions that it otherwise would not bear.

This study is concerned with two permitting scenarios for which the regulations provide:

- The MS4 or WMO is sole permittee; the other party performs SWPPP activities on the permittee's behalf pursuant to an agreement between the parties.
- The MS4 and WMO are co-permittees.

The choice between these scenarios will have consequences for the risks of sanctions and third-party liabilities each assumes. A party that is a named permittee is likely to bear a greater risk of compliance sanctions than one that is not, and may bear a greater risk of third-party liability as well.<sup>6</sup>

It may seem clear that a WMO that voluntarily assumes permit responsibilities on behalf of an MS4 is augmenting its liability risk more than an MS4 that is reducing its direct undertakings by shifting its responsibilities to the WMO. However, shifting responsibility for an SWPPP activity may not shift the compliance or third-party liability that accompanies it; instead, it may become a liability shared by the MS4 and WMO. And in shifting responsibility to an independent organization, the MS4 loses a measure of control over whether and how the activity is performed.

Finally, when an MS4 and a WMO enter into a partnering agreement, each party assumes obligations to the other that it otherwise would not have. Failure to meet an obligation is subject to remedies that the agreement gives the other party for breach of the agreement. A sharing of control over the property of one body or the other also triggers mutual obligations. These are a third form of liability that the MS4 and WMO must consider in embarking on a collaborative approach to SWPPP implementation.

This memorandum reviews the following aspects of assessing liability arising from SWPPP implementation through MS4-WMO partnership:

- The types of liability that arise in implementing an SWPPP;
- The governmental immunities and related protections that moderate these liabilities;
- How an MS4 and a WMO may reallocate liability or fiscal risk between themselves; and
- How an MS4 and a WMO may shift liability to a third party, primarily through insurance.

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<sup>6</sup> For consistency and ease of reference, the discussion in this memorandum nominally assumes a partnership between a single MS4 and a single WMO. The analysis applies as well to any number of MS4's and WMO's that collaborate to meet SWPPP requirements.

## B. Compliance Liability

### 1. Compliance Sanctions

Failing to meet SWPPP commitments, or other violations of the municipal stormwater permit or related legal provisions,<sup>7</sup> can subject a violator to a variety of sanctions enumerated in the federal Clean Water Act and generally reiterated under Minnesota Statutes Chapters 115 and 116. These include the following:

- Administrative compliance or corrective action orders (33 U.S.C. §1319(a); Minn. Stat. §§115.03, 115.071, 116.072) ;
- Administrative penalty orders of up to \$10,000 per day per violation (33 U.S.C. §1319(a), (g); Minn. Stat. §§115.03, 115.071, 116.072);
- Civil court compliance orders (33 U.S.C. §1319(b); Minn. Stat. §§115.03, 115.071);
- Civil fines of up to \$25,000 per day per violation (33 U.S.C. §1319(d); Minn. Stat. §§115.03, 115.071);
- Criminal prosecution and fines (33 U.S.C. §1319(c); Minn. Stat. §§115.03, 115.071);
- Permit revocation (Minn. Stat. §116.072);
- Responsibility for cleanup costs (Minn. Stat. §115.071);
- “Citizen suits” seeking compliance (33 U.S.C. §§1515, 1365); and
- Responsibility for legal fees and costs.

Under USEPA regulations, an MS4 that is a sole permittee, but that relies on another entity to satisfy one or more of its SWPPP obligations, remains subject to compliance sanctions if the entity fails to perform, unless the permitting authority formally has recognized that entity’s responsibility in the individual or general permit under which the MS4 is operating.<sup>8</sup> Under the

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<sup>7</sup> For example, tampering with a monitoring device, Minn. Stat. §115.075, or failing to report a pollutant discharge, Minn. Stat. §115.061.

<sup>8</sup> See 40 CFR 122.35. A permit can recognize that another regulated entity has implementation responsibility for one or more Minimum Control Measures (MCM’s), under two scenarios:

- (a) If the MS4 is relying on another entity to meet one or more obligations under the MS4’s permit, it must so indicate in a notice of intent. The MS4 remains responsible for the third party’s failure to meet the obligation. The USEPA recommends that the parties enter into a legally binding agreement to address responsibility for compliance. *Id.* 122.35(a).
- (b) If the permitting authority formally recognizes (in either a general or an individual NPDES permit) that another governmental entity is responsible for one or more MCM’s, that MS4 need not include the MCM in its stormwater plan, and is not responsible for implementing the measure. If the third-party entity fails to meet its obligation, the permit may be modified to reassign responsibility to the MS4. *Id.* 122.35(b).

joint permitting scenario, each co-permittee is subject to enforcement sanctions as though it were a sole permittee.<sup>9</sup>

## 2. Enforcement Discretion

The Clean Water Act is implemented through a process under which a state authority demonstrates to the USEPA that it has the capacity to enforce the federal program. This includes, for example, demonstrating that it has the ability under state law to exercise an adequate permitting and enforcement role, and that it has the resources to do so.

If the USEPA finds that adequacy is demonstrated, it formally delegates to the state the primary role in implementing the federal program. The MPCA has received delegation from the USEPA for the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act, and is the agency with primary responsibility to implement the municipal stormwater program.

After delegation, the USEPA role largely is one of oversight. However, the USEPA retains its enforcement powers. Accordingly, a state authority may refer an enforcement matter to the USEPA, or the USEPA independently may initiate enforcement action or choose to supplant the state authority in an enforcement action the state authority has initiated.

Enforcement history for the municipal stormwater program in Minnesota is limited, so that the stance of the USEPA Region V office in program enforcement, as it plays out in practice, remains to be seen. In the somewhat parallel construction and industrial stormwater programs, the MPCA has engaged in enforcement referral to the USEPA, which then has proceeded under its independent enforcement powers. However, it is our understanding that the USEPA has not initiated an enforcement case under these programs without an MPCA referral.

In the event that the MPCA chooses to take enforcement action, against which parties will it assert its authority to do so? All permittees? Only permittees? Non-permittees obligated to perform SWPPP activities by agreement with permittees? MPCA officials are in the process of formulating the agency's approach to compliance oversight and enforcement in the municipal stormwater program. However, there is reason to think that the MPCA will follow an approach similar to that which it follows in the construction and industrial stormwater programs. In other words, it would proceed against all those, and only those, who are named permittees.

For example, in the construction program both the property owner and the contractor, if there is one, are required to be named as permittees and typically both are named for enforcement purposes. Where the contractor has failed through oversight to join as a named permittee, it nevertheless is treated as one because under MPCA rules and procedures it is required to be.

The municipal stormwater program explicitly creates sole permittee and co-permittee vehicles. This framework creates a stronger distinction between those formally responsible for compliance

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<sup>9</sup> 40 C.F.R. 122.36 (“If you are covered as a co-permittee under an individual permit or under a general permit by means of a joint Notice of Intent you remain subject to the enforcement actions and penalties for the failure to comply with the terms of the permit in your jurisdiction except as set forth in §122.35(b).”).

and those that are not. There is reason to think that the MPCA's enforcement approach will reflect that distinction. Accordingly, each co-permittee is likely to be subject to MPCA enforcement sanctions for all aspects of SWPPP implementation, including those for which it has no practical responsibility.

If the SWPPP cleanly allocates responsibilities between the MS4 and WMO, can one entity avoid enforcement liability for the other party's failure to meet its SWPPP commitments?

It is unlikely that the MPCA would allow a co-permittee to limit its exposure to sanctions by identifying in advance those activities for which it would not be subject to sanctions. We expect that the MPCA would opt to retain its enforcement discretion over the wider "net" of co-permittees. While it may choose in a specific enforcement context, with specific facts, to pursue only one co-permittee, it is unlikely that this can be assured at the time co-permittees sit down to establish the framework of their collaboration.

Conversely, if a sole permittee enters into an agreement with a second entity for the performance of certain SWPPP activities, it appears that the PCA will look for compliance solely to the party with formal permittee status.<sup>10</sup> It will be up to the permittee to ensure that the agreement of cooperation adequately protects it in this situation.

In the agreement, the parties can adjust the exposure to sanctions that attaches to the permitting arrangement chosen. To a degree, each party can protect itself from, or provide that it is reimbursed for, an outlay of resources that it bears due to enforcement triggered by a failure of the other party. See Section III.H, below. But co-permittees cannot agree among themselves which of them will be the "named party" in an enforcement proceeding; the MPCA will retain its discretion in that regard. As a consequence, a co-permittee is likely to bear certain costs and burdens of enforcement even for activities for which it is not responsible.

### 3. Total Maximum Daily Load and Nondegradation

An MS4 is legally obligated to ensure that the SWPPP reflects any Total Maximum Daily Load (TMDL) requirements applicable to an impaired water into which the MS4 discharges.<sup>11</sup> The MPCA is developing policy now to implement this requirement. Under an approved TMDL implementation plan, a discharge from an MS4 to the impaired water will be subject to a numerical "waste load allocation." Beyond this, the MPCA is considering whether and how the SWPPP should account for the MS4's ability to limit pollutant loadings from private lands draining into the MS4. Because an MS4's ability to limit loadings from private lands, through means such as development regulation, is factored into the TMDL implementation plan, there is reason to think that to some extent the MS4 will be asked to commit to exercising this authority by incorporating it into the SWPPP.

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<sup>10</sup> 40 C.F.R. 122.35(a)(3).

<sup>11</sup> 40 C.F.R. 122.34(e); MPCA General Permit (eff. June 1, 2006), Part IV.D.

Before a TMDL is completed, an MS4 that discharges to an impaired water is required to take account of the impairment when developing the content of its SWPPP.<sup>12</sup>

Similarly, an MS4 required to prepare a nondegradation plan must incorporate its nondegradation commitments into its SWPPP.<sup>13</sup>

Some of the ways in which an MS4, in its SWPPP, may propose to meet its TMDL or nondegradation obligations will be, or fall in the category of, Minimum Control Measures (MCM's) that it already is obligating itself to carry out under the municipal stormwater permit. A more ambitious outcome may be proposed to address a specific impairment, but the nature of the activity will be the same. Other ways an MS4 may be looked to for TMDL loading reductions, or may select to meet nondegradation goals – for example, water-resource enhancing capital projects or open space initiatives – will be different in kind.

There is not a fundamental distinction between these, with respect to the approach to partnering between the MS4 and WMO. Under the framework of the municipal stormwater permitting program, a WMO, as a sole permittee, co-permittee or supporting party to an MS4 sole permittee, may assume responsibility for any SWPPP activity within its powers, including those set forth in a TMDL implementation or nondegradation plan, whether or not the activity fits within the definition of an MCM.

The array of enforcement sanctions listed above would apply to noncompliance with any element of the municipal stormwater permit, whether it concerned an MCM or an additional measure originating in a TMDL implementation or nondegradation plan. An MS4 and a WMO can approach allocation of responsibility for TMDL and nondegradation activities under a SWPPP in the same manner as they approach allocation of responsibility for MCM elements not originating in those programs.

#### 4. Impressions as to Risk of Sanctions

Finally, the risk related to compliance sanctions may be seen as moderated in two respects.

First, the nature of stormwater management, and the state of its science, is that it consists to a large extent of measures that cannot be associated with specific quantitative outcomes. At least presently, the MPCA municipal stormwater general permit reflects this, with much of its framework revolving around an MS4's exercise of "best efforts" to implement "best practices."<sup>14</sup> The SWPPP must specify "measurable goals" associated with each proposed best management practice to be implemented, but goals may be in narrative or numeric form and the failure to meet a goal is not a permit violation.<sup>15</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, Part X.C.

<sup>14</sup> *See generally id.*, Part V.

<sup>15</sup> General Permit, Part III. C.2; 40 C.F.R. 122.34 (d)(2) Individual permits for Minneapolis and St. Paul contain a greater number of specific or quantitative requirements than the general permit, in addition to many "best practices" requirements that leave much discretion to the permittee.

The general permit does impose some requirements for which there is a fairly clear observable distinction between compliance and non-compliance. For example, a permittee must:

- Apply for and obtain a permit;
- Develop a storm sewer system map;
- Adopt a formal mechanism to prohibit non-stormwater discharges into the MS4;
- Perform and document annual inspections of structural pollution control devices within the stormwater system, stockpiles and material handling areas, and of 20 percent of outfalls and basins.
- Hold annual public meetings;
- Submit annual reports;
- Comply with standard conditions.

Whether or not one of these permit requirements has been met ordinarily is a simple question, but performance of most SWPPP activities will involve MS4 or WMO judgment and discretion. If a party is attempting in good faith to meet its SWPPP responsibilities, there is a reasonable level of assurance that severe enforcement consequences will not follow.

Second, typically the MPCA response to apparent noncompliance is gradual: mutual clarification of compliance status, after which voluntary compliance is sought or negotiated. Under this approach, monetary penalties and similar sanctions are pursued only after more cooperative efforts have failed. This approach is particularly applicable to permittees that are local units of government, as they are subject to fiscal and political considerations that differentiate them from private permittees.

Further, the municipal stormwater permit is somewhat unusual. Much of what an MS4 does to comply with permit requirements is to exercise its regulatory authority over other, private parties. Some of this is explicit in the general permit: an MS4 – at least a municipal MS4 - must regulate construction activity for erosion control, development for post-construction stormwater management, and non-stormwater discharges into the MS4. In other respects it is implicit, for example in the ability of a municipal MS4 to apply its development code to meet municipal stormwater, TMDL and nondegradation goals.

In this respect, the program is a delegation of regulatory authority from the MPCA to MS4's, in which the delegation is mandatory and enforced through the municipal stormwater permit. Thus, there is an inherent element of partnership between the MPCA and municipal MS4's that is not present in the ordinary permitting situation. Further, to the extent an MS4's permit obligation involves exercising authority over third parties, there is more "play" in the outcome and a lesser ability of the permittee to reliably commit to that outcome.

These circumstances, taken together, are reason to think that the MPCA will apply a “gradual” approach to enforcement. It suggests, again, that if MS4 and WMO permittees are working in good faith, they are unlikely to be surprised by unilateral enforcement action or substantial compliance liabilities.

#### 5. Reducing Liability Uncertainty Through MPCA Guidance

Advisory committee members representing MS4’s and WMO’s have suggested that compliance liability risks are a disincentive to collaborative SWPPP implementation, and that uncertainty about MPCA enforcement policy may amplify these risks in the view of MS4’s and WMO’s. To the extent enforcement policy can be clarified, compliance liability risks can be more precisely assessed, allocated between collaboration partners, and managed. The following are subjects that could be addressed in MPCA guidance with some benefit for reducing enforcement uncertainty:

- What falls within the duty of an MS4 to “address” non-stormwater discharges and what liabilities may follow a failure to fulfill that duty;
- Criteria that the MPCA will apply to decide on the enforcement approach it will take in a given case and the sanction it may seek (e.g., compliance order, monetary penalty, permit revocation or criminal sanction);
- The availability and use of the MPCA’s ability to formally recognize 3<sup>rd</sup>-party performance and insulate a permittee from liability for that performance;
- The extent to which a sole or joint permittee can insulate itself from compliance enforcement by carefully defining SWPPP implementation roles in a written collaboration agreement;
- How the MPCA will coordinate with the U.S. Environmental Protection Agency on compliance issues, the role each will play, and the criteria that will trigger federal involvement;
- How the MPCA will enforce TMDL- or nondegradation-related SWPPP obligations; and
- How a failure to meet a numeric or narrative goal will be determined and treated as a permit violation.

#### **C. Liability to Third Parties**

The activities of a local unit of government necessarily involve the doing of things that – when done wrong, or not done, or even done right – can result in property damage or injury to people. Generally these fall in the category of common law torts: claims based on trespass, negligence and nuisance. Other potential third-party claims include federal tort claims under 42 U.S.C. §1983 for violation of due process or equal protection, and inverse condemnation claims based on permitting decisions or land inundation due to stormwater management facility design or maintenance.

When a WMO assumes responsibility for an SWPPP implementation activity, it accepts the potential for third-party claims. An MS4 that shifts responsibility to a WMO does not

necessarily shift the risk of third-party liability. Instead, the law may prescribe that both parties assume a part or all of any liability.

The following is an illustrative list of third-party claims that can arise from MCM performance:

#### *Public Participation*

- Volunteer injury during water quality monitoring, storm drain stenciling, community clean-up, citizen compliance monitoring, or similar.
- Property invasion, property damage or injury caused by volunteers acting on behalf of the MS4 or WMO.

#### *Illicit Discharge Detection and Elimination*

- Costs for legal enforcement and appeals related to prohibition of non-stormwater discharges into the MS4.
- Property invasion or damage or privacy/process torts due to enforcement activity.
- Property invasion or damage related to field inspection activity.

#### *Construction Site and Post-Construction Stormwater Runoff Control*

- Costs for legal enforcement, appeals and monitoring/enforcement of post-permit compliance actions (e.g., long-term basin/Best Management Practice (BMP) maintenance).
- Deprivation of property rights by permit decisions.
- Property invasion or damage related to field inspection activity.
- Property invasion or damage related to basin/BMP maintenance responsibility.

#### *Pollution Prevention/Good Housekeeping*

- Property damage or invasion of property rights related to design, construction and maintenance of stormwater conveyance and treatment facilities.
- Injury related to winter maintenance policies and practices for roadways, sidewalks and other public spaces.
- Property devaluation or injury related to vegetation maintenance practices for public parkland and open space.

Local units of government and their legal counsel evaluating these liability risks will consider several elements of liability law that define and, on the whole, moderate these liability risks. These include principles of tort and inverse condemnation, statutory immunities to suit, monetary limits on recovery, allocation of liability among the parties, and insurance.

### 1. Municipal Tort Liability

A “tort” is broadly defined as a “civil wrong or injury...for which the court will provide a remedy in the form of an action for damages.”<sup>16</sup> In Minnesota, cities, townships, watershed districts and joint powers watershed management organizations populate the same legal landscape when it comes to tort liabilities and immunities. All are subject to the Municipal Tort Claims Act as falling within that law’s broad definition of “municipality.”<sup>17</sup>

Under the Municipal Tort Claims Act, municipalities generally must pay damages for injuries caused by their torts, subject to certain specific limitations and exceptions.<sup>18</sup> Municipalities also may be vicariously liable for the negligent or wrongful acts of officers, employees and agents acting in the scope of their duties.<sup>19</sup> Under the statute, a municipality must defend and indemnify an officer or employee for any damages that arise in the performance of the duties of the position, except where the officer or employee is guilty of malfeasance in office, willful neglect of duty, or bad faith.<sup>20</sup> Typically, a court will defer to a municipal determination that an officer or employee acted in bad faith or in willful neglect of duty.<sup>21</sup> A municipality is not liable for an employee’s intentional torts even if the act occurred within work-related limits of time and place, if the actions were unforeseeable and unrelated to the employee’s duties.<sup>22</sup>

As a threshold matter, there must exist a principal-agent relationship between the municipality and the wrongdoer in order to hold a municipality legally responsible for that person’s wrongful acts. A municipality’s agents can include its officials, employees and elected staff; it also can include a third-party contractor who performs work according to the specifications of a contract. A municipality is not liable for the acts of an independent contractor.<sup>23</sup>

The Municipal Tort Claims Act defines “employees,” “officers” and “agents” to include past and present employees, officers and agents, whether temporary or permanent, and whether compensated or non-compensated.

Under the rules of agency, a municipality is liable for damages caused by a volunteer under either of two circumstances: (1) the volunteer acts under the municipality’s direct order to

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<sup>16</sup> Black’s Law Dictionary (6th ed. 1991)

<sup>17</sup> Minn. Stat. §466.01, subd. 1.

<sup>18</sup> Minn. Stat. §466.02.

<sup>19</sup> Minn. Stat. §466.01.

<sup>20</sup> Minn.Stat. §446.07, Subd.1.

<sup>21</sup> *Douglas v. City of Minneapolis*, 230 N.W.2d 577, 586 (Minn. 1975) (applying “arbitrary and capricious” standard of review to municipality’s determination whether to pay a judgment against a police officer pursuant to Minn. Stat. §471.45 or §466.07, subd. 2).

<sup>22</sup> *P.L. v. Aubert*, 545 N.W.2d 666, 668 (Minn. 1997) (holding school district not liable for sexual misconduct by teacher toward student in the absence of any evidence that such misconduct was foreseeable).

<sup>23</sup> Minn. Stat. § 466.01, subd. 6.

perform a task, so that he or she qualifies as the municipality's agent;<sup>24</sup> or (2) the volunteer has "apparent authority" to act, because the municipality has held out the volunteer as having such authority or knowingly has permitted the volunteer to act on its behalf.<sup>25</sup>

## 2. Inverse Condemnation

The United States and Minnesota Constitutions prohibit the "taking" of private property for public use without provision for "just compensation" to be paid.<sup>26</sup> Inverse condemnation describes the circumstance in which private property rights have been taken by a unit of government without the formal process of eminent domain.

An inverse condemnation claim may arise if a development permit has been denied or onerous conditions have been placed on it. Such a claim typically will not be sustained unless: (a) the denial or conditions have deprived the property owner of all reasonable, economic use of the property; or (b) the permit is conditioned on a dedication of property rights to the public that does not bear a close and proportional relation to the harms the unit of government seeks to prevent.<sup>27</sup>

An inverse condemnation claim also may arise where the design, construction or maintenance of an MS4 is insufficient to prevent adverse hydrologic impacts on an upgradient property owner. A claim against the MS4 owner/operator for impacts of this sort is an inverse condemnation claim if the flooding or other impact is of a permanent or regularly occurring nature; sporadic impacts more properly raise a tort claim of trespass or negligence.<sup>28</sup> Accordingly, impacts due to MS4 design more typically support an inverse condemnation claim, while those resulting from inadequate maintenance more typically support a tort claim. If the property impacts result from an extraordinary storm event, neither claim is legally supported.

The property owner's inverse condemnation remedy is a court order directing the unit of government to initiate condemnation proceedings and determine compensation due. Alternatively, the unit of government can act to remove the impediment depriving the property owner of his rights. In that case, the owner may still have a right to compensation for the temporary deprivation.

## 3. Joint and Several Liability

The allocation of liability among two or more parties legally responsible for personal injury or property damage is governed by Minnesota Statutes §§604.01 and 604.02.

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<sup>24</sup> *Winkel v. Eden Rehabilitation Treatment Facility, Inc.*, 433 N.W.2d 135, 138 (Minn.App.1988).

<sup>25</sup> *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn.1988) (quoting *Hockemeyer v. Pooler*, 130 N.W.2d 367, 375 (Minn.1964)).

<sup>26</sup> U.S. Constitution, Amendment V; Minnesota Constitution, Article I, Section 13.

<sup>27</sup> *Parranto Bros. v. City of New Brighton*, 425 N.W. 2d 585 (Minn. App. 1988); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>28</sup> *Wilson v. Ramacher*, 352 N.W.2d 389, 394 (Minn. 1984).

If the claimant bears some responsibility for the injury or damage, the amount of recovery is reduced by the percentage of the claimant's responsibility. If the claimant's responsibility exceeds 50 percent, there is no recovery.<sup>29</sup>

Where two parties bear legal responsibility for injury to a third party, this relationship of shared liability is called "joint and several," which means that the injured person may look to either responsible party for the full amount of the damages, even if the party is only partly at fault.<sup>30</sup> This rule is designed to allow a claimant to collect damages more easily, and leaves the responsible defendants to determine between themselves how much each must contribute to the total award.<sup>31</sup> The rule also may apply to harm caused by two or more independent negligent acts that occur closely in time and together contribute to the harm, even if the negligent parties were not acting in concert.<sup>32</sup>

For an MS4 and a WMO collaborating in SWPPP implementation, the rule of joint and several liability means that each may bear legal responsibility for harm sustained by a third party, regardless of its degree of involvement in the activity causing the injury or damage. When one party must pay more than its share of liability to an injured party, however, generally it can seek contribution from the other responsible party for that party's share of the total liability.<sup>33</sup>

As provided by statute, liability of an MS4 or a WMO arising from SWPPP implementation will be joint and several in any of the following three circumstances:

- The MS4 or WMO is more than 50 percent at fault;
- The MS4 and WMO are acting "in a common scheme or plan"; or
- The liability is deemed to arise under an "environmental or public health law" or "any environmental or public health ordinance or program" of a municipal MS4, watershed district or joint powers watershed management organization.<sup>34</sup>

We are not aware of any case applying the third criterion. Nevertheless, it is likely that the federal Clean Water Act and parallel state laws would be considered environmental or public health laws. It is likely, as well, that an MS4 SWPPP implementation program would be considered a program concerning environmental or public health. And the term "arising under" is broad and likely would encompass all SWPPP implementation activities. Accordingly, if an MS4 and a WMO each are at fault to at least some degree, liability is likely to be joint and several.

However, that "if" is an important one. For joint and several liability to arise under the third criterion, each party must bear at least *some* measure of fault for the harm caused. If the

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<sup>29</sup> Minn. Stat. §604.01, subd. 1.

<sup>30</sup> Minn. Stat. § 604.02, subd. 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Maday v. Yellow Taxi Co. of Minneapolis*, 311 N.W.2d 849, 850 (Minn. 1981).

<sup>33</sup> *Blomgren v. Marshall Mgmt. Svcs., Inc.*, 483 N.W. 2d 504 (Minn. App. 1992).

<sup>34</sup> Minn. Stat. § 604.02, subd. 1.

agreement cleanly allocates responsibility for SWPPP activities, and the injury or damage claim arises from an activity performed by either the MS4 or the WMO without direct involvement of the other, a jury may have no basis to attribute any measure of fault to the uninvolved party. In this case, it appears that the third criterion would not apply.

The second criterion, however, remains as a basis both for an uninvolved MS4 or WMO to be liable (“vicarious” liability) and for that liability to be joint and several. Under the doctrine of “joint venture” – essentially synonymous with the second criterion of “a common scheme or plan,” an MS4 or a WMO wholly uninvolved, as a factual matter, in the activity causing the third party injury or damage nevertheless would be subject to joint and several liability. An MS4 and a WMO would be found to be parties to a “joint venture” if they are found to be engaged in “a mutual undertaking for a common purpose” where each has “a right to some voice in the direction and control of the means used to carry out the common purpose.”<sup>35</sup> Relevant factors include:

- A contribution by each party of money, property, time or skill;
- A proprietary interest and right of mutual control;
- Sharing of profits;
- An express or implied agreement to engage in the joint activity.<sup>36</sup>

The crux of the legal question is how broadly the “venture” is defined. If the venture is the SWPPP activity that caused the injury or damage, the uninvolved party is more likely to be protected from liability. If the venture is the broader program of complying with the municipal stormwater permit through SWPPP implementation, the uninvolved party is more likely to bear liability.

A recent case decided by the 8<sup>th</sup> Circuit, U.S. Court of Appeals,<sup>37</sup> applied the definition of “venture” expansively. There, a boiler repairman was injured by a boiler rupture at a pool jointly operated by the Crookston, Minnesota, school district and the City of Crookston. The two public bodies were parties to a joint powers agreement creating a joint recreation board to operate the pool. The school district was found partly responsible in that it owned and exercised control over the boiler, arranged for the repair, and failed to warn the repair company of a corroded boiler part of which it had knowledge, the failure of which contributed to the repairman’s injury.

The repairman also sought recovery against the City. The City argued that the relevant “venture” was control and maintenance of the boiler, and therefore that it was not subject to vicarious liability. The federal appeals court disagreed, defining the venture as the operation and maintenance of the pool and finding the City to be subject to joint and several liability for the judgment imposed on the school district.

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<sup>35</sup> *Walton v. Fujita Tourist Enterprises, Ltd.*, 380 N.W.2d 198, 202 (Minn. App. 1986) (quoting *Murphy v. Keating*, 283 N.W. 389 (Minn. 1939)).

<sup>36</sup> *Walton v. Fujita Tourist Enterprises, Ltd.*, 380 N.W. 2d 198, 201 (Minn. App. 1986).

<sup>37</sup> *Reimer v. City of Crookston*, 421 F.3d 673 (8<sup>th</sup> Cir. 2005).

Following this decision, the 2006 legislature amended Minnesota Statutes §471.59 to include the following language:

A governmental unit participating in a joint venture or joint enterprise, including participation in a cooperative activity undertaken pursuant to this section or other law, is not liable for the acts or omissions of another governmental unit participating in the joint venture or joint enterprise, unless the participating governmental unit has agreed in writing to be responsible for the acts or omissions of another participating governmental unit.

This protection appears to be coextensive with the “joint venture” doctrine and therefore to disable it as a means of imposing vicarious and joint and several liability on cooperating units of government. Absent this amendment, for the purpose of limiting vicarious liability it would have been advisable for an MS4 and a WMO to craft terms in the agreement for SWPPP implementation that exclude the WMO from broader program goals and delimit its role as simply providing discrete services requested by the MS4.

This care appears no longer to be needed for the purpose of limiting the scope of the “venture.” However, it may be prudent, with respect to implementation activities raising significant liability issues, to define and separate responsibilities as carefully as possible. The purpose of this would be to limit the potential for a jury to find that the uninvolved MS4 or WMO nevertheless did bear some measurable amount of responsibility, and thereby fault, triggering the third criterion of section 604.02, subdivision 1, and subjecting each party to joint and several liability.

What the new legislative language in Minnesota Statutes §471.59 does suggest is care in the agreement in describing and defining the liabilities for which each party is indemnifying the other. The goal is to avoid language that could be construed as “agree[ment] in writing” to be vicariously liable for the partner’s actions. An abundance of caution also might recommend a careful explicit statement in the agreement cataloging the acts or omissions of the other party for which each party is *not* agreeing to be responsible (while making clear that the enumerated acts or omissions are not exclusive).

#### 4. Immunities

Municipalities – as broadly defined under the Municipal Tort Claims Act - enjoy certain immunities and other protections under both the Act and the common law that are relevant to SWPPP implementation. Immunity protects a municipality from state tort claim liability based solely on the nature or subject matter of the claim, and without inquiry into whether the municipality or its agent acted reasonably or conscientiously.

##### a. Discretionary (Statutory) Immunity (Minn.Stat. § 466.03, subd. 6).

The Municipal Tort Claims Act explicitly provides immunity to a municipality for action or inaction taken pursuant to its discretionary judgment.<sup>38</sup> This means that if a municipal action is

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<sup>38</sup> Minn. Stat. § 466.03, subd. 6.

discretionary, the municipality's decision to act or not to act is protected, even if its judgment in the matter appears to have been unsound. Typically a court will interpret this exception narrowly, applying it to planning-level decisions that involve questions of policy and require a municipality to weigh public purpose, political, financial, administrative and other considerations with respect to a given plan or policy.<sup>39</sup> A municipality enjoys immunity for these kinds of decisions because subjecting it to liability would constitute judicial second-guessing of legislative or executive decisions made by local elected officials to whom these decisions are entrusted.<sup>40</sup>

By contrast, a municipality does not have immunity for decisions involving ordinary day-to-day operations.<sup>41</sup> If a decision involves both policy-making and operational decisions, discretionary immunity still may apply, particularly if the operation requires a degree of discretionary decision-making.<sup>42</sup> Once the policy is formulated, however, implementation of the policy is likely to be deemed "operational" and not protected by immunity.<sup>43</sup> The application of scientific and technical skills and the exercise of professional judgment generally are not afforded discretionary immunity.<sup>44</sup>

The following are examples of local stormwater management activities that courts have found to be protected by discretionary immunity:

- *A decision not to remedy a storm sewer system defect or make capital improvements to the sewer system because of budget constraints.* Because the act was discretionary, plaintiff could not sue for damages caused by subsequent flooding or sewer back-up.<sup>45</sup>
- *Permit issuance or modification, including building and sewage treatment system construction permits.*<sup>46</sup>
- *Acceptance of a plat and surface drainage system design for subdivision development.*<sup>47</sup>
- *Development of a roadway inspection system.* Where the development of the inspection system was discretionary and complied with state criteria, and the road inspector had conformed to the system, the estate of a deceased driver whose vehicle slid off the road could not sue for improper road design and inspection.<sup>48</sup>

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<sup>39</sup> *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn.1988).

<sup>40</sup> *Vrieze v. New Century Homes, Inc.*, 542 N.W.2d 62, 66 (Minn. App. 1996).

<sup>41</sup> *Holmquist*, 425 N.W.2d at 233.

<sup>42</sup> *E.g., Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992) (applying discretionary immunity to school district's school bus boarding policy; challenge to implementation was a *de facto* challenge to the policy itself).

<sup>43</sup> *Vrieze*, 542 N.W.2d at 66.

<sup>44</sup> *Schroeder v. St. Louis County*, 708 N.W.2d 497 (Minn. 2006).

<sup>45</sup> *Chabot v. City of Sauk Rapids*, 422 N.W.2d 708, 710-11 (Minn. 1988) (storm sewer system); *Christopherson v. City of Albert Lea*, 623 N.W. 2d 272 (Minn. App. 2001) (sewer system).

<sup>46</sup> *Vrieze*, 542 N.W.2d 62 (building permits); *McNamara v. McLean*, 531 N.W.2d 911 (Minn. App. 1995) (sewage treatment system).

<sup>47</sup> *Wilson v. Ramacher*, 352 N.W.2d 389, 393 (Minn. 1984).

<sup>48</sup> *Gerber v. Neveraux*, 578 N.W.2d 399 (Minn. App. 1998), *rev. den.* July 16, 1998.

- *A decision to build a wastewater treatment facility, and decisions concerning its design.*<sup>49</sup> Note that if a municipality contracts with outside engineers to design the system, their design decisions may not qualify for discretionary immunity. And if the municipality fails to consider a required element in the design process, such as identifying all “major contributors” of waste in assessing the required capacity of the system, that decision may be “scientific” or “professional,” and so not entitled to discretionary immunity.<sup>50</sup>
- *Staff hiring, training and supervision.* Typically Minnesota courts treat these types of employee-related decisions as planning-level conduct protected by the discretionary immunity.<sup>51</sup>

Municipal acts found to be “operational,” and therefore not entitled to immunity, include:

- *Failure to properly maintain and repair a drainage system, including the failure to remove beaver dams within the system.*<sup>52</sup>
- *A school district’s decision to pile snow on a school playground, absent evidence that the decision involved policy-making concerns.*<sup>53</sup>
- *A determination of appropriate speed restrictions based on factors in policy manuals.*<sup>54</sup>
- *A decision not to place warning signs on roads, absent evidence of a deliberative process regarding that decision.*<sup>55</sup>

b. Official Immunity and Vicarious Official Immunity.

Municipal employees and officials are protected from personal liability by the doctrine of official immunity. This common law rule protects an individual public employee or officer for action taken in the course of official duty, so long as the action does not exceed the discretion conferred by law or constitute a willful or malicious wrong.<sup>56</sup> The doctrine’s purpose is to protect officials from threats of personal liability that might deter independent decision-making.<sup>57</sup> For this reason, official immunity protects a broader spectrum of “discretionary” acts than does discretionary immunity, including some decisions made at the operational level.<sup>58</sup>

Official immunity does not extend to the performance of “ministerial duties.” These are duties that are “absolute, certain and imperative, involving merely the execution of a specific duty

<sup>49</sup> *Sota Foods, Inc. v. Larson – Peterson & Assoc., Inc.*, 497 N.W.2d. 276 (Minn. App. 1993) (involving claims against both municipality and engineers).

<sup>50</sup> *Id.* at 282.

<sup>51</sup> *See, e.g., Watson by Hanson v. Metropolitan Transit Comm’n*, 553 N.W.2d 406, 413 (Minn. 1996).

<sup>52</sup> *Happy Land Tree Farms, Inc. v. Finlayson Twp.*, 2002 WL 31894451 at \*2 (Minn. App. Dec. 31, 2002) (unpublished decision).

<sup>53</sup> *Fear v. Independent Sch. Distr. 911*, 643 N.W.2d 204 (Minn. App. 2001).

<sup>54</sup> *Nusbaum v. Blue Earth County*, 422 N.W.2d 713 (Minn 1988).

<sup>55</sup> *See, e.g., Holmquist*, 425 N.W.2d at 234.

<sup>56</sup> *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W. 2d 651 (Minn. 2004).

<sup>57</sup> *Davis v. Hennepin County*, 559 N.W.2d 117 (Minn. App. 1997).

<sup>58</sup> *Anderson*, 678 N.W.2d at 651.

arising from fixed and designated facts.”<sup>59</sup> While the inquiry is fact-specific, a duty is likely to be ministerial if it is grounded in a rule, ordinance, statute or other official standard that an employee is required to follow.<sup>60</sup> Failure to follow the rule can be the basis for a tort claim.<sup>61</sup>

Where establishing the standard itself was discretionary, official immunity will apply to an official’s compliance with the standard, because a challenge to compliance with the rule is essentially a challenge to the rule itself.<sup>62</sup>

When an employee or official is protected from suit by official immunity, that protection will extend to the government employer as well, by what is known as “vicarious official immunity.” Courts have extended immunity to government employers on the reasoning that an official’s performance might be hindered, were he forced to second-guess his actions for fear of incurring liability on his employer’s behalf.<sup>63</sup>

The recent case of *Sletten v. Ramsey County*<sup>64</sup> illustrates the application of the official immunity doctrine. In that case, involving the County’s operation of a yard waste and composting site, plaintiffs claimed that County employees: (1) had created a nuisance by failing to adhere to permit requirements and state health ordinances; and (2) negligently had failed to warn area residents about health hazards posed by the operation. The Minnesota Supreme Court found that official immunity did not bar the first claim, but barred the second.

Employees were not entitled to official immunity on the nuisance claim because they had no discretion as to complying with waste volume and facility design limitations under the MPCA permit and the city’s conditional use permit. By contrast, absent evidence of a rule, protocol or public policy defining how the County must exercise its duty to warn, employees had discretion as to when, how and who they warned. Because it was discretionary, the employees’ conduct challenged in the second claim was entitled to official immunity. The County, in turn, was protected by vicarious official immunity.<sup>65</sup>

### c. Legislative Immunity.

Legislative immunity is a common law doctrine that protects legislators (including local officials acting in a legislative capacity) from liability for their legislative actions.<sup>66</sup> Legislative actions include regional land use planning decisions,<sup>67</sup> voting on and adopting local ordinances,<sup>68</sup> and

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<sup>59</sup>*Id.* at 656 (quoting *Cook v. Trovatten*, 274 N.W. 165, 167 (Minn. 1937)).

<sup>60</sup>*Id.* at 659.

<sup>61</sup> As an example, a city sidewalk inspector has a ministerial duty to repair sidewalks immediately when so required by an ordinance, and is not entitled to official immunity for his decision to delay the repair. *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998).

<sup>62</sup> *Anderson*, 678 N.W.2d at 659.

<sup>63</sup> *Anderson*, 678 N.W.2d at 666.

<sup>64</sup> 675 N.W.2d 291 (Minn. 2004).

<sup>65</sup> *Id.* at 307-08.

<sup>66</sup> *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998).

<sup>67</sup> *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979).

<sup>68</sup> *Bogan*, 523 U.S. at 55.

investigating legislative concerns.<sup>69</sup> An act qualifies as legislative by its nature, and does not depend on the motive or intent behind it.<sup>70</sup>

d. Snow and Ice Immunity (Minn. Stat. § 466.03, subd. 4).

The Municipal Tort Claims Act protects a municipality from claims based on the presence of snow or ice on a highway or public sidewalk, except for those concerning conditions that abut publicly-owned buildings or parking lots or when the accumulation is due to the municipality's negligence. Municipalities are not liable for "mere slipperiness" resulting from accumulation of ice and snow on streets and sidewalks, unless the municipality has been negligent by letting the accumulation remain long enough to allow the formation of slippery ridges, depressions or other irregularities.

e. Parks and Recreation Areas (Minn. Stat. §466.03, subd. 6e).

A municipality enjoys broad immunity against claims by users of parks or open space areas that the municipality owns or leases. The immunity protects against claims relating to the construction, operation or maintenance of any parkland or open space area used for recreational purposes, including clearing of the land, refuse removal, and maintenance of trails without artificial surfaces. The only duty imposed on the municipality is to provide reasonable warning to known entrants of a concealed condition that could cause death or severe bodily harm.<sup>71</sup>

f. Unimproved Property (Minn. Stat. §466.03, subd. 6b).

A municipality is immune from claims based on the condition of unimproved real property that it owns. No Minnesota court has addressed whether a storm basin, conveyance structure or other facility, or vegetative management on otherwise unimproved lands for water quality purposes, constitutes an "improvement" that voids this immunity.

One court decision suggests that an "improvement," as the term is used in this statute, is merely "any contribution to real property of labor, skill, material, or machinery for any purpose specified, which includes the alteration of any building." In an unpublished decision of the Minnesota Court of Appeals, a driveway, a gate, lighting, compost piles, and a sediment pond together constituted "improvements over the state of nature," so that immunity under §466.03, subdivision 6b, was not available.<sup>72</sup> Construction of a sediment pond has been deemed an "improvement to real property" for the purpose of determining, under a different statute, the statute of limitation that applies to a claim of negligent design.<sup>73</sup>

g. Failure to Qualify for Municipal Approval (Minn. Stat. §466.03, subd. 10).

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<sup>69</sup> *Green v. DeCampo*, 612 F.2d 368, 371-32 (8<sup>th</sup> Cir. 1980).

<sup>70</sup> *Bogan*, 523 U.S. at 54.

<sup>71</sup> *Johnson v. Washington County*, 518 N.W.2d 594, 599 (Minn. 1994).

<sup>72</sup> *Sletten v. City of Maplewood*, No. C4-98,2377, 1999 WL 595368 at \*4 (Minn. App. 1999), *rev. denied* (Minn. Oct. 26, 1999).

<sup>73</sup> *Nelson v. Short-Elliott-Hendrickson*, 716 N.W.2d 394, 400 (Minn. App. 2006).

This section of the Act provides that a municipality cannot be sued for a claimed loss related to the claimant's failure to meet the standards necessary to qualify for a license, permit or other authorization.

h. Public Duty Doctrine.

The public duty doctrine precludes a claim against a municipality by an individual plaintiff for the municipality's failure to prevent a harm caused by a third party or outside force. The doctrine is premised on the concept that the governmental duty to prevent harms is owed to the public at large and not to individuals.<sup>74</sup> The doctrine is historical in origin and has been eroded or abolished in some jurisdictions. Minnesota courts continue to apply it at least with respect to activities such as firefighting,<sup>75</sup> licensing,<sup>76</sup> and permitting and inspections.<sup>77</sup>

To surmount the doctrine, a plaintiff must establish that the government has undertaken to protect a particular class of persons from the risks associated with a particular harm, and that plaintiff falls within that class.<sup>78</sup> In making the determination of a "special duty of care," a court will consider: (1) the municipality's actual knowledge of a dangerous condition; (2) reasonable reliance on representations or actions of the municipality; (3) mandatory acts clearly intended to protect the identified class of persons;<sup>79</sup> and (4) whether the municipality used due care to avoid increasing the risk of harm.<sup>80</sup>

i. Improved Real Estate Statute of Repose (Minn. Stat. §541.051).

Minnesota applies a two-year statute of limitation and a ten-year statute of repose on a tort or contract claim seeking damages based on the defective and unsafe condition of an improvement to real property. This means that no claim may be brought more than two years after discovery of an injury, or more than ten years after substantial completion of the improvement.

The statute protects the property owner, designer, construction entity and construction manager. Storm sewer systems, including sediment ponds and improvements to their structures, qualify as "improvements to real property" under the statute.<sup>81</sup> The statute does not preclude a claim alleging improper maintenance, operation or inspection of the improvement.<sup>82</sup>

5. Liability Limit

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<sup>74</sup> *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806 (Minn. 1979).

<sup>75</sup> *Woehrle v. City of Mankato*, 647 N.W.2d 549, 553 (Minn. App. 2002).

<sup>76</sup> *Andrade v. Ellefson*, 391 N.W.2d 839 (Minn. 1986) (finding, however, a special duty created with respect to daycare licensing).

<sup>77</sup> *Cracraft*, 279 N.W.2d at 80; *Hoffert v. Owatonna Towne Inn Hotel, Inc.*, 199 N.W.2d 158, 160 (Minn. 1972).

<sup>78</sup> *Cracraft*, 279 N.W.2d at 806.

<sup>79</sup> In a footnote to a decision involving a claim against a county for inadequate point-of-sale inspection of a septic system, the Court of Appeals noted that a regulation and ordinance addressed to protecting the general public and surface and ground waters did not create a special duty, since this type of protection was not designed to protect a particular class of people. See *McNamara v. McLean*, 531 N.W.2d 911, 916 n.2 (Minn. App. 1995).

<sup>80</sup> *Cracraft*, 279 N.W. 2d at 806-07.

<sup>81</sup> *Nelson*, 716 N.W.2d at 400.

<sup>82</sup> Minn. Stat. §541.051, subd. 1(c).

The Municipal Tort Claims Act also limits the amount of recovery a tort claimant may have against a municipality. Minnesota Statutes §466.04, subdivision 1, establishes the following liability limits:

- \$300,000 for a single claim; increasing to \$400,000 for a claim arising after January 1, 2008; and to \$500,000 for a claim arising after July 1, 2009.
- \$1,000,000 total for all claims arising out of a single occurrence after January 1, 2000; increasing to \$1,200,000 for all claims arising out of an occurrence, for claims arising after January 1, 2008; and to \$1,500,000 for all claims arising out of an occurrence, for claims arising after January 1, 2009.

Punitive damages may not be awarded against a municipality.<sup>83</sup>

## 6. Insurance

Insurance is a further means to moderate liability exposure. For example, a substantial majority of cities and watershed districts in the metropolitan area maintain a comprehensive municipal coverage policy issued by the League of Minnesota Cities Insurance Trust (LMCIT). The Minnesota Association of Townships Insurance and Bond Trust offers similar liability insurance covering third-party tort claims. Joint powers watershed management organizations may seek coverage through one or the other of these organizations, depending on their makeup and circumstances. Each unit of government and its legal counsel will need to evaluate its insurance coverage and the liability exposure that may remain as a result of deductibles, exclusions and uninsured risks.

The standard LMCIT municipal policy provides defense and liability coverage for personal injury and property damage claims, automobile liability claims, and third-party damages arising from land use and development regulation. Coverage extends to the unit of government itself, members of its decision-making body, employees and volunteers. The standard policy provides protection for the types of claims that can arise from the performance of SWPPP activities such as those enumerated above. Coverage limits generally match municipal liability limits under the Minnesota Tort Claims Act as listed in the previous section. Excess coverage also may be purchased, for example to protect against federal Section 1983 claims that are not subject to the monetary ceilings of the state law.

An agreement between an MS4 and a WMO establishing the terms of collaboration for SWPPP implementation is likely to provide for mutual indemnification. For example, each entity may assume responsibility for all claims arising out of the activities it has committed to perform. LMCIT coverage applies to liabilities the insured unit of government bears through indemnification to the same extent as to liabilities it bears directly.

## 7. Risk Allocation Between Partners

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<sup>83</sup> Minn. Stat. 466.04, subd. 1(b).

If a party does not meet its obligations, the other party may incur enforcement liabilities or liabilities to third parties. The agreement can shift these liabilities back to the nonperforming party, or allocate them as the parties choose, through means such as the following:

- *Agreement to indemnify.* A party agrees to bear the liability risk and ultimately the cost incurred by the other party as the result of a third-party liability.
- *Agreement to defend.* In conjunction with indemnification, a party agrees to provide and bear the cost of the other party's legal defense.
- *Agreement to hold harmless.* A party agrees not to seek compensation from the other party for costs it has been forced to bear.
- *Subrogation or assignment of rights.* One party conveys to the other its legal right to pursue claims against a third party.
- *Taxing district.* A WMO may create one or more taxing districts, or require the MS4 to do so, so that costs incurred by the WMO may be allocated more precisely to that part of its constituency that has benefited from the expenditure.<sup>84</sup>
- *Requirement to insure.* Where a party has agreed to indemnify or will exercise custody over or use property of the other party, the other party may require maintenance of insurance to ensure that the indemnification or compensation commitment will be effective.

#### **D. Liability to Partner**

The third category of liabilities that arises from collaboration between an MS4 and a WMO is the liability of one collaborating party to the other.

An MS4 implementing its SWPPP without WMO participation is subject to the enforcement and third-party liabilities described above. However, how it carries out its activities is not constrained by obligations contractually owed to a governmental partner. Similarly, in agreeing to assume certain responsibilities on behalf of an MS4, a WMO assumes a liability to the MS4 if it does not perform those responsibilities. Even if the WMO already is engaged in an activity independent of its participation in SWPPP implementation (for example permitting, inspection or enforcement), its discretion as to how it carries out the activity may become constrained by its duty to the MS4, and its failure to perform the activity in the manner to which it committed may be actionable by the MS4. The agreement between the MS4 and the WMO will determine the remedies each party has against the other for a breach of the commitments made.

The sole permittee likely will look first to remedies that lead or compel the nonperforming party to perform; if the other party fails to perform an activity required under the SWPPP, the MPCA

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<sup>84</sup> Although Chapter 103B appears explicitly to establish a vehicle for a watershed district to create and levy an *ad valorem* real property tax on a taxing district encompassing less than all of the watershed, the current position of the Minnesota Department of Revenue is that a watershed district does not have this authority.

may look to the permittee for performance and may seek to apply enforcement procedures or sanctions to the permittee. Further, from the perspective of an MS4 as sole permittee, a lack of performance may increase the risk of injury or damage to third parties, which the MS4, as system owner/operator, may have a more immediate interest in abating. If the parties are co-permittees, each will have a strong interest in the performance of the other.

The parties can strengthen the assurance of performance. For example, agreement language can:

- Provide for performance auditing or reporting to detect nonperformance;
- Establish a process of notice and/or public process to ensure that the entity failing to perform is aware of the need to act and publicly highlight its failure;
- Specify that the other party, possibly through an expedited process, can obtain court relief through an order directing that the work be done; and
- Authorize the other party to undertake the work on behalf of the nonperforming party, and to be reimbursed for it.

If the parties choose, with respect to some activities (for example, maintenance of stormwater facilities) the agreement could require the performing party to maintain a performance surety. The surety would be obligated to secure performance in the event the performing party failed to do so.

The parties also could choose to specify a monetary remedy for breach of the agreement. Sanctions are separate from, and in addition to, terms that require a nonperforming party to “make the other party whole” with respect to any costs the other party incurs as the result of enforcement proceedings or claims of third parties arising from the nonperformance. The purpose of a monetary remedy might be to create a stronger incentive for performance; it might be to compensate a party for damages arising from the other party’s nonperformance that are difficult to quantify (for example, disruption of planning, budgeting or operations or community relations difficulties).

The monetary remedy for breach of the agreement ordinarily would be the amount of foreseeable damages sustained from the breach. However, in the case of SWPPP implementation, damages will tend to be very difficult to quantify and therefore largely unavailable. As an alternative, the parties may specify liquidated damages. A liquidated damages clause would provide for the forfeiture of a specified sum for breach. The amount may be payable as a single sum or on a daily basis, and may vary depending on the nature of the breach. The clause must be drafted carefully to be legally enforceable.

Conversely, the collaborating units of government may conclude that it would be contrary to the desired relationship to impose monetary sanctions for a failure to perform. In this case, the parties would include language in the agreement explicitly foreclosing monetary claims based on breach of the agreement.

Depending on which SWPPP implementation activities are allocated to the MS4, collaboration also raises the prospect of one party maintaining or exercising control over the property of the other. WMO maintenance of MS4 stormwater facilities is one example; another is sharing of data, proprietary or otherwise. The parties may choose to include terms in the agreement to address standards of care, liability for property damage, and obligations to maintain insurance.

#### **E. Conclusion**

When an MSA and a WMO enter into an agreement to implement an SWPPP, each is likely to assume additional risks of liability for enforcement sanctions and claims of third parties relating to how stormwater activities are performed.

For MSA's and WMO's carrying out an SWPPP in good faith, the risk of substantial enforcement sanctions appears fairly low. To the extent to which an MSA or WMO already engages in the stormwater activities identified in the SWPPP independent of the SWPPP, additional risks of third-party liability for tort or inverse condemnation will not be different in type and may not be substantially greater in magnitude. Municipal immunities, liability limits and insurance further mitigate those risks.

MSA's, WMO's, their counsel and their insurers should carefully evaluate these risks. As well, the written agreement between MSA and WMO should precisely allocate responsibilities between the parties and utilize established risk-sharing and risk-shifting mechanisms, so that the collaborative arrangement presents an acceptable risk profile to each party.

## V. IMPLEMENTATION FRAMEWORK

This implementation framework is intended to provide a road map for municipal MS4s and WMOs, along with state and other local agencies that will assist with implementation of a joint MS4 permitting scenario (co-permittee or sole permittee). This framework includes the following elements:

- Planning process and programmatic overlaps and gaps
- Evaluation of flexible permitting options provided in federal regulations
- Evaluation of permitting scenarios

### A. Planning process and programmatic overlaps

The logistical issues surrounding a watershed-based permitting effort by municipal MS4s and WMOs begin at the planning stages with each entity's obligations under state law. All parties participating in study discussions identified overlapping planning and programmatic requirements as a barrier to successful implementation of a joint permitting scenario between WMOs and municipal MS4s.

The decision by a municipal MS4 or WMO to enter into a joint permitting arrangement will begin with an understanding and evaluation of overlapping planning and permitting requirements by the municipal MS4 and WMO. The current structure of planning and permitting requirements is characterized by differing content requirements and poorly coordinated timing among programs. This does not lend itself well to collaboration within a joint permitting scenario, although informal collaboration occurs and further opportunities for such collaboration remain.

Requirements for plan content were evaluated for the following planning mandates:

- MS4 Storm Water Pollution Prevention Programs (SWPPPs),
- local water management plans (LWMPs),
- watershed management organization plans,
- total maximum daily load (TMDL) implementation plans,
- county groundwater plans, and
- source water protection plans.

Information on plan content was obtained from Minnesota rules and statutes, the Metropolitan Council Water Resources Management Policy Plan (2005), the Minnesota MS4 General Permit (Part V, 2006), and federal and state guidance for TMDL study content.

**Table 2** summarizes the plan content requirements and identifies overlaps between content requirements.

**Table 2.** Stormwater Management Plan Content of Various Programs.

<b>Required Elements</b>	<b>MS4 SWPPP</b>	<b>LSWMP (M.S. 103B.235)*</b>	<b>WMO Plan (M.S. 103B.231)</b>	<b>TMDL Study</b>	<b>County GW Plan</b>	<b>Source Water Protection</b>
Develop public education and outreach program	X (MCM #1)	X (MC)	X	X		X
Develop public participation program	X (MCM #2)	X (MC)	X	X	X	X
Develop, implement and enforce an illicit detection and elimination program	X (MCM #3)	X (MC)				
Develop, implement and enforce a construction site SW runoff control and related waste program	X (MCM #4)	X (MC)	X (if chosen to control WQ)			
Develop, implement and enforce a post-construction SW management program	X (MCM #5)	X (MC)	X (if chosen to address WQ)			
Develop pollution prevention and good housekeeping program for municipal operations	X (MCM #6)	X (MC)	X			
Official controls (ex. ordinances) supporting the LSWMP	X (for IDDE, construction and post-construction)	X				
Definition of drainage areas and the volumes, rates and paths of stormwater runoff		X				
Identify adequate stormwater storage areas		X	X			
Define water quality and water quality protection methods		X				
Identify "regulated" areas	X	X				

<b>Required Elements</b>	<b>MS4 SWPPP</b>	<b>LSWMP (M.S. 103B.235)*</b>	<b>WMO Plan (M.S. 103B.231)</b>	<b>TMDL Study</b>	<b>County GW Plan</b>	<b>Source Water Protection</b>
Develop an implementation program with official controls and a capital improvement program (CIP) supporting the LSWMP		X				
Reduce the discharge of pollutants to the stormsewer system	X					
Establish measurable goals and timelines for BMPs	X					
Regularly submit progress report	X (annual)					
Identify discharges to "Special" and sensitive waters within the jurisdiction	X					
Purpose/objectives statement		X	X			X
Outline of water resource management agreements		X				
Land and water resource inventory	X	X	X			X
Pollution control device, conduit and outfall inventory	X					
Policies and goals, and assessment of how they relate to other governmental plans, goals and programs		X	X			X
Develop, implement, budget and enforce a pollution control program	X	X	X (Comprehensive watershed plan)	X (TMDL implementation plan)		X
Discuss coordination of education programs	X					

<b>Required Elements</b>	<b>MS4 SWPPP</b>	<b>LSWMP (M.S. 103B.235)*</b>	<b>WMO Plan (M.S. 103B.231)</b>	<b>TMDL Study</b>	<b>County GW Plan</b>	<b>Source Water Protection</b>
Ensure adequate long-term O&M of BMPs and training programs	X					
Develop a routine inspection program for all structural pollution controls	X					
Financial impact analysis		X	X			
Assessment of existing and potential water resource problems and possible solutions, with priorities	X	X	X	X		X
Plan amendment procedures	X	X	X		X	
Policies and goals consistent with Met Council's Water Resources policy chapter		X				
Identify methods used to improve or reduce SW quantity and improve WQ (per following list)						
- control peak runoff rates		X (MC)	X			
- adopt water quality criteria		X (MC)	X	X		
- promote infiltration (volume reduction) and decrease impervious areas	X	X (MC)				
- identify and adopt management practices (BMPs)	X	X (MC)	X	X		
- incorporate pre-settlement requirements		X (MC)				
- adopt methods for minimizing effects of increased temperature		X (MC)		X if needed)		
- adopt a wetland management plan		X (MC)	X			

<b>Required Elements</b>	<b>MS4 SWPPP</b>	<b>LSWMP (M.S. 103B.235)*</b>	<b>WMO Plan (M.S. 103B.231)</b>	<b>TMDL Study</b>	<b>County GW Plan</b>	<b>Source Water Protection</b>
- establish measurable water quality goals		X (MC)		X		
- discuss how SW protection will help GW	X	X (MC)	X			X (for GW systems)
Contain soils data			X			
Contain data on fish habitat			X	X (if needed)		
Identify known pollution sources			X	X		X
Discuss how relate to TMDL program	X	X (MC)				
Discuss how to meet MS4 requirements		X (MC)				
Discuss how "no adverse impact" on WQ will be met		X (MC)				
Incorporate "nondegradation" program if selected by state	X	X (MC)				
Describe conflicts between watershed plan and LGU existing plans			X			
Establish water data collection and monitoring program			X	X		
Describe existing and expected changes to the physical environment, land use and development in the jurisdiction covered		X			X	X
Summarize available information on county GW resource					X	

<b>Required Elements</b>	<b>MS4 SWPPP</b>	<b>LSWMP (M.S. 103B.235)*</b>	<b>WMO Plan (M.S. 103B.231)</b>	<b>TMDL Study</b>	<b>County GW Plan</b>	<b>Source Water Protection</b>
Statement of goals, objectives and priorities for GW protection					X	X
Contain standards, criteria and guidelines for protection of GW and set forth how they can be implemented by WMOs and LGUs					X	
Describe relationship and potential conflicts with other water resource plans					X	
Delineate source area for drinking water well or intake	X					X
Inventory and manage potential contamination sources						X
Develop drinking water contingency plan						X
Assess drinking water source vulnerability/susceptibility	X					X
Identify discharges to source water protection areas	X					

\* The content of LWMPs is contained in M.S. 103B.235, but is supplemented by requirements of the Metropolitan Council [M.S. 473.859, Subd. 2(a)] under its authority to require the content of local comprehensive plans to be consistent with the Water Resources Management Policy Plan (M.S. 473.175, Subd. 1). Supplemental content requirements of the Metropolitan Council are acknowledged by (MC). Note that this list of elements does not contain specific local mandates through WMO plans, although LWMP must be consistent with them.

Table 3 describes the timing of plan development requirements for each of the plans.

Table 3. Plan Timing Requirements

	<b>Timing of Submittal</b>	<b>Considerations</b>
MS4 Storm Water Pollution Prevention Program (SWPPP)	Within 5 years of issuance of MS4 General Permit (40 CFR 122.34); within 18 months of an approved TMDL Plan	MS4 General Permit is reissued every 5 years.
Local water management plan (LWMP)	Each local plan shall be adopted within two years of the BWSR board's approval of the last WMO plan that affects local units of government (MN Rules 8410.0160)	Very difficult for municipalities with more than one WMO to stay up to date with all WMO plan revisions. Municipalities are required to be constantly "planning".
Watershed management organization plans	A minimum of every 10 years	Minor and major plan amendments and revisions to watershed rules can occur frequently
Total maximum daily load implementation plans	Variable, as determined by MPCA after study completion; if needed, SWPPP must be modified within 18 months of approved TMDL load allocation	Study and development of approved implementation plan can take several years to complete
Community non-degradation plans (currently 30 cities)	On MPCA determined timeline during 2007	Plan will likely be implemented via MS4 program
County groundwater plans	Voluntary plan that should be revised at least every 10 years after preparation	Although certainly impacted by surface water, county plan has little overlap with other surface water plans
Source water protection plans	By 2006, all groundwater based communities must have begun the planning process. Plan submittal timing requirements are phased according to MDH Rules.	Wellhead protection plans need to be updated every ten years, unless a new well is added to the water supply system or wellhead protection boundaries begin to overlap. Program evaluations must be done every 2.5 years.

Table 4 describes the differences in annual reporting requirements.

Table 4. Summary of Annual Reporting Requirements

	<b>Annual Reporting Requirements</b>	<b>Considerations</b>
MS4 Storm Water Pollution Prevention Program	Required by June 30 <sup>th</sup> of each year to be submitted for review to the MPCA.	Annual report includes statement of compliance with permit conditions, activities planned for next reporting year, any changes in BMPs or measurable goals, and a statement of sharing MCMs if applicable
Local water management plan (LWMP)	None, unless specified by the WMO.	
Watershed management organization plan	Within 120 days of the end of fiscal year must submit financial report, activity report and audit report. Annual report content requirements are outlined in MN Rules 8410.0150. Reports are submitted to the BWSR for review.	Current annual reporting requirements do not include any reference or information that relates to MS4
Total maximum daily load implementation plan	All reporting done according to work plan developed by MPCA and study parties	Works outside of annual stormwater reporting for permits and plans
County groundwater plan	None	
Source water protection plan	None	An evaluation of the progress made to implement the source water plan is required if/when a plan is amended.

### *Current Programmatic Overlap*

Table 1 compares content requirements and identifies overlaps among SWPPPs, local water management plans and WMO water resource management plans. Essentially all of the required SWPPP elements already are required content for local water plans under Minnesota Rules 8410. In addition, the Metropolitan Council, through its Water Resource Management Policy Plan (2005), requires the local water plan to incorporate essentially all substantive elements of the community's SWPPP. This local water plan fulfills the community's obligation under Minnesota Statutes §103B.235 to prepare and gain WMO approval of a water plan and is a required element of the comprehensive land use plan revision mandated by Minnesota Statutes §473.864, subdivision 2.

The requirements for SWPPP content in some respects are more specific than the corresponding requirements for WMO water resource management plans and local water management plans. Overlaps between SWPPP, local water plan (2008 content requirements), and WMO plan content requirements are evident in Table 1.

Total maximum daily load (TMDL) implementation plans will most likely be implemented through MS4 permits. The EPA policy memorandum "Establishing TMDL Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs" (November 22, 2002) clarifies EPA policy on addressing WLAs through municipal and construction NPDES permitting programs. The current MS4 General Permit requires SWPPPs to incorporate WLAs set forth within EPA approved TMDLs. It is anticipated that as TMDL implementation plans are completed, the MPCA will utilize this portion of the MS4 General Permit to achieve water quality results set forth in TMDLs. As noted in Table 1, local water management plans now are expected to address TMDL efforts as part of the Metropolitan Council's required elements.

Timing of local water plan development becomes a significant issue in a joint permitting scenario. Currently, regular updates are not required for local water management plans; rather updates are triggered by WMO plans revisions. The watershed planning process is not regular, making it difficult for municipalities to keep LWMPs current. This could be adjusted through administrative actions by BWSR, and possibly rule or statute changes.

Annual report content and submittal date requirements do not coincide for MS4 and WMO annual reports. A WMO that is also a MS4 is required to develop two annual reports within months of each other, both documenting watershed and stormwater management. To reduce duplication and increase efficiency, these annual reports could be combined, through administrative action by the MPCA or a BWSR rule change.

### *Current Programmatic Gaps*

The most significant gaps encountered between current water related programs are related to groundwater. Both county groundwater plans and municipal source water protection plans have the potential for significant integration into watershed and stormwater management; however, currently there is little connection between these programs and surface water management programs in the state. The MS4 permit does reference Discharges Affecting Source Water

Protection Areas in Section IX.H. (MN Rules 4720.5100-5590). This section requires incorporation of BMPs in the MS4's SWPPP to protect drinking water sources if they are mapped vulnerable sources identified under the wellhead protection or source water assessment programs.

## **B. Flexible Permitting Evaluation**

The Phase I Framework for Integrated Watershed-based Stormwater Permitting in Minnesota, 2006, outlined options under federal rules for flexible permitting at the state level. This section reiterates that discussion and describes the (1) US EPA's Qualifying Local Program and (2) shared responsibilities approach.

### *US EPA's Qualifying Local Program Approach*

The Phase 1 Framework for Integrated Watershed-based Stormwater Permitting in Minnesota (2006) references the Qualifying Local Program (QLP) approach to improve efficiency and collaboration of NPDES municipal stormwater permitting. The concept formally established in U.S. EPA regulations permits the state implementing agency to determine in advance that a specifically described program will meet identified MCM requirements. This allows MS4s to incorporate the approved QLP into its SWPPP rather than developing its own program. However, those regulations, at 40 CFR 122.44(s), allow the use of this QLP approach only for the Construction Site Stormwater Runoff Control MCM. This was confirmed with Region V EPA staff (Nikos Singelis, US EPA, personnel communications, April 2007).

### *US EPA's Shared Responsibilities Approach*

EPA rules (40 CFR §122.35), allow for two options for an MS4 permittee to utilize other governmental units or entities to implement minimum control measures. These options, referred to as the shared responsibilities approach, are<sup>85</sup>:

#### ***§ 122.35 As an operator of a regulated small MS4, may I share the responsibility to implement the minimum control measures with other entities?***

*(a) You may rely on another entity to satisfy your NPDES permit obligations to implement a minimum control measure if: (1) The other entity, in fact, implements the control measure; (2) The particular control measure, or component thereof, is at least as stringent as the corresponding NPDES permit requirement; and (3) The other entity agrees to implement the control measure on your behalf. In the reports you must submit under § 122.34(g)(3), you must also specify that you rely on another entity to satisfy some of your permit obligations. If you are relying on another governmental entity regulated under section 122 to satisfy all of your permit obligations, including your obligation to file periodic reports required by § 122.34(g)(3), you must note that fact in your NOI, but*

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<sup>85</sup> 40 CFR §122.35

*you are not required to file the periodic reports. You remain responsible for compliance with your permit obligations if the other entity fails to implement the control measure (or component thereof). Therefore, EPA encourages you to enter into a legally binding agreement with that entity if you want to minimize any uncertainty about compliance with your permit.*

*(b) In some cases, the NPDES permitting authority may recognize, either in your individual NPDES permit or in an NPDES general permit, that another governmental entity is responsible under an NPDES permit for implementing one or more of the minimum control measures for your small MS4 or that the permitting authority itself is responsible. Where the permitting authority does so, you are not required to include such minimum control measure(s) in your storm water management program. (For example, if a State or Tribe is subject to an NPDES permit that requires it to administer a program to control construction site runoff at the State or Tribal level and that program satisfies all of the requirements of § 122.34(b)(4), you could avoid responsibility for the construction measure, but would be responsible for the remaining minimum control measures.) Your permit may be reopened and modified to include the requirement to implement a minimum control measure if the entity fails to implement it.*

The existing MS4 General Permit allows for the first option described under the shared responsibilities approach, if the permittee (municipal MS4) remains responsible for compliance with the MS4 General Permit and conducts all annual reporting. The permittee’s NOI must identify the third party who will be responsible for implementing an MCM. **Table 5** summarizes the steps in this process with an example from Washington County. The example included is based on a real example currently being implemented, although the details may not be accurate.

**Table 5.** Summary of Shared Responsibility Process Initiated by MS4 Entity

Step #	General Description of Shared Responsibility Process Initiated by MS4 Entity	Example
1	MS4 Entity (A) identifies that another Entity (B) is implementing an MCM or other program that meets NPDES permit requirements.	The South Washington Watershed District (SWWD) identifies the East Metro Water Resource Education Program as providing stormwater related education within Washington County. The SWWD evaluates the program to ensure compliance with the minimum content requirements of MCM #1 – Develop Public Education and Outreach Program.
2	MS4 Entity (A) requests that Entity (B) accept responsibility for implementation of the particular MCM on behalf on MS4 Entity (A) to satisfy the permit obligations of MS4 Entity (A). MS4 Entity (A) remains responsible for compliance with its	The SWWD enters into agreement with the East Metro Water Resource Education Program that specifies the Program will complete the MS4 education and outreach requirements on behalf of the SWWD.

	permit obligations.*	
3	Entity (B) accepts responsibility.	The East Metro Water Resource Education Program enters into agreement with the SWWD to accept this responsibility.
4	MS4 Entity (A) states in its §122.34(f)(3) reports that it is relying on Entity (B) to satisfy its permit obligation.	The SWWD lists the East Metro Water Resource Education Program and other relevant information in its Notice of Intent and annual reports.

\*Note the EPA recommends that the MS4 entity and the implementing entity enter into a legally binding agreement in order minimize uncertainty about permit compliance.

The current MS4 General Permit does not allow for option (b), which allows another regulated NPDES entity to take over responsibility for meeting a MCM. Under this approach to shared responsibilities, described in detail within the Phase I Framework for Integrated Watershed-based Stormwater Permitting in Minnesota (2006), the NPDES Permitting Authority (MPCA) recognizes a NPDES regulated entity (MS4, Phase 1 community, or NPDES permitting authority) within the MS4 General Permit or Individual Permit (e.g. Phase I communities) as having the responsibility to implement MCM(s) for a specific MS4. This approach would be applicable in an individual applicant, co-permittee and sole permittee scenario. Under each of these scenarios, the specific MS4 is no longer responsible for compliance with permit requirements for the MCM(s) being implemented by another recognized NPDES regulated entity.

The Phase I Framework for Integrated Watershed-based Stormwater Permitting in Minnesota (section 3, subpart 2) describes in detail the process, challenges and benefits to utilizing this approach. There are no present examples of this process in Minnesota. Therefore, a theoretical example is offered in **Table 6** below.

**Table 6.** Summary of Shared Responsibility Process Initiated by NPDES Permitting Authority

Step #	General Description of Shared Responsibility Process Initiated by NPDES Permitting Authority	Theoretical Example
1	MS4s and the MPCA identify potential NPDES regulated entities that could be performing one or more MCM on behalf of another MS4.	The MPCA recognizes that Ramsey County (a NPDES regulated entity) is proposing a county-wide Illicit Discharge Detection and Elimination (IDDE) program.
2	Determine interest by NPDES-regulated entity to take over MCM on behalf of MS4.	The MPCA or Ramsey County MS4s determine that Ramsey County is willing to perform MCM #3 – IDDE Program requirements on behalf of all MS4s within the county.
3	MPCA evaluates ability of NPDES-regulated entity to meet MCM requirements within MS4 jurisdiction.	MPCA determines that the County’s IDDE program meets the minimum requirements for MCM 3 for each of the county MS4s.
4	MPCA recognizes the approved NPDES regulated entity within the MS4 General Permit.	The MPCA lists Ramsey County and the IDDE program in the General Permit for use within Ramsey County.
5	NPDES-regulated entity implements its SWPPP and reports annually to the permitting authority (MPCA), which also tracks program efficacy	Ramsey County identifies the IDDE program in its SWPPP and reports annually on the MCM. MS4s within the County do not need to address MCM 3 in their SWPPPs. MPCA tracks Ramsey County program annually.

This option would not require a statutory or rule change, but would require changes to the MS4 General Permit structure and process. MPCA program steps would include:

- Developing the overall process and training MPCA staff.
- NPDES regulated entities and programs would be reviewed and “recognized” by the MPCA.
- Amending the MS4 General Permit to include recognized NPDES regulated entities and their responsibilities. This could be done every five years coincident with general permit reissuance or the MPCA could add entities and programs to the MS4 General Permit between cycles; this latter approach would require ongoing MPCA rulemaking activity.
- MPCA would track the implementation and effectiveness of approved shared programs.

### C. Permitting scenario evaluation

The permitting scenario evaluation consists of two parts: 1) Determine the appropriate permitting scenario 2) Develop steps to implement it.

During the listening sessions, it became clear that “linear” MS4s (road authorities) would not benefit from a change in the overall MS4 permitting program to allow for watershed-based permitting. The concern of linear MS4s is the multiple and divergent sets of requirements as a linear project traverses communities and watersheds. Shared responsibilities or QLPs could simplify permitting for projects of a linear nature. Linear MSAs, however, are not further considered in the discussion presented below.

### *Determining the Appropriate Permitting Scenario for a WMO*

The Phase 1 Framework for Integrated Watershed-based Stormwater Permitting in Minnesota (2006) outlined in detail the individual applicant, sole permittee, and co-permittee scenarios. The following text from that report describes the sole and co-permittee scenarios<sup>86</sup>:

#### Sole Permittee

*EPA’s Watershed-based NPDES Permitting Implementation Guidance describes a permitting scenario that involves developing and issuing an NPDES permit to an authorized watershed entity that represents point source dischargers [which include MS4 permittees] within a watershed. This scenario would require that only one permittee submit an NOI and SWPPP to the permitting authority for an MS4 area (i.e. watershed) that includes other entities. This sole permittee would implement the SWPPP for the entire watershed area in lieu of requiring the other MS4s within that boundary to comply. Unlike the co-permittee scenario, this sole permittee would be singly culpable and responsible for permit compliance even within areas of the MS4 that are not owned and operated by that sole permittee. The purpose for this type of approach is to promote complete integration on a watershed-basis for maximum water quality improvements and administrative efficiencies for both the permitting authority and permittees.*

#### Co-permittee

*The [Federal] NPDES Stormwater Program gives regulated MS4s the flexibility to share permit compliance responsibilities by taking a co-permittee approach. Under the NPDES Stormwater Phase II Final Rule, multiple regulated small MS4s may jointly submit an NOI for MS4 general permit coverage as co-permittees. Each permittee will be equally liable for compliance, however, responsibility for implementing the MCM can be shared amongst the co-permittees or one of the covered co-permittees can be responsible for implementing all MCM for the other co-permittees covered. The NOI must describe which entities will implement the MCM within the area to be covered. (It is important to note that although the federal stormwater regulations allow a co-permittee permitting approach, MPCA’s draft proposed MS4 general permit does not explicitly address whether or not regulated small MS4s can jointly submit an NOI and share responsibility for SWPPP development and implementation.)*

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<sup>86</sup> From Framework for Integrated Watershed-based Stormwater Permitting in Minnesota (May 2006), section 3.

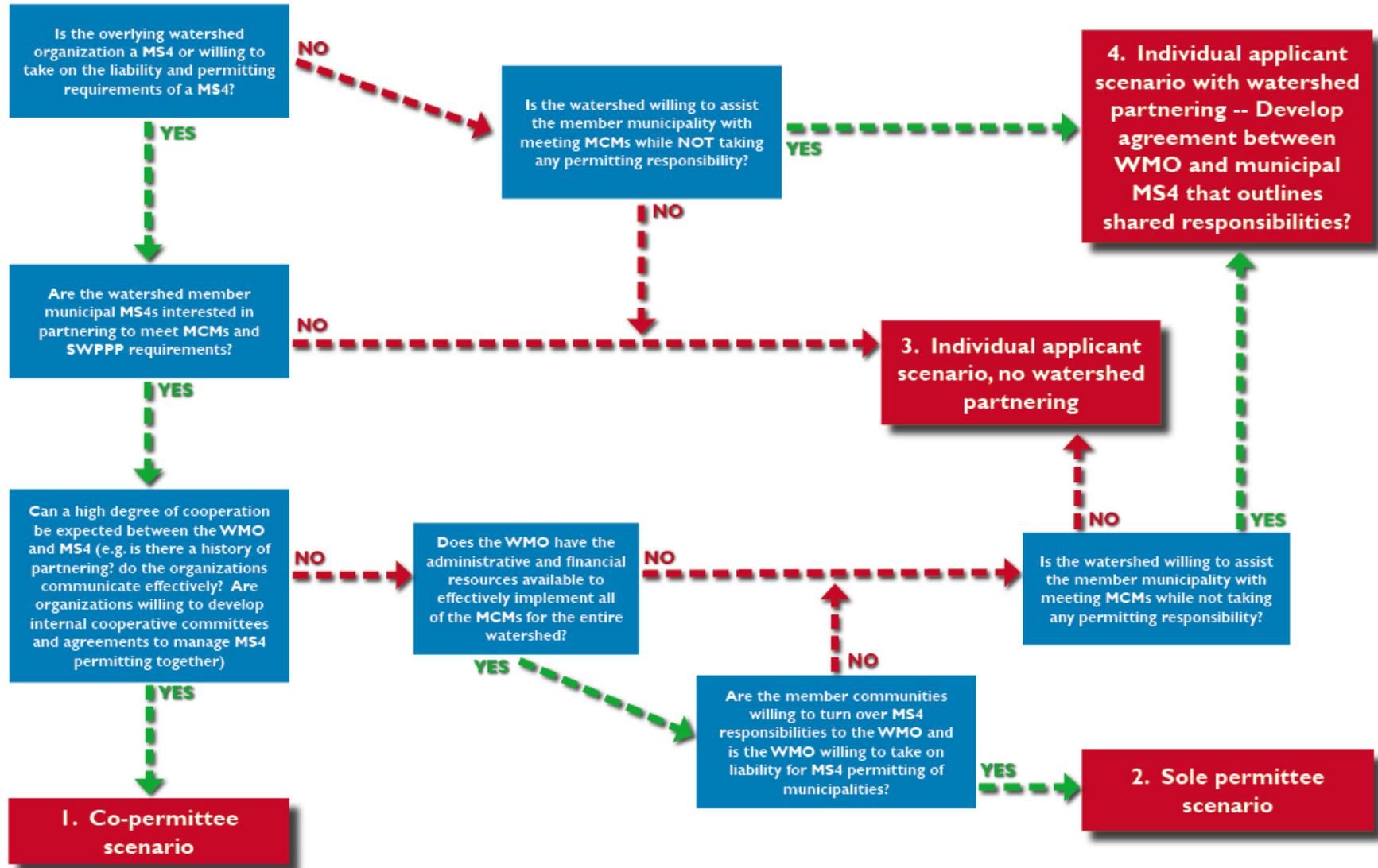
A flow chart can assist in identifying if a sole or co-permitting scenario would be advantageous. The flow chart (Figure 1) has four end points:

- Individual applicant scenario;
- Individual applicant scenario, with watershed/MS4 partnering;
- Co-permittee scenario; and
- Sole permittee scenario.

Key questions to be asked and evaluated when determining if a co- or sole permittee role is appropriate for a WMO include:

1. Is the overlying watershed organization an MS4 or willing to take on the liability and permitting requirements of an MS4?
2. Are the watershed and member municipal MS4s interested in partnering to meet MCMs and SWPPP requirements?
3. Can a high level of cooperation be expected between the WMO and MS4?
4. Does the WMO have the administrative and financial resources available to effectively implement all or some of the MCMs for the municipal MS4?
5. Are the member communities willing to turn over MS4 responsibilities to the WMO? Is the watershed willing to take on compliance and third-party liabilities related to SWPPP implementation?

Figure 1. WMO Permitting Scenario Flow



### *Steps to Implementation*

The steps to implement a co- or sole permitting scenario for the piloted watershed organizations will differ depending on the type of WMO being considered. A WMO that is an existing MS4 will be evaluated for the sole and/or co-permittee scenarios. A WMO that is not an existing MS4 will be evaluated under USEPA's shared responsibility approach.

The following describes the steps needed to adjust permittee status for each type of WMO. Review and evaluation of each municipal MS4 also will follow the steps listed below. The step by step processes do not differ as among WMOs that are watershed districts, joint powers organizations, and county led WMOs.

#### MS4 WMO

The following steps implement a co- and/or sole permitting scenario for an MS4 WMO. These steps assume that the WMO and municipal MS4 are in favor of a watershed-based permitting approach.

- Step 1. Identify current overlaps and gaps in municipal and WMO plans and local controls (including SWPPPs) as relates to each MCM and NPDES permitting requirements. Currently MN Rules 8410 and MN Statute 103B do not require that MS4 program elements be included in watershed and local water management plans (pre-2007).
- Step 2. Identify areas for shared responsibilities (between WMO, municipal MS4 and other entities) and develop legal agreements between the parties.  
Determine costs and funding sources including staffing requirements.
- Step 3. Develop watershed plan amendments as needed to implement MCM(s) (could also be accomplished by revision to 8410).
- Step 4. Develop appropriate MCM programs.
- Step 5. Institute risk management practice to address potential liabilities.
- Step 6. Work with member MS4s and MPCA to be recognized in the MS4 General Permit as providing permit compliance within its boundary (for sole permittee scenario).
- Step 7. Prepare and submit NOI and SWPPP for MS4 General Permit coverage. Co-permittee scenario will identify all permittees and their responsibilities (not explicitly allowed within current MS4 General Permit).
- Step 8. Implement SWPPP and conduct annual reporting.
- Step 9. Document required statute, rule and permit changes.

#### Non-MS4 WMO

The following steps implement an individual applicant scenario using the USEPA's Shared Responsibility approach.

- Step 1. Identify current overlaps and gaps in municipal and WMO plans and local controls (including SWPPPs) as relates to each MCM and NPDES permitting requirements.
- Step 2. Identify shared responsibilities (between WMO, municipal MS4, and other entities) and develop legal agreements between the parties. Discussions will be held between the WMO and municipal MS4.
- Step 3. Determine costs and funding sources including staffing requirements.
- Step 4. Develop watershed plan amendments as needed to allow implementation of MCM(s) (could also be accomplished by revision to 8410).
- Step 5. Develop appropriate MCM programs.
- Step 6. Institute risk management practice to address potential liabilities.
- Step 7. Municipal MS4 will submit NOI and SWPPP to MPCA referencing shared responsibilities with the WMO.
- Step 8. WMO and municipal MS4 will implement MCM(s) as described in legal agreements. Municipal MS4 continues to submit annual reporting requirements.
- Step 9. Document required statute, rule and permit changes.

## VI. COST ANALYSIS

The cost analysis provides the necessary information to determine if a change in the stormwater permitting structure would be a cost-saving incentive. If cost-savings are realized at the state, watershed, and local levels, implementation of a watershed-based permitting NPDES permitting program will more likely be supported. A cost analysis was conducted for the permitting agency (MPCA) and the municipal MS4 permittee.

### A. MPCA Cost Evaluation

An estimate of existing MPCA costs to conduct the NPDES MS4 program was developed by MPCA staff. MPCA costs were developed for the 2011-2021 permitting cycle and are based on 2006 dollars.

#### *Background*

There are currently 236 regulated small MS4s (municipal) in the State, with 159 of these MS4s located within the Metropolitan Area. The remaining 77 are located in Greater Minnesota. There are currently 37 watershed organizations within the Metropolitan Area.

Costs are based on 2006 average hourly rates for MPCA staff. Hourly rates take into account overhead costs and benefits and are included in Table 8.

Table 8. MPCA Hourly Rates.

<b>Classification</b>	<b>Hourly Rate at mid-range [\$]</b>
Pollution Control Specialist, Sr.	36.25
Hydrologist 2	36.30
Hydrologist 3	44.85
Engineer Senior	46.78
Grad. 2 Engineer	37.37
Compliance Coordinator	41.72
Pollution Control Specialist, Analyst	33.97
Student Worker	20.09
Supervisor	61.50
Manager	65.94
NOI reviewer average	41.03
Annual Report reviewer average	25.32

## *Assumptions*

There were many variables that were evaluated for each cost scenario, which when taken together magnify the uncertainty of the cost estimate. MPCA staff has developed this best guess for cost estimates based on the following key assumptions:

1. The entire state and all current municipal small MS4 permittees are included in the cost estimates. MPCA made this a part of the estimate because it expects any changes in its future approach to be applied statewide.
2. The cost estimate for the individual applicant and joint permitting scenarios assumes that in the future (2011-2021) SWPPPs will be the main vehicle to evaluate compliance with water quality standards including TMDLs. SWPPP review will also occur in far more detail than under the current process (see also #5 below).
3. The co-permittee and sole permittee scenarios both assume that watershed organizations would be the lead permitting organization, and therefore reduces the number of permits equally.
4. For the Notice of Intent, Annual Report and Audit entries, MPCA expects that hours per permit will increase in order to “insure coverage” of all permittees. Reviewing individual permittees is the simplest review approach, gaining complexity as co-permittee and sole WMO permittee agreements occur. That is, complexity of arrangement results in more time spent per community and WMO.
5. In the future (2011-2021), SWPPPs will be scrutinized further than under current conditions due to USEPA expectations. All minimum control measures (MCMs) will be heavily scrutinized, versus the current model that focuses on construction and post-construction MCMs.
6. Adjustments in costs occur across the table. The audits entry, for example, is based upon the USEPA recommended average of three days per audit. Under the co-permittee option, the agency would need to obtain information from several co-permittees and compare them to the others, thus increasing the time per permittee, as reflected in the increase. However, overall costs go down because the permittees are on the same cycle and can be checked all at once rather than irregularly spread over the five-year permit cycle. That is, the efficiency of review improves.

The following tasks are included in the cost estimates:

1. Notice of Intent (NOI) Review – This application by the permittee is required to be reviewed by MPCA staff for compliance with the General Permit.
2. Notice of Intent Public Notice – Each NOI or application submitted by a permittee is placed on public notice for review and comment.
3. Annual Report Review – Annual reports submitted by permittees are reviewed by MPCA staff.
4. Audits - 20% of all SWPPPs are assumed to be audited by MPCA staff annually.
5. Elevated Enforcement – Assumes that 1 in 120 SWPPPs will not be implemented appropriately and will not be meeting the intent of the General Permit. MPCA staff will enforce the General Permit in these situations.

6. Education and Technical Assistance – MPCA staff provides educational materials and technical assistance with SWPPP development and implementation. These costs include an additional \$10,000 for contract work.

Appendix B contains the equations used to generate the cost estimate tables.

*Individual Applicant Estimate*

Table 9 summarizes the cost estimate for the current individual applicant scenario (236 applicants). This cost estimate reflects an individual applicant scenario where every MS4 is required to obtain permit coverage for all of the six MCMs. Permit applicants can obtain assistance from other entities (ex. SWCDs, WMOs) to meet any of the MCMs, but the permit applicant must meet all application and reporting requirements. Table 9 includes costs for 159 metro MS4s and 77 non-metro MS4s.

Table 9. Estimated annual costs based on current individual applicant scenario, 2011-2021 permit cycle. Appendix B contains calculation details.

	<b>Annual hours of effort per permittee</b>	<b>Cost</b>
<b>Notice of Intent Review (every 5 yrs.)</b>	11	\$ 21,302.78
<b>Notice of Intent Public Notice (every 5 yrs.)</b>	4	\$ 6,844.00
<b>Annual Report Review</b>	2	\$ 11,951.04
<b>Audits (20%/yr)</b>	24	\$ 46,478.78
<b>Elevated Enforcement (1 in 120 annually)</b>	50	\$ 4,164.42
<b>Education and Technical Assistance</b>	6	\$ 58,101.52
<b>Total Full Time Equivalent Staff</b>		<b>1.84</b>
<b>Total Costs</b>		<b>\$148,842.54</b>

*Joint Applicant Estimates*

MPCA staff also developed projected costs based on the descriptions of the two joint permitting scenarios being evaluated in this study. Table 10 includes the cost estimates for each permitting scenario. Each permitting scenario includes an estimate for two different scenarios, one based on 100% participation within the metro area and one based on 50% participation within the metro. Both of these scenarios result in a reduced number of permits being issued. The 100% participation scenario assumes that all watershed organizations within the metro area (37)

participate in the co-permitting scenario and that all non-metro MS4 permittees (77) remain individual applicants, for a total of 114 permits. The 50% participation scenario assumes that 50% of the watershed organizations within the metro area (18) participate in a co-permitting effort, 100% of non-metro permittees (77) remain individual applicants along with 57% of all metro MS4s (91), for a total of 186 permits. This takes into account small municipal MS4s that are overlapped by a WMO taking part in a co-permitting scenario and a WMO that is not taking part in a co-permitting scenario. Table 10 summarizes the cost estimates for each of the joint permitting scenarios.

Each scenario assumes a total of 114 permits for 100% compliance within the Metropolitan Area. This assumes that every WMO within the Metropolitan Area is the lead permittee and works with member municipal MS4s to meet all General Permit requirements or the WMO is the sole permittee, taking on full responsibility from member municipal MS4s for compliance with the General Permit. The 50% scenario assumes a total of 186 permittees (18 metro WMO and 168 LGUs) to be regulated by the MPCA.

Table 10. Estimated annual costs based on joint permitting scenarios, 2011-2021 permit cycle. Appendix B contains calculation details.

<b>Co-Permittee Scenario</b>				
	<b>100% (37 Metro WMOs, 77 Non-metro MS4)</b>		<b>50% (18 Metro WMOs, 91 Metro MS4, 77 Non-metro MS4)</b>	
	<b>Annual hours of effort per permittee</b>	<b>Cost</b>	<b>Annual hours of effort per permittee</b>	<b>Cost</b>
<b>Notice of Intent Review (every 5 years)</b>	22 joint (37) 11 individual (77)	\$6,679.68 <u>\$6,950.48</u> \$13,630.16	28 joint (18) 11 individual (168)	\$4,135.82 <u>\$15,164.69</u> \$19,300.51
<b>Notice of Intent Public Notice (every 5 years)</b>	5 joint 4 individual	\$1,256.89 <u>\$2,092.55</u> \$3,394.44	5 joint 4 individual	\$652.50 <u>\$4,872.00</u> \$5,524.50
<b>Annual Report Review</b>	4 joint 2 individual	\$3,747.36 <u>\$3,899.28</u> \$7,646.64	4 joint 2 individual	\$1,823.04 <u>\$8,507.52</u> \$10,330.56
<b>Audits (20%/year)</b>	48 joint 24 individual	\$14,573.86 <u>\$15,166.69</u> \$29,740.55	52 joint 24 individual	\$7,680.82 <u>\$33,086.59</u> \$40,767.41
<b>Elevated Enforcement (1 in 80 annually)</b>	75 joint 50 individual	\$1,460.02 <u>\$2,038.09</u> \$3,498.11	75 joint 50 individual	\$714.66 <u>\$4,446.75</u> \$5,161.41
<b>Education and Technical Assistance</b>	10 joint 6 individual contracts	\$12,568.90 \$15,694.14 <u>\$10,000.00</u> \$38,263.04	10 joint 6 individual contracts	\$6,114.60 \$34,241.76 <u>\$10,000.00</u> \$50,356.26

<b>Total Full Time Equivalent Staff</b>	<b>1.2</b>	<b>1.6</b>
<b>Total Costs</b>	<b>\$96,172.94</b>	<b>\$131,440.65</b>
<b>% of Individual Applicant Scenario</b>	<b>65%</b>	<b>88%</b>

<b>Sole Permittee Scenario</b>				
	<b>100% (37 Metro WMOs, 77 Non-metro MS4)</b>		<b>50% (18 Metro WMOs, 91 Metro MS4, 77 Non-metro MS4)</b>	
	<b>Annual hours of effort per permittee</b>	<b>Cost</b>	<b>Annual hours of effort per permittee</b>	<b>Cost</b>
<b>Notice of Intent Review (every 5 years)</b>	14 joint (37) 11 individual (77)	\$4,250.71 <u>\$6,950.48</u> \$11,201.19	16 joint (18) 11 individual (168)	\$2,363.33 <u>\$15,164.69</u> \$17,528.02
<b>Notice of Intent Public Notice (every 5 years)</b>	4.5 joint 4 individual	\$1,207.12 <u>\$2,233.00</u> \$3,440.12	4.5 joint 4 individual	\$587.25 <u>\$4,872.00</u> \$5,459.25
<b>Annual Report Review</b>	3 joint 2 individual	\$2,810.52 <u>\$3,899.28</u> \$6,709.80	3 joint 2 individual	\$1,367.28 <u>\$8,507.52</u> \$9,874.80
<b>Audits (20%/year)</b>	28 joint 24 individual	\$8,501.42 <u>\$15,164.69</u> \$23,666.11	30 joint 24 individual	\$4,431.24 <u>\$33,086.59</u> \$37,517.83
<b>Elevated Enforcement (1 in 140 annually)</b>	50 joint 50 individual	\$559.62 <u>\$1,164.62</u> \$1,724.24	50 joint 50 individual	\$272.25 <u>\$2,541.00</u> \$2,813.25
<b>Education and Technical Assistance</b>	5 joint 6 individual Contracts	\$6,284.45 \$15,694.14 <u>\$10,000.00</u> \$31,981.59	5 joint 6 individual Contracts	\$3,057.30 \$34,241.76 <u>\$10,000.00</u> \$47,299.06
<b>Total Full Time Equivalent Staff</b>		<b>0.9</b>		<b>1.5</b>
<b>Total Costs</b>		<b>\$78,723.05</b>		<b>\$120,492.21</b>
<b>% of Individual Applicant Scenario</b>		<b>53%</b>		<b>81%</b>

### Conclusions

The following conclusions are based on the MPCA cost estimates:

1. Per permittee costs go up because of increased complexity, but overall costs go down because of fewer permit numbers and improved review efficiency.

2. Any movement toward joint or sole permitting will save MPCA hours and cost – the amount of each depends upon participation level, with increased savings mounting as participation increases.
3. The costs associated with allowing Qualifying Local Programs and Shared Responsibilities as part of the General MS4 Permit have not been evaluated.

## **B. Municipal MS4 Cost Evaluation**

The objective of the Municipal MS4 Cost Evaluation was to gather baseline cost information from existing MS4 municipalities for capital, operations and maintenance, and administrative costs relating to their MS4 programs. The information is compared to per household cost estimates prepared by the USEPA (EPA, 1999).

### *Method of Evaluation*

An on-line survey was developed based on the questions included in *Economic Analysis of the Final Phase II Stormwater Rule* (EPA, 1999). The survey was distributed to the sample community through an existing MS4 list serve via the MPCA on March 16, 2007. Responses to the survey were collected until March 30, 2007. Appendix C contains the full survey.

The survey was distributed to 120 municipalities in the seven-county metro area. About 31% of the communities responded to part or all of the survey, with detailed cost estimate data collected from 10% of metropolitan municipal small MS4s.

Upon completion of the survey, data were summarized by municipality and household. The following summary statistics were calculated:

- Response rate
- Average municipal cost for each MS4 program element
- Average total cost to municipality for MS4 program
- Average estimated municipal cost savings for municipalities that share MS4 program elements
- Average household cost of MS4 program element
- Average total household cost of MS4 program

### *Results*

The overall response rate for the survey was 31.7 percent, with 38 of the 120 MS4 entities responding to at least a portion of the survey. Mn/DOT and Ramsey County also provided full cost information. The response rate for those municipal MS4s that provided complete cost information was 12 percent of the entire pool of 120. The municipal MS4s that provided full cost information include:

- Chanhassen
- Elk River (non-metro area)
- Excelsior
- Lakeville
- Oakdale
- Prior Lake

- Forest Lake
- Gem Lake
- Hilltop
- Roseville
- Shorewood
- Woodbury

Several other municipalities provided partial cost information. The municipal MS4s that provided partial cost information include:

- Andover
- Burnsville
- Empire Township
- Fridley
- Lakeville
- Lauderdale
- Lexington
- Loretto
- Newport
- Osseo
- Plymouth
- Ramsey
- Richfield
- Spring Lake Township
- Wayzata
- Willernie

All of the data were reviewed and scrutinized to determine the applicability and comparability of the submitted raw data. To make the data comparable the following steps were taken:

- Responses of zero (no cost) were eliminated and not included in the calculations because it is assumed that the implementation of each MCM has a cost associated with it
- Responses for MCM 5 did not always represent the same information. In some cases, capital costs were included (e.g. land acquisition funds) while in others those costs were not included. The dollars reported for MCM 5 are adjusted by removing the dollars identified as capital expenditures.
- Some cities were not included in the results as the data reported were determined to be inadequate for comparison purposes.

### Average cost per minimum control measure

Respondents were asked to provide a cost estimate for each minimum control measure (MCM) in their MS4 program. The average cost of each MCM is summarized in Table 11.

Table 11. Average Cost per Minimum Control Measure

Minimum Control Measure	Average Cost <sup>1</sup>	Cost Range <sup>1</sup>	Number of Respondents <sup>1</sup>
1. Public education and outreach	\$8,593	\$150-\$40,000	21
2. Public participation and involvement	\$7,278	\$100-\$39,897	14
3. Illicit discharge detection and elimination	\$19,454	\$100-\$101,000	13
4. Construction site runoff	\$61,945	\$1,000-\$178,340	12
5. Post-construction runoff control	\$54,130	\$1,000-\$179,000	11
6. Pollution prevention and good housekeeping	\$151,265	\$420-\$528,600	12
<b>Total:</b>	<b>\$302,664</b>		<b>N/A</b>

<sup>1</sup> Data from following communities were eliminated from the Average Cost per Minimum Control Measure calculation: Spring Lake Township, Loretto, Hilltop, Willernie, and Lauderdale. All other cost information provided by respondents was included in the Average Cost per Minimum Control Measure calculation.

### Average cost per household

Respondents were asked to provide the number of households within their jurisdiction so that the cost per household could be calculated. The average cost per household of each minimum control measure is summarized in Table 12.

Table 12. Average Cost per Household

Minimum Control Measure	Average Cost per Household <sup>1</sup>	Number of Respondents <sup>1</sup>
1. Public education and outreach	\$1.41	14
2. Public participation and involvement	\$1.99	12
3. Illicit discharge detection and elimination	\$3.89	12
4. Construction site runoff	\$11.00	11
5. Post-construction runoff control	\$6.49	10
6. Pollution prevention and good housekeeping	\$19.71	11
<b>Total:</b>	<b>\$44.48</b>	<b>N/A</b>

<sup>1</sup> Data from the following communities was eliminated from the Average Cost per Household calculation: Spring Lake Township, Loretto, Hilltop, Willernie, and Lauderdale. All other cost information provided by respondents was included in the Average Cost per Household calculation.

Additional analysis was conducted to compare the total MS4 program costs with land area being served by the MS4 and total market value. Figures 1 and 2 illustrate these findings. The municipalities included in these analyses include Prior Lake, Oakdale, Roseville, Chanhassen, Forest Lake, Gem Lake, Shorewood, Lakeville, Woodbury, and Excelsior.

Figure 1. Total MS4 Program Cost versus Area Served by MS4 System

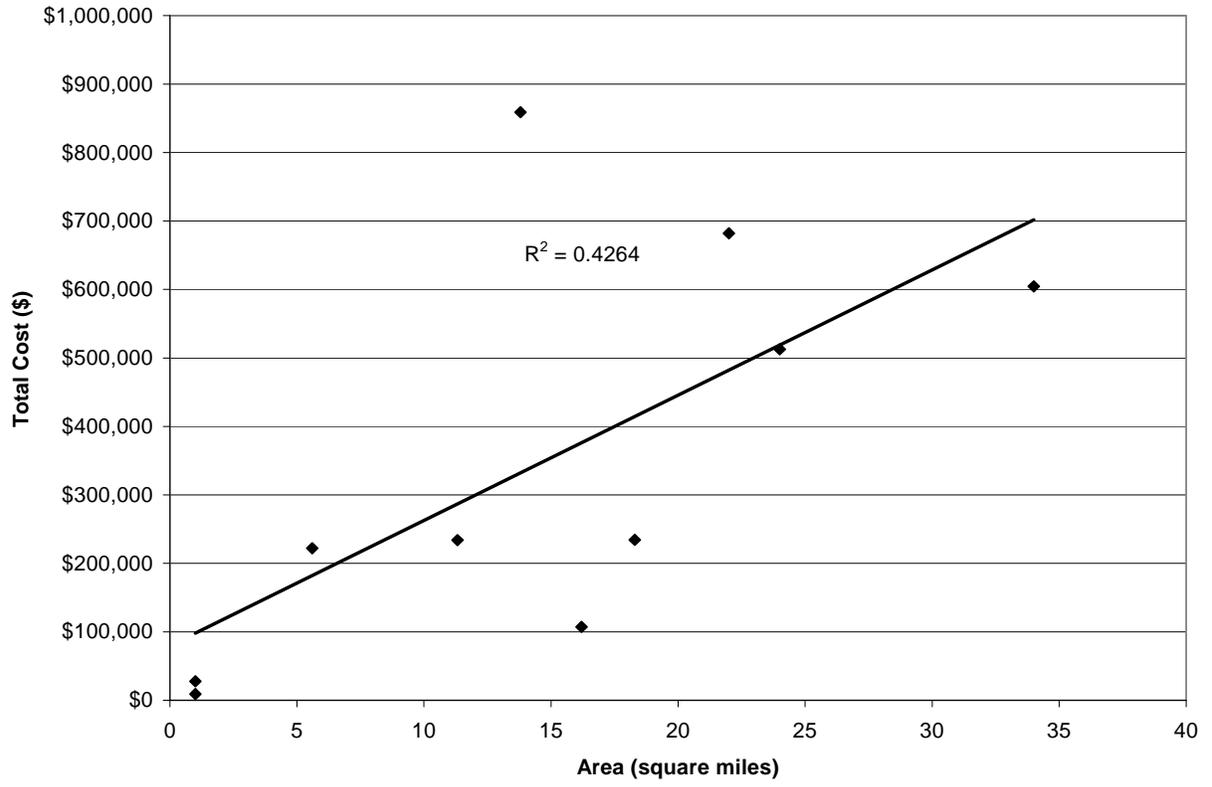
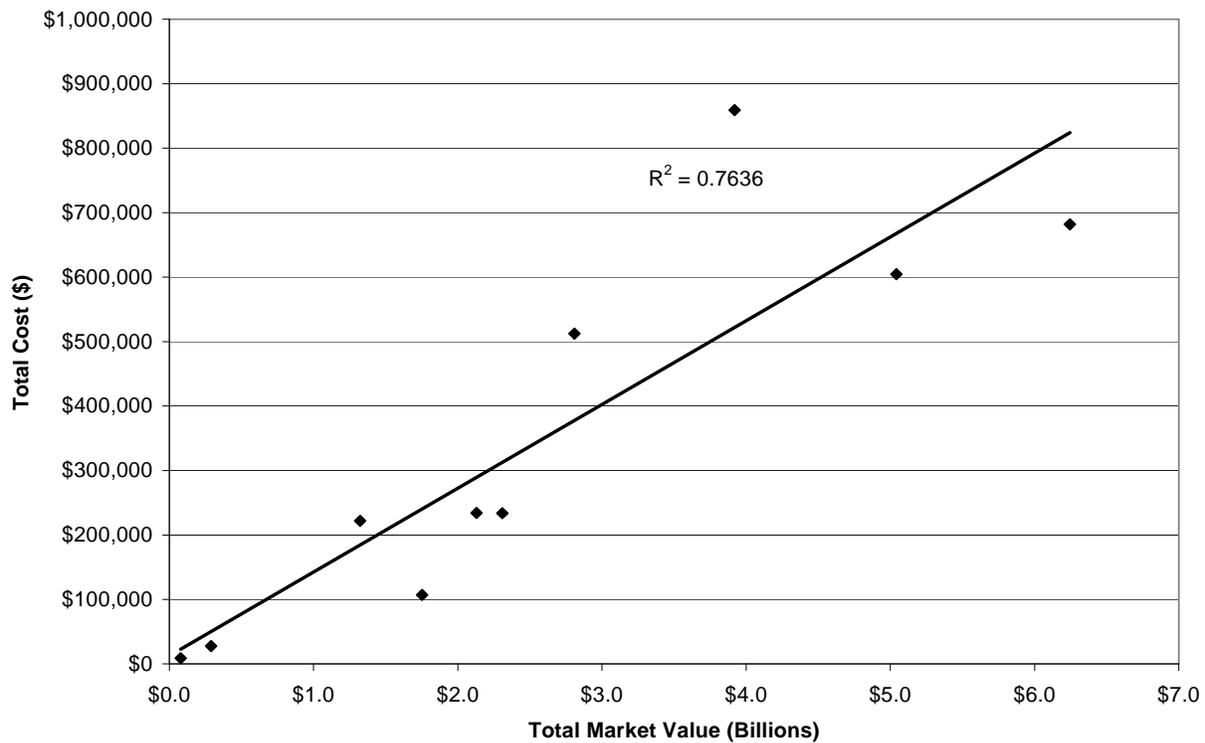


Figure 2. Total MS4 Program Cost versus Total Market Value



### Average cost savings for sharing responsibilities

Respondents were asked to indicate whether or not they share responsibilities for any MS4 program element with another organization such as a watershed management organization, another MS4 community, or a non-profit. If respondents answered "yes" to this question, they were then asked to provide an estimate of the cost savings to their municipality, if any, for sharing responsibility with another MS4 entity. Although there were few quantified responses to this question, all respondents who provided a cost estimate indicated a cost savings from sharing responsibilities. The average cost savings for sharing responsibilities is summarized below (Table 13).

Table 13. Average Cost Savings for Sharing Responsibilities

Minimum Control Measure	Average Cost Savings	Number of Respondents
1. Public education and outreach	\$2,500	5
2. Public participation and involvement	\$1,625	4
3. Illicit discharge detection and elimination	\$2,125	4
4. Construction site runoff	\$12,750	4
5. Post-construction runoff control	\$1,833	3
6. Pollution prevention and good	\$1,000	1

housekeeping		
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*Discussion and Comparison to 1999 USEPA Cost Estimate*

In its 1999 economic analysis of the Phase II Stormwater Rule, the USEPA estimated the average annual cost of the rule to households to be \$9.16. Adjusting for inflation, the USEPA’s estimated average annual cost to households in 2006 is \$11.33. The survey undertaken in this BWSR study found the average annual cost in 2006 to be \$44.48.

One of the most significant reasons for the discrepancy between the USEPA’s estimated costs and the actual costs reported by respondents to this survey is due to the existing water regulations within the State of Minnesota. The Metropolitan Surface Water Management Act, enacted in 1982, requires local government units to plan and implement comprehensive surface water management programs. As a result, many of the components of a typical municipality’s MS4 program were likely already in place prior to the implementation of the Phase II Stormwater Rule. While the average per household cost of this survey may be higher than that forecasted by the USEPA, the cost may not reflect an actual increase in costs to Minnesota taxpayers as many components of the MS4 program were likely already in place prior to the implementation of the Phase II Stormwater Rule. Survey respondents were asked to identify the number of full time equivalent staff that were added as a result of the Phase II program. Fourteen municipalities identified between 0 and 1 FTEs were added to address specific MS4 program related requirements. All of the respondents had full time staff prior to the Phase II requirements and half needed to add additional staff.

## **VII. FINDINGS CONCERNING COLLABORATION AND IMPROVING STORMWATER PROGRAM EFFECTIVENESS**

### **A. Background**

This portion of the report draws together findings from all of the information gathering phases of the study and offers some conclusions on the basis of this information. Input to this analysis comes from the following activities:

- Listening sessions (7) with state and regional agencies, watershed organizations, cities, and private interests
- Advisory Committee meetings
- Pilot Area Study
- State Stormwater Committee meetings
- Study team discussions with BWSR, MPCA and various WMOs and cities

The discussion that follows attempts to gather consensus from this input and draw conclusions about the potential for more and better collaborative efforts on local stormwater management. During the input part of the study, all ideas were collected and all opinions on the success or failure of the current approach were considered. As discussions proceeded, the study team, in conjunction with BWSR, the Advisory Committee and the Pilot Area participants, began to define problems and potential solutions. Clearly, consensus on many aspects of stormwater management collaboration is difficult, as evidenced in the “Factors Affecting Collaboration” section that follows shortly below. Surprisingly, however, is the number of issues upon which consensus can be attained. At times, consensus could be attained as to the nature of the problem, but not as to solutions. A good example of this is the desire of many local stormwater managers for more formal collaboration, but failure to act because of the perceived threat of state and federal liability if the collaboration does not work. We have tried to address that fear and work with the state agencies to clarify the true nature of that liability.

This study goes as far as was possible within its scope to address what needs to be done. It will not address all needs, however. Where additional work is needed, it is so noted. One example is the recommendation that BWSR prepare guidance for MS4 communities and WMOs interested in pursuing collaboration, but unsure of how to do it or what liabilities exist. One of the biggest conclusions of the study is that very few barriers exist to prevent this kind of collaboration, but participants need to know the basics for success.

The BWSR Watershed Study identified a need to do some in-depth fact finding with two Pilot WMOs and two MS4 cities within each of those WMOs. The intent was to identify the concerns and hopes of these pilot participants with respect to increased collaboration. This chapter introduces the conclusions that have been drawn from all study input received, with emphasis on the Pilot Areas relative to:

1. Factors affecting collaboration
2. MCM coordination opportunities
3. Related programmatic factors

Explanation of the pilot area selection process, detailed interview notes, and categorized input summaries are contained in Appendix D.

The following representatives of pilot participating WMOs and MS4 communities were interviewed:

- Jim Hafner, Stormwater Manager, City of Blaine (CCWD) – June 18, 2007
- Sharon Doucette, Environmental Resources Coordinator, and Paul Kauppi, Public Works Engineer II, City of Woodbury (RWMWD) – June 19, 2007
- Cliff Aichinger, Administrator, Ramsey-Washington Metro Watershed District- June 19, 2007
- Bill Dircks, Public Works Superintendent, City of Little Canada (RWMWD) – June 19, 2007
- Dave Berkowitz, City Engineer, City of Andover (CCWD) – June 20, 2007
- Tim Kelly, District Administrator, Coon Creek Watershed District – June 20, 2007

## **B. Factors Affecting Collaboration**

The pilot participant assessment allowed for a definition of the factors that work for and against further WMO/MS4 collaboration. The following interview team findings resulted from summarizing pilot participant input. Many of these points were raised during other input phases, including Advisory Committee meetings.

### Factors Working in Favor of Greater Collaboration (interview team findings)

#### *Joint*

- There are no legal barriers to enhanced collaboration; many examples of existing efforts show success and willingness to informally work together
- WMOs and cities often work together now to support each others' regulatory, education and planning programs
- Stormwater has become a much more visible topic to local officials and the public, and more comprehensive/collaborative programs have resulted
- There is a natural tendency toward collaboration with respect to programs such as TMDLs, non-degradation and source water protection
- WMO and city staff both are in a position to monitor activities affecting watershed and local resources, and work with each other on remedial solutions
- WCA LGU authority may reside with either the MS4 or the WMO and call for coordination with the wetland regulatory authority of the other entity
- Both cities and watershed organizations have flexible funding mechanisms that allow for funding of staff positions, programs, and projects (e.g., use of a stormwater utility)
- Coordinated water resource planning under Minnesota Statutes chapter 103B is an existing framework for collaboration

#### *WMO*

- WMO's are institutionally suited to develop watershed knowledge and stormwater management expertise and to make it available to communities on a watershed basis

- There is potential and some interest for WMOs to play more of a role in implementing MCMs
- Nothing prohibits a WMO (MS4 or non-MS4) from collaborating on MCM implementation.

#### *MS4 (community)*

- Cities are under pressure to reduce stormwater management costs and fund more visible priorities at higher levels; they can do so by looking to WMOs for MCM implementation at WMO cost or to gain cost efficiencies that both entities can share
- Cities have enforcement powers more extensive than those of WMOs
- City housekeeping practices (salt and sand storage and application, BMP O&M, chemical treatment, city vehicle maintenance, public land management) can produce significant cost savings while substantially improving water quality
- Cities all have emergency response programs that can be supplemented, if needed, to include response to illicit discharges and that can be improved with a watershed focus

#### Factors Working Against Greater Collaboration (interview team findings)

##### *Joint*

- Municipal autonomy is in tension with a watershed-scale approach
- Timing of various required water planning and permitting programs and reporting obligations is not well coordinated
- Comfort level with *status quo*, perceived limits on potential program savings from collaboration and the transaction costs of collaboration could inhibit the search for a better approach
- WMOs and MS4s both are reluctant to relinquish their construction erosion control and post-construction stormwater management responsibilities, and both seem comfortable with current overlap because of improved vigilance and the fact that cost savings to an individual WMO or MS4 from reducing duplication are not perceived as substantial (also a positive factor)
- Transaction costs and liability uncertainties of collaboration – or perceptions thereof -- may exceed potential monetary gains

##### *WMO*

- The focus of a non-elected WMO governing body on watershed rather than city-scale issues is seen by some to detract from responsiveness to local needs
- WMOs that are not also MS4s may see participation in MS4-related activities as an undesirable expansion of responsibility, liability and focus
- MS4 coverage extends only to owned stormwater conveyance infrastructure and therefore does not apply to many water resources with which WMO programs are concerned

##### *MS4 (community)*

- Water is only one of many concerns facing municipal government; an MS4 may not prioritize stormwater management sufficiently to invest in collaborative engagement
- Most cities have territory that lies in more than one WMO, making collaboration more complex and suggesting that net benefits of collaboration may be less substantial

- Limited specialized staff expertise in some smaller MS4s may inhibit MS4 desire to explore collaboration
- A perception of liability exposure inhibits entering into formal collaborative agreements and restricts collaboration to areas such as public education that where it can occur less formally
- Some cities do not see the need to collaborate with WMOs for successful stormwater management

### **C. MCM Coordination Opportunities**

The focus of this BWSR Watershed Study has been to identify opportunities for improved collaboration between WMOs and local MS4s in meeting MS4 MCM requirements. Based on the pilot participant interviews and analysis of plans and annual reports, as well as input received over the course of the study, the following opportunities for MCM coordination were identified by the interview team:

#### *#1 – Public Education and Outreach*

This MCM presents significant coordination opportunities for WMO and MS4 communities. Attention will be needed to avoid confusion and the potential for conflicting or differing approaches where cities have more than a single WMO within their boundaries. In most cases the requirement to have an education program that distributes material on the nature and management of stormwater can be handled by an oversight entity such as a WMO. Additional community-specific details or items of interest that a municipal MS4 wants to emphasize can be incorporated as a supplement by the MS4. This MCM provides perhaps the best opportunity to save MS4 communities the effort of developing and distributing potentially duplicative material. In fact, many WMOs now provide this as a service to its municipalities, but not as an officially sanctioned Phase II action. In this program area, collaboration need not be overly formalized and liability risks are low.

This MCM should also be the location to bring in non-WMO and non-MS4 interests. These other participants could include counties and their soil and water conservation districts, lake associations, university extension and education programs, and citizen or public interest groups. Again, coordinating this activity or creating a lead role for the WMO can assure uniformity of program within a watershed while still providing for a local flavor as an integral part, while also reducing local costs. Public education also may benefit from implementation at a supra-watershed level.

#### *#2 – Public Participation and Involvement*

This MCM again presents opportunities for coordination between WMOs and MS4 communities. In cases where the WMO is an MS4 itself, a joint annual meeting is possible, thus meeting the requirements of both entities. For instances when the WMO is not an MS4 and not subject to the meeting requirement, a joint watershed board/MS4 community meeting can work to meet the

annual MS4 meeting requirement and give the watershed board an opportunity to communicate with its cities and its citizens.

Public attendance at annual MS4 meetings appears to be a challenge. The pilot WMOs and MS4 communities try very hard to attract people to the meetings, but most years see less than a few attendees, if any. Woodbury advertises in numerous venues, yet does not attract many attendees. It is, therefore, reluctant to expend further effort.

Organizing whole watershed MS4 annual meetings could be an effective way to minimize expenditures by each MS4 entity. An overview followed by an open house/input opportunity at local MS4 tables could spark those with more of a watershed interest to attend and have input to both MS4 programs. Similar coordination could occur even if the WMO is not an MS4.

MCM #2 also includes other public participation efforts, such as volunteer programs, that are often the subject of collaboration. However, due to the current limited requirements for MCM #2, these public participation efforts are rarely listed in a SWPPP. In the future, as MCM requirements become more ambitious, an active WMO citizen's advisory committee could be an example of collaboration activity.

*#3 – Illicit Discharge Detection and Elimination (IDDE)* This MCM can be complex. The basic technical requirement is fairly straightforward and involves the mapping of the MS4 stormsewer system and the waters into which it drains. The complexity comes from assessing who is responsible for which part of the system and who responds when an incident occurs. As among MCM's, this one raises among the more substantial concerns with respect to MS4 autonomy, clear allocation of roles and liability risks. In part this is due to ambiguity as to an MS4's legal responsibility with respect to illicit discharges and responses to them.

All of the pilot participants have an ordinance or rule that prohibits the discharge of any pollutant into its stormsewer system. However, if a discharge is discovered and flows from a local collection system into surface receiving waters, the question of response quickly becomes complicated due to response authority that rests with watershed, county and state agencies in addition to the MS4/municipality. Because essentially all MS4 systems outlet to surface waters and contribute flows beyond municipal boundaries, there is clearly a role for WMO's in assessing potential impacts, monitoring for illicit discharges and formulating responses. At the same time, emphasis should rest on identifying such discharges close to the source, rather than monitoring for their impacts downstream. Further, in emergency response generally, municipalities assume the primary role among public agencies absent elevation in a particular case; WMOs, conversely, do not have a formal emergency response role. .. Guidance from the MPCA as to the contours of MS4 responsibility (and hence liability) for illicit discharge response would further MS4/WMO coordination in this area. .

IDDE education of citizens and local public employees, with an emphasis on local commercial, industrial, agricultural or other sources, can be cost-effectively coordinated with WMOs to minimize duplication and reduce local costs. This approach also means that distribution of educational material will have a broader geographic scope and better chance of reaching the potential audience. . .

#### *#4 – Construction Site Stormwater Runoff Control*

This MCM concerns the greatest programmatic overlap between WMOs and local MS4s in a realm that has very substantial impact on water quality in urban and developing areas of the state. The state Stormwater Steering Committee (SSC) NPDES Construction Site Erosion Control Compliance Workgroup has been examining the issues related to state, local and watershed erosion and sediment control programs. For this reason, the study sponsors suggested that less emphasis be given to it here. .

In pilot interviews, as well as the series of “listening sessions” held early in the study, MS4 representatives emphasized MS4 interest in maintaining control over development review, approval and monitoring. The method through which developers are required to control erosion and sediment on development sites is deemed by many to be very closely associated with local development prerogatives. Additionally, local MS4s expressed the need to keep these decisions as close to the local elected officials as possible since construction site problems tend to be very visible. At the same time, because of the acute water quality risks posed by active development, WMO representatives believe careful oversight of development activity also is a core function of their organizations.

Currently it is likely that any development on a site over one acre will require an erosion and sediment control (ESC) permit from the local community, the WMO and the MPCA. Standards for erosion and sediment control design, inspection and maintenance and response requirements will be similar, but not entirely so.. WMO and MS4 representatives interviewed in the pilot watershed study indicated that their organizations do not object to the current overlap; to their perceptions, as well, developers appear to be accustomed to the overlapping permitting requirements. This belief, however, was not acknowledged by the development community in its Listening Session, nor in further discussions during the course of the study. Each of the permitting entities views the parallel regulation as enhancing water quality protection. .

The need for better coordination of inspection and enforcement activity was noted in many discussions during this study. Proper training and education of inspectors, and the cooperation and understanding of the development community, are key to success. Although the permittees might understand and tolerate construction erosion control duplication, clearly they do not prefer it or think it necessary.

Each permitting entity is likely to have its own, independent inspection program. The MPCA, WMOs and MS4s might coordinate when problems arise, but routine site inspections are typically done by each entity. The MPCA pilot JPA inspection program initiated an effort to enhance collaboration with respect to site inspections and enforcement. Nevertheless each permitting authority is concerned about its interests and wants to assure they are properly addressed. In spite of this preference for the status quo, clearly there is room for substantial collaboration, probably supported by a level of formal agreement, achieve savings for MS4s, WMOs and regulated parties without a loss of oversight.. Though beyond the scope of this study, further efforts in this area, of course, should examine as well the relation of local

construction site permitting to MPCA implementation of municipal and construction permits and the extent to which MPCA program elements could be incorporated into local roles.

#### *#5 – Post-construction Stormwater Management*

This MCM concerns what typically is the heart of stormwater management plans developed by municipalities and WMOs under the metropolitan water planning framework of Minnesota Statutes chapter 103B. Accordingly, there is a preexisting framework for MS4/WMO collaboration in identifying locally justified stormwater management standards and in monitoring, enforcing and carrying out stormwater management system facility maintenance needs. .

This MCM therefore provides another excellent opportunity for WMO/local MS4 coordination. Opportunities further are enhanced by non-degradation and TMDL obligations incorporated into SWPPPs that by their nature require a perspective at least as broad as the watershed.. As compared with some other elements of a local stormwater program, mandated work in these areas can be quite costly. The financial savings offered by efficient collaboration therefore can have real meaning here. In addition, work in this area calls for a good deal of specialized technology and knowledge that MS4s, especially smaller ones, may not otherwise have a sound reason to maintain but that WMOs are likely to cultivate and possess. These provide a real incentive toward collaboration..

#### *#6 – Pollution Prevention/Good Housekeeping for Municipal Operations*

This MCM concerns an area with more clear-cut roles, since WMOs typically have few, if any, program areas to which operational housekeeping considerations apply. Further, operational considerations, liability considerations and the municipal autonomy interest suggest a general lack of MS4 interest in transferring to WMOs a substantial role in MS4 housekeeping and maintenance activities. To the extent these activities fall outside of the realm of typical WMO experience and expertise, a WMO role does not offer a favorable prospect of public cost savings. However, WMOs do have watershed oversight and education roles and could offer beneficial training and/or inspection services. A good example of this is the RWMWD “Public Works Forum” which presents training and educational opportunities for local public works staff from both within and outside the watershed. Many participants claim this training as part of the requirements for MCM #6. Some of the local MS4 communities indicated that public works staff can be more attentive to credible presentations that originate from outside of city staff. There is also the potential for WMO personnel to play a role in system inspection because of their presence in the field during their normal duties. .

**Table 13** summarizes opportunities for additional collaboration between WMOs and MS4 communities.

**Table 13. Watershed – MS4 Path to Greater MCM Collaboration**

MCM	Pilot Examples	Additional Opportunities for Collaboration
1. Public education and outreach	All four MS4 cities use education material prepared by the two pilot watershed districts	Formal or informal sharing agreement wherein WMO takes primary MCM #1 responsibility for developing materials
2. Public participation and involvement	Little joint effort other than possible notification of annual meetings	Add other volunteer programs, public participation programs, etc.
3. Illicit discharge detection and elimination (IDDE)	All participants have informal efforts to detect illicit discharges and respond according to where discharge occurred	Possible formal delineation of responsibilities for detecting/monitoring, inspecting for and responding to illicit discharges
4. Construction site stormwater runoff control	RWMWD does permitting for Little Canada, which reviews projects and comments to the district; Blaine and Andover require applicants to have CCWD permit before city will issue its plat approval; CCWD does Blaine’s stormwater permitting	Three tiers of permitting (state, watershed, local) could benefit from more uniformity of best practices standards, state delegation of some program elements and closer MS4/WMO collaboration in inspection and enforcement. WMOs and MS4s could adopt standardized inspection approach and joint or cooperative inspections; development of a web-based permit status tool for checking each others’ permits interactively
5. Post-construction stormwater management	RWMWD has offered cost sharing to Woodbury property owners for exceeding legal requirements; the cities and CCWD worked together on the CCWD’s voluntary non-degradation plan	BMP installation and O&M; monitoring effectiveness of post-construction program on water quality; TMDL implementation
6. Pollution prevention/good housekeeping for municipal operations	Several communities use the RWMWD Public Works Forum to meet MCM #6 requirements in part	City public works training could incorporate WMO pollution prevention as outside expertise; cost sharing by WMOs on PW equipment when benefit to WMO, winter road maintenance issues re: salt/sand

## **D. Related Programmatic Factors**

In addition to the potential collaboration on MCMs, the study team was able to draw some conclusions on other issues, leading to recommendations for further actions. The following conclusions summarize the findings that the interview team drew from the input. Each set of findings is followed by a recommendation suggested by the team. The prioritization was presented to the Advisory Committee (Sept. 27, 2007) and is based on the following criteria:

- High – primary finding in need of action for success to occur (could be a change is needed or simply a need to increase activity)
- Medium – important factor that could increase success
- Low – efforts currently underway or not crucial to advancement of collaboration

### *High Priority*

#### 1) MCM coordination/sharing

- City needs vary widely and cannot be generalized into a single WMO/MS4 approach. Some cities rely heavily on WMO programs and others operate relatively independent of WMO activities. Specific agreements between a WMO and an MS4 city can formalize roles suited to particular circumstances.
- An opportunity for cost savings exists through collaboration in MCM implementation in accordance with the strengths of each organization.
- Cities have expressed reluctance to formalize agreements with WMOs because of a perception of potential liability to the MPCA under the NPDES municipal permit and to third parties if WMOs do not perform.
- Many MS4 communities rely on WMOs for technical expertise and information on alternative approaches and effectiveness.
- Although not explicitly stated in the MS4 permit, sharing MCM implementation responsibility is allowed by MPCA. Explicit text with guidance in the next general permit revision could help move this cooperative effort forward.

*Recommendation:* MPCA should add language in the next MS4 permit to emphasize that shared responsibilities between WMOs or MS4s are allowed. BWSR should prepare guidance or advisory documentation on how cities and WMOs can accomplish this goal through either formal or informal agreements.

#### 2) Regulatory Programs

- WMOs can support stormwater regulation by cities within their borders or can administer a parallel regulatory system .
- Some cities rely on WMOs for regulatory support, especially for stormwater management (SWM) and erosion and sediment control (ESC).
- At present, mandated comprehensive land use plan revision and related stormwater ordinance and rule updating at WMO and community levels presents a window for action.

- New tools like development of permit e-mail system that coordinates/communicates the status of permits between a city and WMOs within its borders and development of uniform rules could foster more efficient regulatory programs.
- MS4s and WMOs do not always communicate or coordinate effectively concerning their respective stormwater regulatory programs..
- All three pilot cities with land within multiple WMOs state that they adopt the most stringent WMO standard so as to apply a single rule for the entire city.
- All pilot participants have unique approaches/tools for better stormwater management.
- Overlap on MCM #4 construction runoff management still occurs. The level of acceptance of this overlap by WMOs, MS4 communities and permittees varies. The actions resulting from this BWSR study should be informed by and consistent with the outcomes of the SSC NPDES Construction Site Erosion Control Compliance Workgroup.

It is important that a WMO use its technical resources and judgment to adopt development review standards, whether they are binding through a permitting program or simply used to review development proposals and comment to the local land use authority.

*Recommendation:* MS4s and WMOs should explore collaboration in regulatory programs in order to reduce duplication, reduce public administrative and private compliance costs, and provide a stronger focus and better enforcement. Formal agreements can establish roles and responsibilities precisely in order to use such collaboration to meet NPDES requirements.

### 3) MS4 document effectiveness

- Some view the SWPPP as a paperwork exercise that does not encourage program focus or innovation (see Appendix D, SWPPP Evaluation). In this view, SWPPPs too frequently lack a connection to water planning documents and rest on the incorporation of standard Best Management Practice sheets. SWPPPs do not engage the public.
- Annual MS4 meetings tend to be very poorly attended by the public, and generating more interest remains a challenge.

*Recommendation:* Cities and WMOs should continue to search for effective ways to interest the public in stormwater management and annual meeting participation. MPCA, BWSR and the Metropolitan Council should focus on ways to improve the reporting function associated with the SWPPP and coordinate it with other stormwater reporting requirements, like the local comprehensive plan and WMO annual reports. A reader should perceive a SWPPP's connection to MS4 and watershed plans and recognize the SWPPP as an operational element of those plans.

### 4) Plan relationships, timing and reporting

- Some coordination of stormwater management occurs through the current process of sequential WMO and municipal stormwater plan development under Minnesota Statutes chapter 103B..
- Lacking of content and timing coordination among stormwater plan mandates remains one of the biggest stormwater manager complaints.
- The requirement that a city revise its local water management plan (LWMP) within two years of a WMO revision can be a challenge for cities, particularly those with area within multiple WMOs.

- Review of each others' SWPPP and/or annual report could be a key point for potential WMO/MS4 coordination and MCM sharing.
- Possibilities for better coordination of mandates raised during interviews include:
  - Put all WMOs, or all WMOs within delineated regional "sectors," on a uniform plan revision schedule, and establish a "minor plan amendment" category that would not trigger the legal requirement of a LWMP amendment
  - Coordinate WMO and municipal plan development under Chapter 103B to the comprehensive land use plan update schedule of Chapter 473
  - By MPCA administrative action, adjust the NPDES permitting cycle to coordinate with Chapter 103B planning

*Recommendation:* BWSR, MPCA and the Metropolitan Council should coordinate a revision of Minnesota rules and permits (and, if necessary, statutes) to better align the timing and content requirements for stormwater management plans and reports.

#### 5) "QLP-Like") approach

- Whether a "QLP-Like" approach – namely, MPCA pre-approval of "off-the-shelf" MCM implementation elements – has merit is a judgment for the MPCA in light of the substantial up-front MPCA resources that may be needed for rulemaking and the tension between the principal of preapproval and the MPCA's desire that SWPPPs be tailored to local circumstances.

*Recommendation:* The MPCA should consider this approach as a potential tool to streamline the NPDES municipal stormwater program.

### *Medium Priority*

#### 6) Inspections

- Construction site inspection and enforcement is inefficient as each permitting agency (WMO, MS4, MPCA) independently exercises its own authority under its own regulations and permits. WMOs and cities both wish to maintain oversight and cities are concerned about liability and about preserving autonomy on matters of land development oversight.
- Many permitting entities are moving toward dedicated field inspectors for SWM/ESC. This is viewed as essential by some cities because of the increasing specialization of the role and the growing demands made on building or other inspectors not dedicated to or highly versed in stormwater management functions. At the same time, WMO staff are becoming increasingly more well-trained in the knowledge and tools of field inspection and oversight.
- Although many cities, WMOs and MPCA will coordinate once a site becomes a problem, there is not extensive coordination on routine inspection and enforcement.
- In recent years the MPCA has explored delegation of some inspection functions to local units of government through joint powers agreements and MPCA funding. There is not legal authority for full delegation of NPDES municipal, construction or industrial

stormwater permit programs from the MPCA to local government, but still room for substantial incorporation of program elements into local WMO and MS4 programs.

*Recommendation:* Coordination of MS4, WMO and MPCA construction site permitting, inspections and enforcement should be closely examined. The public administrative and private compliance cost savings from coordination should be more closely studied. Coordination should be pursued for all public and private savings provided public oversight is not rendered less effective..

7) Post-Construction approaches

- The regulatory and capital programs of both WMOs and cities are moving away from traditional ponding to on-site volume control and other nontraditional Best Management Practices as more effective means of achieving stormwater management goals.
- Many cities are beginning to institute volume and phosphorus control programs.
- WMOs and MS4s have a history of collaborating in the construction of regional stormwater works for needs that exceed the bounds of individual community MS4s.
- Current law requires LWMPs to be consistent with WMO plans, which presses WMO and MS4 standards towards uniformity..
- The state Construction General Permit requires post-construction runoff management via BMPs installed on newly developed sites.

*Recommendation:* There should be cooperation to the extent possible between WMOs, MPCA and MS4 communities on post-construction runoff controls.

8) Maintenance

- Stormwater BMPs and related infrastructure, on both public and private property, require vigilant long-term maintenance to remain effective. Maintenance needs vary according to the practice and its siting..
- Research, effectiveness evaluation (monitoring) and model development are ways in which WMOs can assist community MS4s.

*Recommendation:* Every BMP installation, no matter how small, should be evaluated to make sure it is installed according to design, and monitored and maintained pursuant to a consciously developed O&M plan..

9) Non-degradation

- The NPDES requirement to prepare and implement a non-degradation plan as an element of the SWPPP is a primary driving force behind MS4 volume reduction efforts.
- Coordination between WMOs and MS4 communities can integrate watershed and local approaches to solve identified problems.
- Coordination of non-degradation programs will become increasingly important as deadlines for implementation approach and to the extent that requirements become more stringent and far-reaching.

*Recommendation:* Since non-degradation issues transcend local boundaries and their proper resolution requires specialized knowledge and technology, there is a natural incentive for MS4/WMO collaboration in plan development and implementation.

#### 10) TMDL

- Because impaired resources and their contributing areas almost always have a regional or watershed scale, many reason that WMOs should take a lead role in TMDL development and in assisting MS4 communities in load allocations and implementation.
- Cities wish to be involved in TMDL development, but because of program complexity and supra-municipal scale do not necessarily wish to be in charge. Some believe that there is a clear role for WMO leadership especially in fully developed areas where retrofits are essential.
- The MPCA should continue to evaluate whether TMDL waste load allocations (WLAs) should address details at a sub-MS4 or sub-watershed level when a WMO could play this allocation role as part of the implementation strategy. The MPCA can explore mechanisms by which load allocations left to WMOs and MS4s in TMDL plans can meet the “reasonable assurance” standard of federal law.

*Recommendation:* When watershed-scale resources are impaired, WMOs should be the lead agency working in cooperation with municipal MS4s to develop and implement effective multi-jurisdictional TMDL plans.

#### 11) Source water protection

- There is substantial overlap between stormwater management and source water protection mandates, but little effort to date to integrate the two programs.
- Often stormwater and source water programs are managed within different municipal departments.
- WMOs can play a key role in identifying drinking water resources on both city and watershed scales.
- Infiltration is a possible pollution threat in sandy soils and should be carefully studied to identify the range of its use and its limitations.

*Recommendation:* Integration of source water protection programs, WMO programs and plans, LWMPs, and NPDES stormwater requirements is needed, perhaps through adjustment of existing statutory and/or permit language.

#### 12) Enforcement

- Cities and WMOs each have their own enforcement approaches and levels of enforcement aggressiveness. Approaches range from lack of enforcement to stop-work authority and pursuit of fines and penalties. Some cities prefer full independence from WMOs, while others rely on WMO enforcement much more extensively.

*Recommendation:* Cities and WMOs should formalize the enforcement approach that most effectively uses, or combines, the powers of both entities, and then track enforcement for effectiveness.

### 13) Possible legal issues

- Perception of liability remains a major concern for MS4 communities; specifically, compliance liability, liability to third parties as a result of approval decisions or field activities, and the risk and disruption of needing to carry out unplanned obligations if a WMO partner does not perform make some MS4s reluctant to partner with WMOs on many SWPPP activities..
- The MPCA, and potentially BWSR, can foster collaboration by assisting in development of collaboration agreements and providing guidance on liability-related issues..

*Recommendation:* BWSR, as an outcome of this study, should work with one or more MS4/WMO partnerships to develop and monitor performance pursuant to a collaborative agreement for MCM implementation. The MPCA should work with MS4s to clarify regulatory liabilities so that potential coordination and joint WMO/MS4 efforts can proceed with knowledge of liability risks to be shared and allocated.

### *Low Priority*

#### 14) Education

- Major efforts in WMO/MS4 sharing education/information are underway right now, including joint activities such as fairs, brochure distribution, and joint meetings. More coordination, however, is possible.
- Knowledgeable WMO staff can assist in training of municipal public works and other personnel and often bring credibility an “outside experts.”. RWMWD’s “PW Forum” is a great example, with other applications possible for business and industry training.
- City public works staff will need regular training as stormwater BMP innovations continue.
- MS4 training with respect to municipal housekeeping should focus on new staff, temporary summer staff, chemical handlers and annual refreshers for regular staff. WMOs could accept this role or facilitate watershed-wide coordination of training.
- Additional education assistance is available from non-MS4 organizations, such as non-profits, SWCDs and schools at all levels.

*Recommendation:* Efforts between MS4 cities and WMOs to optimize education efforts should be pursued as a primary example of cooperative stormwater management. In this realm liability risks are not perceived as substantial. Additional education resources should be used and supported to the extent feasible.

#### 15) Water Quality Monitoring

- Monitoring is a key continuing or potential role for WMOs. Cities do a minor amount of monitoring, but most WMOs have substantial monitoring programs. Monitoring programs could be tied better to MS4 programs by coordinating data gathering with local needs.
- Monitoring needs are likely to grow as modeling capacity increases and as TMDL, nondegradation, NPDES stormwater and other stormwater programs mature and require implementation monitoring and adaptive management.

*Recommendation:* WMOs should work with local MS4 communities to coordinate collection of meaningful data that helps both entities better manage stormwater. The likely increasing emphasis on monitoring increases the benefits that can result from efficient collaboration.

16) Funding

- Most cities in the metro area have adopted stormwater utility fees to fund or partially fund stormwater programs.
- Stormwater utilities can provide dedicated, reliable funding for stormwater programs and dedicated inspectors.

*Recommendation:* MS4 communities should examine the use of the stormwater utility framework to develop a reliable source to fund stormwater related programs.

## VIII. POLICY RECOMMENDATIONS

Throughout the course of this study, owners and operators of municipal separate storm sewer systems (MS4's) and watershed management organizations (WMO's) have spoken to the multiple but largely uncoordinated stormwater planning obligations to which MS4's are subject.

- To comply with Minnesota Pollution Control Agency (MPCA) municipal stormwater permitting requirements, MS4's must develop and, every five years, revise stormwater pollution prevention plans (SWPPP's) on a schedule set by the MPCA. Presently the schedule is uniform for all MS4's across the state. In addition, TMDL obligations imposed on an MS4 must be incorporated into SWPPP's within 18 months of their Environmental Protection Agency approval. SWPPP's also must incorporate nondegradation plans on a schedule stipulated by the MPCA.
- Separately, at least every ten years, each WMO within the Twin Cities metropolitan area must engage in a substantial review and revision of its surface water management plan, on a schedule established by the Minnesota Board of Water and Soil Resources (BWSR). Within two years of that revision, each MS4 must revise its local water resources plan to conform to the WMO plan. This planning obligation becomes more complex for those MS4's with boundaries lying within more than one WMO which -- at least under one interpretation of the BWSR rule -- must engage in local plan revision piecemeal in response to WMO plan revisions on different schedules.
- As well, by December 31, 2008, and every ten years thereafter, each municipal MS4 within the metropolitan area is obligated to review and amend its local comprehensive land use plan for submittal to and approval by the Metropolitan Council. MS 473.864. A required element of the comprehensive plan is the MS 103B.235 local water plan, approved by the WMO. This timeline will not always match up well with the schedule for WMO and local plan development as it is proceeding under 103B.235.
- Finally, a municipal wellhead protection plan must be revised within ten years of the prior plan approval by the Minnesota Department of Health (MDH). Minn. Rules 4720.5570.

The scope of this study was drawn to focus on how MS4's and WMO's can collaborate more extensively in SWPPP implementation, allowing more effective stormwater management in a more resource-efficient way.

At each stage of the study, however, participants have raised these largely uncoordinated and somewhat duplicative municipal planning obligations as warranting scrutiny. Given the fundamental importance of water quality and flood control to both local and broader interests, it is understandable that over time, both federal and state legislative bodies have asserted authority to regulate water management. It also is understandable that programs placing planning and regulatory burdens on local governments have arisen within the purview of different state or regional agencies, each of which pursues a mandate for which sound water management is

relevant. Coordination of those efforts only comes after, and adjustments are difficult where agencies are asked to modify structures already in place and around which the agency or stakeholders have established related activities.

Further, public policy considerations would suggest that a federal mandate for local units of government is most valuable to ensure a baseline level of stormwater planning and regulation in areas where stormwater management otherwise would be inadequate. However, in Minnesota, and in the Twin Cities in particular, stormwater management has been in place and evolving for some years, and in many respects is much more developed and thorough than the baseline standards mandated from the federal level and implemented through the MPCA general permit.

At the same time, MPCA officials suggest, and a review of the governing federal laws affirms, that there is no exception from the federal program where a local program exists and no MPCA authority to formally delegate federal program implementation to the local level.<sup>87</sup> Accordingly, despite federal endorsement of watershed-based water management, as reflected in a number of guidance documents and pronouncements issued recently by the U.S. EPA and the U.S. Army Corps of Engineers, the MPCA must continue to administer statewide municipal, construction and industrial stormwater permitting programs alongside municipal and watershed programs that in many cases are coordinated but to a significant extent already are somewhat duplicative.

MS4 and WMO representatives agree that better coordination of these programs would be seen as beneficial for rational water planning and a more efficient use of public funds.

### **A. Qualifying Local Program**

Enlargement of the study scope to examine this set of issues originated in the study sponsor's request to review the potential benefits of the Qualifying Local Program provision in the NPDES municipal stormwater regulations. Under this provision, the NPDES implementing agency (MPCA) may approve a stormwater program as meeting regulatory requirements for all or part of a required Minimum Control Measure (MCM). Once approved, the program could be utilized by any MS4 to fulfill the MCM obligation defined by the MPCA.

By federal regulation, the QLP approach may be used only for the construction site control MCM. 40 CFR 122.44(s).<sup>88</sup> Notwithstanding, in our assessment the MPCA – consistent with its limitations as implementing authority and other legal requirements – could adopt a very similar approach for the other five MCM's by using its general permit authority. To our examination, the MPCA could issue a general permit containing substantive criteria for MCM approval in a manner that would not differ measurably from a general permit formally implementing QLP; an MS4 then could incorporate that program into its SWPPP by filing a notice of intent or taking other procedural steps established by the MPCA in the general permit. This concept was named the “QLP-Like” approach.

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<sup>87</sup> If federal rules were to permit subdelegation of stormwater permitting programs from the MPCA to the federal level, legislative changes would be needed to augment municipal and/or watershed organization powers to meet federal standards for implementing agencies.

<sup>88</sup> MPCA use of QLP authority in the area of construction site control is considered in the context of improving collaboration in this area of SWPPP implementation supra at [insert].

An examination of this concept by project team and advisory committee members led us to conclude that this approach would not likely be fruitful. The following are reasons for this:

- The initial assessment of administrative procedure is that MPCA approval of a local program element would need to occur through rulemaking. Although the intent of QLP approval is that an approved element be widely adopted, initially these rulemaking actions would concern geographically limited matters of interest only to a single MS4. This seems an uncertain project for investment of substantial MPCA rulemaking resources.
- The intent behind the open-ended SWPPP structure, in part, is to foster innovation in the development of stormwater practices suited to local circumstances. QLP success, in the form of widespread incorporation of MPCA-approved QLP's, would represent, one might say, a failure of innovation.
- The MPCA states that an important emphasis of the municipal stormwater program, as reflected in criteria it applies in SWPPP review, is an inventory of Best Management Practices that are directed to local circumstances and needs. This emphasis runs counter to the QLP concept and suggests the likelihood that general permits approving QLP's would reserve MPCA discretion to modify or condition a QLP on a SWPPP-specific basis. The legal need to incorporate TMDL and nondegradation plan elements in SWPPP's, expected to become more frequent with time, further undermines the assumption of uniform practices that QLP represents. Thus the efficiency basis of the QLP concept would be sacrificed.

## **B. Alternatives to QLP**

The study team continued to examine means to reduce duplication and increase efficiencies in local stormwater planning, consistent with other program goals – foremost, effective and innovative stormwater management. The following were identified as relevant features of the setting in which stormwater planning takes place:

- Duplicative and poorly coordinated stormwater planning obligations
- Regulatory overlap for construction-phase and post-construction stormwater management
- Many active and sophisticated MS4's and WMO's, where the NPDES municipal stormwater program adds limited value and, in fact, can have the effect of stifling innovation and “leveling” protection standards
- Many areas developing actively where the NPDES municipal stormwater program can play an important role in institutionalizing careful, comprehensive and watershed-based stormwater management
- Limited MPCA resources to review SWPPP's and oversee SWPPP implementation

Ultimately, the study team has identified two concepts that may improve the efficiencies of local stormwater management without reducing, and indeed potentially enhancing significantly, the effectiveness of stormwater management. The first of these – which can be implemented independently of the second - is simply, through limited statute changes and the exercise of state agency discretion, to align the several state planning obligations. The second – which requires some implementation of the first – is to establish an MPCA general permit recognizing NPDES compliance on WMO approval of an MS4 local water plan meeting SWPPP criteria established in the general permit.

### 1. Alignment of Stormwater Planning Obligations

Planning requirements that could produce benefits by being aligned include:

- Every five years, MS4's must revise SWPPP's for MPCA approval. The date that establishes the cycle is set by the MPCA in the municipal general permit. Presently all MS4's in Minnesota are subject to the same cycle. The deadline for the next SWPPP revision is May 31, 2011. Federal law requires MS4's to hold valid permits, but does not delimit the MPCA's discretion to set permit cycles.
  - For those MS4's selected by the MPCA for nondegradation review, additional control measures to meet nondegradation requirements must be incorporated into the SWPPP on MPCA approval of the nondegradation report. The date for submittal of the nondegradation report has, to date, been set by the MPCA in the municipal stormwater general permit. In the first round, report submittals by 30 MS4's have been staggered over a period of six months.
  - Under the general permit, the SWPPP must be modified to incorporate an applicable TMDL waste load allocation within 18 months after the allocation is approved. [source of requirement?]
  - Federal law requires each MS4 to report annually on SWPPP implementation. In the general permit, the MPCA has set June 30 as the report deadline.
- Minnesota Statutes §103B.231 requires each metropolitan area WMO to review and revise its water resource management plan at least every ten years. Revision occurs on a schedule established administratively by BWSR. Submittal dates are staggered.
  - Within two years of BWSR approval of a WMO plan revision, each city and township wholly or partly within the WMO must adopt a local water plan revision approved by the WMO as consistent with the revised WMO plan. Minn. Rules 8410.0160.<sup>89</sup>

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<sup>89</sup> BWSR rule 8410.0160 is subject to more than one reading. Some municipalities with territory in more than one WMO read the rule to require adoption of a revised local plan only two years after the *last* WMO within the municipality has been approved. Any change to the metropolitan water planning rules pursuant to this study should avoid this sort of ambiguity.

- Minnesota Statutes §473.864 requires each metropolitan municipality to review and, as necessary, amend its comprehensive local land use plan by December 31, 1998 and every ten years thereafter. Amendments must be made as needed to conform local plans with Metropolitan Council system plans for water, transportation, parks and open space, and aviation.
  - A required element of the local land use plan is a WMO-approved §103B.235 water resources plan.
- Minnesota Rules 4720.0550 requires municipal public water suppliers to revise their wellhead protection plans at least every ten years. The deadline for revision is ten years after MDH approval of the original plan and every ten years thereafter.

The study group and advisory committee members believe there is value in aligning these planning exercises, whether or not there is actual integration. Alignment allows an MS4 to focus on water resource needs, facilitates fully integrated planning by bringing different emphases of the different exercises forward within the same time frame, and husbands public funds by reducing duplicative paperwork.

Alignment also would go some distance in addressing the complaints of municipalities lying within more than one WMO (which characterizes almost all of the larger and medium-sized municipalities). While these municipalities still would need to plan on a subwatershed basis to meet the potentially divergent requirements of multiple WMO's, the water plan revision itself would be a single exercise more effectively coordinated with municipal capital improvement programs and other related activities.

The comprehensive land use plan revision schedule is the only schedule specifically established by statute and that would require legislation to adjust. Further, a change in this schedule likely would disrupt Metropolitan Council regional systems planning and have other complicating consequences unconnected to water resource planning. Accordingly, we have considered aligning water planning by establishing the §473.864 recurring decennial review deadline as the orienting date.

Conceptually, the following adjustments would be made:

- BWSR would adjust the WMO water resource management plan revision schedule so that WMO plans are adopted two to three years in advance of the comprehensive land use plan amendment deadline.
  - The requirement for local water plan revision would continue to be two years after WMO plan approval. Local plan revision would be timed to occur in the run-up to land use plan amendment.
  - BWSR would place all WMO plan revisions on the same cycle, allowing municipalities with multiple WMO's to undertake a single local water plan

revision effort. Alternatively, WMO plan revisions would be staggered, but by county or another method that would limit the number of municipalities required to respond to WMO plans on different schedules.

- Major local water plan review every ten years would be supplemented with review at the five-year intervals to incorporate SWPPP changes resulting from the five-year municipal stormwater permit cycle. WMO plans would not require revision (except for WMO's that also are MS4's), but the interim revisions to the local plans would need to remain consistent with the WMO plan and, per existing §103B.235, be approved by the WMO.
- The dates of the annual WMO financial, activity and audit report (now due to BWSR by April 30, per Minn. Rules 8410.0150) and the annual NPDES report (now due to the MPCA by June 30, per the general permit) would be aligned.
- The MPCA would keep the municipal stormwater permit duration at five years, but would adjust the cycle for metropolitan MS4's to match the Chapter 103B cycle.
  - Here, there is a choice. The MPCA permit renewal date could be matched to the §103B.231 cycle, integrating the planning efforts of WMO's that are also MS4's but leaving municipal MS4 water planning unaligned; the date could be matched to the §103B.235 cycle, leaving WMO MS4 water planning unaligned; or municipal and WMO MS4's each could be subject to a deadline matched to its water planning cycle, with some potential loss of collaborative potential in SWPPP implementation.
- The framework would need to accommodate SWPPP amendment to incorporate approved TMDL and nondegradation program elements; there need be no change to the present process and timing requirements for amendment of the SWPPP.
  - If the SWPPP amendment required a WMO or local water plan amendment, that could occur much as minor amendments of WMO and local water plans occur today, between revision cycles. Or BWSR, by rule, could create a plan amendment process more expedited than the present minor plan amendment process, which can take six to eight months.
  - Alternatively, SWPPP amendments for TMDL and nondegradation purposes could be incorporated into WMO and local water plans during five-year revisions.
- Finally, the MDH, by rule change, could align the ten-year wellhead protection plan revision cycle with the local water plan review cycle.

This study, by its scope, concerns only MS4's within the Twin Cities metropolitan area. Further, the issue of aligning SWPPP cycles with local water planning cycles arises only for MS4's that are municipalities subject to the local water planning requirements of §103B.235. For the purposes of this study, then, the MPCA would be free to establish SWPPP cycles pursuant to its

discretion for municipal MS4's outside of the metropolitan area and for non-municipal MS4's. Similarly, the MDH could establish a different wellhead protection plan revision schedule for public water suppliers other than metropolitan-area municipal MS4's.

## 2. MPCA General Permit Allowing Inclusion of SWPPP in Local Water Plan

If the planning processes of the NPDES municipal stormwater program and the metropolitan surface water management act are aligned, a further opportunity exists both to reduce inefficiencies and to better integrate WMO and municipal water planning.

The concept, in short, would be implemented by a second MPCA municipal stormwater general permit. A municipal MS4 could choose to incorporate its SWPPP into its local water plan, and submit both for WMO review and approval. Under the MPCA general permit, WMO approval of a local plan including required SWPPP elements would constitute an MPCA authorization of MS4 stormwater discharges in accordance with the general permit.

The general permit would contain, or incorporate, the substantive standards of the existing general permit, as those standards may be amended by the MPCA from time to time. This includes, at present, specified requirements for the six MCM's; the requirement to reduce pollutant discharge to the maximum extent practicable; TMDL and nondegradation requirements; and special provisions governing prohibited and restricted discharges, discharges to trout waters or wetlands; discharges requiring environmental review; and discharges affecting threatened or endangered species or species habitat, historic or archeological sites, or source water protection sites.

This concept differs fundamentally from the Qualifying Local Program. Under the QLP, the MPCA would issue a general permit recognizing MCM adequacy if the MCM (or the MCM element) conforms to detailed substantive criteria included in the general permit. The proposed general permit differs in two basic ways. First, the general permit would not provide for approval of just an element of the SWPPP, it would provide for approval of the SWPPP in its entirety. Second, the criterion for meeting the terms of the general permit would not be substantive, but procedural: receiving SWPPP approval by the WMO in the context of local water plan review.

The proposed general permit would differ from the existing permit by containing additional procedural requirements. These might include, for example, some or all of the following:

- An enhanced MPCA role in §103B.235 local plan review;
- A public hearing requirement on the local plan/SWPPP before WMO approval (this is a requirement of federal law);
- A requirement that a WMO prepare specific findings documenting its basis for SWPPP approval;

- MPCA reservation of its right to require the MS4 to apply for an individual permit or under the existing general permit;
- MPCA reservation of its rights to monitor and enforce SWPPP compliance and penalize noncompliance;
- MPCA authority to audit an WMO in order to recognize the role of that WMO under the general permit.

The MPCA's authority to use general permits is prescribed by federal law at 40 CFR 122.28. By our review, use of the general permit in the manner described is within the MPCA's authority to the same extent as the present general permit.<sup>90</sup> This framework would not in any respect constitute a delegation of permitting authority to WMO's; the MPCA would remain the agency issuing, determining compliance with and enforcing the general permit. WMO approval of the local plan and SWPPP simply would constitute the primary criterion for an MS4 to qualify as a permit holder under the general permit. The option would be voluntary; any MS4 could choose simply to proceed under the existing general permit or an individual permit.

This general permit alternative could offer the following advantages:

- A municipal MS4 largely could integrate its §103B.235 and NPDES stormwater planning, implementation programming and reporting into a single process and single plan; public costs of duplicative and disjunctive planning would be reduced.
- Consistent with MPCA goals, integration of SWPPP development into local watershed planning likely will enhance SWPPP responsiveness to local circumstances.
- The option most likely would be used by high-performing MS4's that work well with their WMO's. This would allow the MPCA to focus its resources on MS4's and areas of the state with less well-developed surface water management institutions.
- Little demand would be placed on MPCA rulemaking resources; overall, legislative and rule changes to effect the alternative would be limited.
- The alternative fosters integration of MS4/WMO stormwater management and can constitute a simple vehicle for MS4/WMO collaboration on SWPPP implementation.
- The alternative links stormwater management more closely with land use planning, provides a model for incorporating EPA watershed-based management policies into the NPDES municipal stormwater program and provides a basis for future integration of the

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<sup>90</sup> Federal regulations, at 40 CFR 122.28, authorize issuance of a general permit applicable to a specific category of stormwater sources that "(A) Involve the same or substantially similar types of operations; (B) Discharge the same types of wastes ...; (C) Require the same effluent limitations [or] operating conditions ...; (D) Require the same or similar monitoring; and (E) ... [A]re more appropriately controlled under a general permit than under individual permits." The regulation does not indicate that a general permit may apply only substantive, rather than procedural, conditions.

federal construction permit program through delegation from the MPCA to local units of government or by other means.

The study authors believe this concept offers benefits both for integrated local water management and for reducing stormwater program inefficiencies. Necessarily, further thought must be given to how the concept would be implemented, and issues that might arise. Initial discussion of this concept with advisory committee members suggests three areas in particular that bear consideration:

- What framework would be used to incorporate a SWPPP into a local water plan?
- Can the program be consistently implemented across WMO's and will the MPCA retain control adequate to guide program direction?
- Will MS4's choose this general permit alternative in numbers sufficient to make the effort worthwhile?

### 3. Framework for SWPPP Incorporation

The question of how SWPPP obligations would be incorporated into the local water plan is of great consequence for MS4's. On the one hand, the more the SWPPP can "disappear" into the local plan, the more that water planning can be integrated and duplication of effort can be reduced. On the other hand, as it becomes difficult to distinguish SWPPP obligations from other local plan content, complications arise.

The SWPPP and the local water plan are different creatures and their provisions cannot simply be merged. A SWPPP is, in effect, a list of permit conditions; failure to meet SWPPP obligations is subject to a range of MPCA enforcement powers, including compliance orders, significant monetary penalties, permit revocation and criminal prosecution. Conversely, a local plan establishes water management goals and describes a broad program with a wide range of activities that may be undertaken toward the identified goals. Commitments an MS4 makes in a local plan are not explicitly subject to any formal enforcement mechanism. A WMO, through its water resource management plan, or BWSR, by rule, may have some authority to compel a municipality to conform its actions to its approved plan, but under the present laws it very likely is beyond WMO authority to seek monetary or other punitive sanctions for nonconformance.

Although an MS4 may intend any number of stormwater management activities, it could not be faulted for including in its SWPPP only what is needed to meet the minimum requirements of the general permit. For what it puts in its SWPPP is what it binds itself to perform, with legal consequences for the failure to do so. The local plan is quite different. While it must contain certain specific commitments to meet BWSR rules and requirements specified in the WMO plan, it also is a place where aspiration and innovation are encouraged and where a wide range of activities is generated for implementation decisions that will come later. If there is any risk that SWPPP incorporation into the local plan will have the effect of turning local plan elements into legally enforceable terms of the SWPPP, the proposed general permit option will be rejected.

Discussions among advisory committee members suggest that for the proposed general permit to be considered by an MS4, it must be confident that the MPCA will clearly distinguish enforceable SWPPP elements in the plan.

There could be other consequences of merging the SWPPP and the local plan too closely. For example, §319 of the Clean Water Act, administered by the MPCA, is a significant source of funding for water management activities and one that municipalities use. Because the local water plan is the basis for municipal stormwater projects and activities, a municipality that uses §319 funds is likely to apply them to an action that has its basis in the local plan. One advisory committee member observed that federal law prohibits §319 funds to be spent to meet a compliance obligation. He expressed concern that if SWPPP and local plan terms are not distinguishable, an MS4 will become ineligible for §319 funds.

The MPCA would have its own reasons for SWPPP obligations to be clearly distinguishable from other local water plan content. One benefit of the proposed general permit is that it allows the MPCA to shift program resources from review of SWPPP's being reviewed by WMO's to other, greater program needs. Presumably, however, the MPCA would use efficient mechanisms to oversee WMO review and MS4 implementation of SWPPP's. Efficiency would be sacrificed if MPCA staff were required to wade through local water plans in an effort to identify SWPPP commitments. MPCA representatives have emphasized that for the proposal to work, SWPPP content would need to be clearly communicated in the local plan. They recommend, as well, that a common format be used to do so.

These considerations recommend that SWPPP content be included in the local plan as a separate chapter or other discrete element of the local plan. Some potential efficiency gains would be lost by making this separation. However, in our assessment, integration of the two planning activities still could result in quite measurable benefits both for sound resource planning and for efficient application of municipal staff resources. Further, because the local planning effort goes beyond SWPPP requirements both in its analysis and in the breadth of its implementation program, we would expect that in most cases the SWPPP elements would fall out easily from the local plan implementation program.

#### 4. Consistent Implementation and MPCA Program Control

Under the framework established by the proposed general permit, the MPCA would continue to prescribe substantive and procedural criteria for SWPPP's. However, review of submitted SWPPP's against those criteria would be performed by WMO's, with the MPCA providing oversight. MPCA officials have raised a number of questions about the concept, including the following:

- Would this shift of the permit review locus to WMO's exceed MPCA authority under federal law or applicable court decisions?
- Would WMO's need to engage in interpretation of SWPPP requirements or other subjective evaluations that would lead to inconsistent program implementation?

- Would the decentralization of SWPPP review create a greater need for MPCA program guidance? Would this in turn reduce program flexibility, contrary to the program goal of furthering place-specific and innovative municipal stormwater management?
- Would this shift constrain the MPCA's ability to manage and refine the municipal stormwater program, at a time when the program is young and evolving?
- What mechanisms of program oversight would ensure MPCA accountability without sacrificing staff resourcing benefits?
- Would MPCA's less direct involvement in SWPPP review complicate MPCA enforcement of SWPPP obligations?

The first question, concerning MPCA legal authority, is one to be assessed by MPCA legal counsel. Our initial assessment does not find the MPCA's authority to be constrained by federal terms governing program implementation. The MPCA would retain full authority to issue or deny the general permit; it simply would establish, in the general permit, a procedural criterion for general permit applicability (WMO approval of the local plan) alongside the existing substantive criteria. With respect to applicable court decisions, the Minnesota Court of Appeals has ruled that a public hearing is required on a SWPPP before a municipal stormwater permit may issue.<sup>91</sup> The concept described here would preserve that public hearing requirement. Otherwise, we are not aware of court decisions that would place the concept in legal jeopardy.

We also venture a view that this approach would not hamper MPCA evolution and refinement of the municipal stormwater program. We envision the proposed general permit as a companion to the existing general permit. As SWPPP criteria are revised – we expect, on a five-year cycle – the general permits would be revised and reissued in tandem. If MPCA determined as a matter of program development that the terms specific to the proposed general permit – chiefly concerning the process for WMO review and MPCA oversight – warranted revision, that could be accomplished within the same permit adoption cycle. If the MPCA determined that the WMO review option no longer should be offered, the general permit could be retired and MS4's having used that option in the previous cycle would revert to the present general permit. At the conceptual level, we do not see that the existence of the alternate review route would complicate the MPCA's ability to adjust the terms of its general or individual permitting.

The other questions fall largely to the MPCA, as chief architect of the general permit framework. A number of measures, some enumerated above, can be used by the MPCA to maintain program oversight and control. The task is to knit together a set of procedures and oversight mechanisms that the MPCA concludes offers sufficient oversight without undermining efficiency gains for both the MPCA and permittees.

There is one natural alignment that, we believe, very much favors a workable oversight framework. Namely, the general permit option is likely to be attractive more to MS4's that are higher-performing and already working closely with WMO's. This supports a program decision

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<sup>91</sup> Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, [cite] (Minn. Ct. App. 2003).

by the MPCA, effected through the proposed general permit, to shift resources from one set of MS4's (those that tend to be higher-performing) to another (those whose programs and watershed-based relationships are less well developed).

#### 5. Will the Proposed General Permit Be Attractive to MS4's?

The proposed general permit, of course, would not be mandatory, but rather an option for MS4's alongside the existing general permit and the individual permit. There is little sense in developing an alternative general permit if it will not be used. It is important, then, to gauge whether the proposed concept would be perceived by MS4's as offering net benefits worth pursuing.

The chief question here is the willingness of an MS4 to present its SWPPP for approval by a WMO rather than the MPCA. Implicit in the advisory committee discussion on this topic have been three questions:

- Might the WMO read or interpret SWPPP requirements differently from the MPCA in a way that imposes a greater burden on the MS4?
- Would the decentralization of SWPPP review result in less certainty as to how the WMO will interpret and apply SWPPP terms?
- Can the WMO be entrusted to complete review and approve the SWPPP on a timeline that prevents a lapse in permit coverage?

One additional question concerns the fact that many or most municipal MS4's in the metropolitan area lie within more than one WMO. Would the need, in this case, for multiple WMO's to review a SWPPP previously reviewed just by one agency (the MPCA) negate any potential efficiency benefits of the general permit?

The fundamental supposition of the concept is that if it is attractive, it will be so foremost to MS4's with well-developed stormwater management capabilities and good relationships with WMO's. SWPPP review will arise in the context of WMO review of the local plan required under §103B.235. If the review is collaborative and constructive, SWPPP review should not substantially increase differences between the WMO and the MS4.

In addition, we would envision a framework under which an MS4 at any time – before or after WMO action on a SWPPP – could submit its SWPPP to the MPCA under the existing general permit. With this failsafe mechanism, an MS4 at any time could choose to forego the benefits of the proposed general permit and submit to the standard MPCA review process, whether during WMO review or, in effect, as an appeal thereof. It also would ensure that an MS4 could protect itself from a lapse in its municipal stormwater permit coverage under federal law.

As concerns an MS4 with multiple WMO's, our thinking is the same. If the MS4 is working well with its WMO's, SWPPP review is an incremental further part of local plan review and would not implicate MS4 resources significantly, whether it involves one WMO or three. If the

relationship between the MS4 and its WMO's is not strong, the MS4 probably will not choose this permit option.<sup>92</sup>

The study team also perceives a trend toward subwatershed-based planning, reflected in recent WMO water resource management plans and driven as well by TMDL and nondegradation programs. As this trend develops and municipal planning becomes more subwatershed based, the fact that municipal territory is distributed among more than one WMO will tend to diminish in consequence.

Finally, the primary purpose of this study has been to explore means to advance collaboration between MS4's and WMO's in SWPPP implementation and stormwater management generally. The proposed general permit will be a fruitful option only for MS4's and WMO's that work well together. To the extent it is perceived as offering benefits, the prospect of making use of this permitting option will serve as one incentive to foster the development of MS4/WMO collaboration.

### **C. Changes to Statutes or Rules to Implement Alignment Proposals**

The above text suggests two routes to improve the efficiency of municipal stormwater planning within the Twin Cities metropolitan area: (a) better align multiple stormwater planning obligations; and (b) employ an MPCA general municipal stormwater permit in which MS4 compliance is achieved through WMO approval of a local water plan containing required SWPPP elements.

Each of these approaches could be implemented with very little statutory or regulatory change. Necessary changes are as follows:

#### **1. Alignment**

Above, we describe an approach to aligning municipal stormwater tasks oriented on the existing statutory requirement for municipal comprehensive land use plan amendment under Minnesota Statutes §473.864. All adjustment of schedules and deadlines for NPDES municipal stormwater permitting, metropolitan water planning and wellhead protection plan revision can be accomplished without legislation, with one limited exception.

One recommendation above is to establish an expedited process to amend a local or WMO water plan to incorporate TMDL or nondegradation elements. Minnesota Statutes §103B.235, subdivision 5, presently specifies a means of amending a local plan that involves full review by the WMO, affected counties, the Metropolitan Council and BWSR. The time frame for review can be fairly long. The statute allows a deviation from this process only as provided in the WMO plan. It may be more efficient for a more summary amendment process to be provided for in §103B.235, subdivision 5, or a BWSR rule, rather than looking to each WMO to undertake a plan amendment to provide for that summary process.

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<sup>92</sup> If deemed worth the added complexity, the "failsafe" mechanism could permit an MS4 within multiple WMO's to utilize WMO review for some parts of the municipal territory and turn to the MPCA for review of others.

A second adjustment, providing for an expedited means of WMO plan amendment for the same purpose, could be accomplished by a rulemaking. In Minnesota Rules 8410.0140 and 8410.0020, subpart 20, BWSR specifies a more abbreviated plan amendment procedure for certain “minor” plan amendments. There may be a yet more expedited process that could be established for amendments specifically to incorporate TMDL, nondegradation or other SWPPP-driven elements. In addition, the language in the cited rules defining “minor” capital program and other amendments may not include all SWPPP-driven amendments and would benefit from a revision to include such amendments.

The following are three additional rule changes needed to fully implement the alignment proposal discussed above:

- Minnesota Rules 8410.0160: This rule contains the following language that some have found to be ambiguous: “Each local plan shall be adopted within two years of the board's approval of the last organization plan that affects local units of government.” An effort to align planning should include rule language that more clearly establishes the timeline of a municipality’s obligation to adopt a local plan revision for conformance to a WMO plan, when the municipality lies in more than one WMO.
- Minnesota Rules 8410.0150, subpart 10: This rule requires a WMO to submit its annual financial, activity and audit report within 120 days of the end of its fiscal year – in most cases, by April 30. The present MPCA general permit requires the annual MS4 stormwater report to be submitted by June 30. If these are to be aligned by adjusting the date of the WMO report, BWSR would need to amend its rule.
- Minnesota Rules 4720.5570: This rule requires that a municipal wellhead protection plan must be revised at least every 10 years, measured from the date of the first plan approval by the MDH. Arguably, a rule adjustment is not needed here, as a municipality may revise its plan before 10 years has passed and within every ten years thereafter, in coordination with its local water planning. However, a rule change would assist in clarifying this option.

All other steps needed to implement the alignment proposal may be accomplished through administrative action by the MPCA and BWSR.

## 2. General Permit

We describe above how federal municipal stormwater permit requirements might be integrated into local watershed-based planning through an MPCA general permit that recognizes WMO approval of an MS4 SWPPP, as a component of a local plan, as sufficient to meet the terms of the permit. As is the case with alignment, this proposal could be implemented with very little legislative change.

Indeed, the only advisable statutory change would be an amendment to Minnesota Statutes §103B.235 to incorporate an opportunity for MPCA review of a local plan before WMO approval. This recommendation is based on the assumption that as an element of adequate

program oversight, the MPCA would wish the opportunity to be involved in SWPPP review at the time it is being considered for approval by the WMO. Nothing in §103B.235 presently precludes MPCA review, and that review could be mandated in the MPCA general permit. However, §103B.235 establishes strict time frames for completion of review by the WMO and other named agencies, which are likely to conflict with a full MPCA review opportunity, and almost certainly with any MPCA right to intervene should it find a proposed SWPPP to be insufficient.

Nor is any rulemaking activity compelled. The permitting framework can be accomplished entirely within the terms of the MPCA general permit. At the same time, the following rule changes, though not compulsory, would clarify the ability of local units of government to incorporate SWPPP elements into the local water plan:

- Minnesota Rules 8410.0110, subpart 2: This provision requires a WMO to analyze the financial impact on local government units of the proposed regulatory controls and programs in the WMO plan. A rule revision could clarify that this analysis need not consider the MS4's cost of implementing its SWPPP.
- Minnesota Rules 8410.0160, 8410.0170: Nothing in these sections prohibits an MS4 from incorporating SWPPP elements into its local plan. However, to clarify and encourage MS4's to do so, the authority and possibly submittal requirements (with reference to the MPCA general permit) could be explicitly stated.