



**Title:** TAC Meeting 7 Pre-Read: Compliance Framework

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**Meeting Purpose:**

At Meeting 7, the Technical Advisory Committee (TAC) will review and provide feedback on the draft Compliance Framework for Minnehaha Creek Watershed District (MCWD) and discuss opportunities to improve coordination on regulatory inspection and enforcement.

**Compliance Framework:**

**Background:**

Over the past several years, the MCWD has been working to align the organization to support its vision of a Balanced Urban Ecology, where built and natural environments exist in balance to create value and enjoyment. The Balanced Urban Ecology policy laid the foundation for the Permitting Program's new purpose, as identified in the District's 2017 Watershed Management Plan:

*"To protect natural resources against degradation associated with land-use development; and, partner with public and private parties to generate greater natural resource outcomes than those achieved through regulation alone."*

To achieve this new purpose, MCWD is moving from the traditional regulatory model, towards a collaborative approach to better serve its mission, communities, and applicants by:

- Revising regulations to streamline language, increase efficiency, and align with state MS4 standards.
- Formalizing a Compliance Framework to increase efficiency, prioritize field inspection based on natural resource risk, and improve effectiveness in protecting water resources.
- Exploring formal partnerships with municipalities to improve coordination, reduce duplication of efforts, and leverage each other's capabilities.
- Improving coordination with external partners to cultivate opportunities for greater water resource protection.
- Increasing administrative efficiency, user-friendly experience, and data gathering potential through technology investments.

These program improvements are a key part of the [Land and Water Partnership Initiative](#) (LWPI) and will help strengthen partnerships that support MCWD's emphasis on impactful, collaborative projects that benefit the watershed and its communities. The TAC has been providing feedback on rule revisions and identifying ways to improve partnership and coordination. At Meeting 7, the TAC will discuss and provide feedback on the proposed Compliance Framework (See Attachment).

**TAC Meeting 7:**

To achieve the Permitting Program's new purpose, there was an opportunity to improve and formalize how MCWD prioritizes field inspections and escalates the enforcement process for non-compliant sites to improve program efficiency and effectiveness to best manage water resource risk across the watershed. MCWD's proposed Compliance Framework has three components, as summarized below and attached.

### Inspection and Site Prioritization Policy

The Inspection and Site Prioritization Policy formalizes a prioritization framework to memorialize MCWD's internal risk assessment of particular land-uses or construction activities and outline appropriate levels of field presence. This policy recognizes that MCWD staff will exercise judgment in setting inspection priorities and allocating resources to inspection activity.

The NPDES MS4 General Permit (paragraph 19.8) requires that the MCWD maintain procedures to identify high- and low-priority sites for the purpose of inspection scheduling. The proposed site prioritization policy allows staff to focus their inspection efforts on sites with the greatest risk for a negative impact on a water resources. This makes the identification of compliance issues more likely and increases the MCWD's presence at sites with more public interest. District staff will be conducting a trial period of the new Inspection and Site Prioritization Policy beginning in the spring 2023 construction season. During this time, staff will evaluate the effectiveness of the point system and make adjustments, if needed.

### Enforcement Policy

The Enforcement Policy refines the escalation and enforcement process for clarity, effectiveness, and improved coordination with municipal partners. The policy follows four principles of graduated enforcement that outline a path for staff to increase escalation and consequences of non-compliance until compliance is achieved. These levels are as follows:

1. Request for Voluntary Compliance
2. Staff Enforcement Action
3. Board Enforcement Action
4. Court Action

The refined Enforcement Policy streamlines the compliance process by providing guidance and clarity to both permitting staff and the permittee.

### Financial Assurance Usage Policy

The Financial Assurance Usage Policy updates financial assurance amounts to reflect modern construction prices and clarifies protocols for how financial assurances may be used. The MCWD Financial Assurances Rule requires a financial assurance to be submitted with a permit application to incentivize compliance with the terms of the MCWD permit and provide resources to reimburse the MCWD for any costs incurred to bring the site into compliance. The policy includes a Financial Assurance Schedule which outlines the financial assurance required based on regulation and project type, and it has been updated to reflect current material and construction costs. To address the need to periodically assess the schedule and adjust based on current market pricing, the policy outlines a process for assessing the schedule and bringing a written recommendation for adjustment to the Board of Managers every 3-5 years.

The policy also includes a process for managing, safekeeping, using, and releasing financial assurances. This adds clarity to MCWD internal process and accomplishes the goal of streamlining our permittee's experience of permit close-out and financial assurance return. Additionally, the new policy clarifies how financial assurances may be used to deter and correct compliance issues, accomplishing our goal of protecting water resources.

### TAC Meeting 7 Questions:

Please come ready to discuss the following questions (where applicable for your organization):

- Inspection and Site Prioritization Policy
  - Is the policy clear? Are there considerations or revisions that would improve the site prioritization system?
  - How does your organization prioritize sites for inspection? What types of sites are your highest priority?
  - How might MCWD and cities coordinate on inspections to increase field presence and reduce duplication of efforts? What are the potential benefits or challenges?

- Enforcement Policy
  - Is the policy clear? Do you have any feedback on potential improvements?
  - What compliance tools or incentives does your organization use to promote corrective action?
  - How might MCWD and cities coordinate on enforcement action to improve compliance? What are the potential benefits and challenges?
- Financial Assurance Usage Policy
  - Is the policy clear? Are there considerations or revisions that would improve the clarity of the policy?
  - How might MCWD and cities coordinate to reduce duplication in financial assurance requirements and usage? What are the benefits or challenges?

***Next Steps:***

After collecting input at Meeting 7, MCWD staff anticipates refining the policies for adoption by the end of Q2 of 2023 by MCWD's Board of Managers. In addition, at [Meeting 4](#) the TAC discussed the idea of formalizing partnerships between the cities and MCWD for MS4 compliance in areas of regulation, inspection, and enforcement. As a follow up to that discussion, we're asking our city partners to **complete this [survey](#) by May 5, 2023** as TAC responses will be used to inform next steps for potential partnership agreements and coordination improvements.

**Policy No.:** \_\_\_\_\_

**Policy Title:** **Inspection & Site Prioritization**

**Adopted by:** **Administrator**

**Date(s) Amended:** \_\_\_\_\_

**External Requirements:** **NPDES MS4 GP 18.10, 18.12 (illicit discharge);**

**GP 19.8, 19.10 (construction site control)**

**MINNEHAHA CREEK WATERSHED  
DISTRICT INSPECTION & SITE  
PRIORITIZATION POLICY**

**A. INTRODUCTION**

This policy serves as guidance for the District's field compliance program ("Program") that operates within the Permitting Department ("Department"). Under the Program, District staff inspect sites within the watershed for compliance with District rules and permits. Inspection types include the following:

- Inspection of sites subject to active permits
- Permit closeout inspections
- Inspection of unpermitted work
- Inspections prompted by complaints
- Inspections of possible illicit discharge
- Post-closeout inspection of stormwater management BMPs and wetland buffer
- Public drainage system inspections

On-the-ground inspection of disturbed sites and of features installed in the landscape to manage water resource impacts of development is an essential element of the District's regulatory program. At the same time, the size of the watershed and the number of permits the District processes annually require that the District carefully set inspection priorities to use staff time most effectively. The chief purpose of this policy is to provide guidance to staff as to inspection scheduling and the use of District staff or engineering resources for inspections.

In addition, as an NPDES MS4 permittee operating under an MPCA general permit (GP), the District is required to implement an inspection program that meets GP standards both for active construction sites (GP 19.8, 19.10) and for sites at risk of illicit discharge to stormwater systems (GP 18.10, 18.12). This policy is intended to meet these requirements as well.

Finally, the District is the drainage authority responsible to manage several remaining public drainage systems within its boundaries. Pursuant to Minnesota Statutes §103E.705, the drainage authority must inspect its systems "on a regular basis," and open channels within the system at least every five years. Drainage system inspection is not a regulatory function, but is included here due to its functional similarity. Inspections may or may not be conducted by Department staff.

A diligent inspection program, well documented, serves several important purposes:

- It allows for site conditions to be recognized and corrected before they result in impacts to water resources.
- The District is legally obligated to perform regular inspections for certain purposes.

- A field presence creates an incentive for those engaged in land disturbance to be conscientious and attend to District permit and other legal requirements.
- Timely inspection, and follow-up inspection, demonstrates to regulated parties and, as necessary, to judges that the District considers poor site practices to be a serious matter that should be taken seriously.

This policy recognizes that Department staff will exercise judgment in setting inspection priorities and allocating resources to inspection activity. However, staff should be mindful of these purposes in making inspection decisions.

District ditches and ponds are inspected by the Project Maintenance Program annually.

## **B. SCOPE OF POLICY**

This policy provides guidance to schedule field inspections and allocate staff resources to this activity. The Department Manager is responsible to schedule and allocate Department resources in accordance with this policy, and to oversee its implementation. District staff should consult other policies as to the conduct of inspections, inspection documentation, and enforcement.

## **C. INSPECTION FRAMEWORK**

### **1. Sites Subject to Active Permits**

A substantial part of Program resources will be directed to inspection of sites subject to active District permits. The NPDES MS4 general permit (paragraph 19.8) requires that the District maintain procedures to identify high- and low-priority sites for the purpose of inspection scheduling. Setting priorities is necessary as well simply as a means of using Department staff resources efficiently. This policy sets forth a tool to set priorities among active permit sites. On permit approval, Department staff will calculate a site's score, and document this calculation in the Permitting Portal. The score will determine whether the site is high, medium or low priority, which in turn will determine inspection frequency.

The tool uses a scoresheet to assign a permitted site a score from 1 to 10. The score results in the following inspection frequency:

0-1	Inspection at staff discretion
1-3	Quarterly/once based on staff discretion.
4-6	Monthly
7-10	Biweekly

The score is calculated as follows, additive for the three categories:

1. Number of rules triggered: 1 point assigned for each rule not including erosion control.
2. Work in or adjacent to waterbody:
  - a. Waterbody on-site or directly adjacent: 1 point.
  - b. Work in a waterbody, temporary impacts only: 2 points (e.g., no net loss, culvert replacement, bridge reconstruction)

- c. Work in a waterbody, permanent impact: 3 points (stream remeander; draining, filling, excavating in waterbody): 3 points
- d. If the work is subject to the dredging rule, the scoresheet is not used and the site will be inspected weekly.

3. Total disturbed area:

- a. <1 acre: 0 points
- b. 1-5 acres: 1 point
- c. 5-10 acres: 2 points
- d. >10 acres: 3 points

4. Site Topography (Slopes)

- a. Significant slope (>3:1): 1 point

If department staff judges that due to proximity to a waterbody or inlet, site slope or other factors, a project poses high risk to a water resource, staff will conduct an initial inspection within 14 calendar days of permit issuance. The District inspector may alter the calculated inspection frequency for a site on the basis of the inspection experience. Factors determining adjustments to inspection frequency include the intensity of site activity, actual risk to water resources presented, the permittee's schedule of critical activities that merit District observation, and observed non-compliance. If an inspection report or compliance document requests that a certain action be taken by a specified time, Department staff should calendar an inspection for a time appropriate to determine whether the action has been taken. All adjustments of the inspection frequency for a permitted site, and all specific dates for inspection, should be input to the Permitting Portal and, as appropriate, the reason for the adjustment briefly documented.

District staff are to provide for occasional inspection of sites subject to the District's erosion control general permit, and not otherwise subject to a District permit. The Department manager will provide direction to allocate staff time to such inspections.

Additionally, District staff are to inspect sites in accordance with section 10b of the Erosion Control Rule, which requires the applicant or its authorized agent to notify the District in writing at the following points in the life of the permit:

- (1) On completing installation of perimeter erosion and sedimentation controls.
- (2) On completing land-disturbing activities and putting into place measures for final soil stabilization and revegetation.
- (3) Prior to any site dewatering.
- (4) When the site has been permanently stabilized and re-vegetated.
- (5) When all temporary erosion and sedimentation controls have been removed from the site.

Once notice is received, District staff should determine if an inspection is necessary and if so, inspect the site within 48 hours of notice.

## **2. Permitted Sites, Closeout Inspections**

The permittee is required to submit a written notice of project completion with a financial assurance return request. The District must make a determination of project completion within 45 days of receipt (if inspection is feasible), so that the financial assurance is not deemed released before the District has determined completion. District staff should schedule an inspection promptly, and in any event so that there is time to inspect and advise the permittee before 45 days has elapsed. District staff should reach out to applicants at permit expiration to either closeout or renew the permit.

## **3. Post-Closeout Inspections**

As a condition of District permits, numerous parcels throughout the District are subject to obligations, often perpetual, to maintain stormwater management facilities and vegetated wetland buffers. Parcels with recorded maintenance declarations may be located by use of ElementsXS.

*[text here as to practices for selecting parcels to inspect and inspection scheduling]*

## **4. Inspections of Possible Unpermitted Activity**

Unpermitted activity is site disturbance that is subject to District permitting but for which a permit has not been issued. Department staff learn of possible unpermitted activity in various ways. The District may receive information from city or other public agency staff who have observed the questionable activity, or by a neighbor or other person in their private capacity. District staff may make direct observation. Staff awareness of city development approval activity or similar community information may suggest that unpermitted activity may be occurring, or be imminent. The NPDES MS4 general permit (paragraph 19.10) requires that the District have procedures in place to receive and consider reports of non-compliance on sites of construction activity.

Information received from outside sources as to possible unpermitted activity is to be logged into the ElementsXs. At the time the report is logged, Department staff will assess whether the District may have regulatory jurisdiction over the activity. Staff will summarize this assessment in the report log.

For those reports where the District may have jurisdiction, staff will assess the threat of impact to water resources, on the basis of the nature and scope of the reported activity; its proximity to surface waters, direct conveyance to surface waters, or sensitive groundwater resources. In making this assessment, staff are to use readily available desktop resources. Staff will summarize this assessment as well in the report log, and will inspect the site within the following timeframes:

- Impact to water resources occurring or immediately threatened: within 24 hours.
- Immediate threat not apparent: within seven days.

## **5. Inspections Related to Illicit Discharge**

Overall responsibility to investigate, locate and eliminate illicit discharges lies with the Department Manager.

Pursuant to the NPDES MS4 general permit (paragraph 18.10), the District maintains an inventory of priority areas identified by land uses associated with business/industrial activities; areas where illicit discharges have been identified in the past; and areas with storage of significant materials that could result in an illicit discharge. Priority areas and locations of documented illicit discharges are identified in ElementsXS. The Department will inspect each priority area monthly during the building season in addition to any time an illicit discharge is reported in accordance with the District's inspection practices policy.

In addition, if the District receives a report of an illicit discharge, Department staff will enter the report into the Permitting Portal, along with a brief statement of whether the site lies within the area in which the District's illicit discharge rule applies, and whether the report appears credible and significant. If the site lies within the area where the District's rule applies, Department staff will inspect within 24 hours of receiving the report or the next business day. If a potential illicit discharge is detected, staff, in accordance with the inspection practices policy, will use visual and other means to identify its origin. If it does not lie within this area, within 24 hours of receipt staff will notify the appropriate MS4 governing unit of the report, by telephone and email. Staff will include the written notice in the report log.

## **6. Public Drainage System Inspection**

The Project Maintenance and Land Management Department will schedule and provide for inspection of all public drainage systems (PDS) for which the District is the drainage authority in order to meet the requirements of Minnesota Statutes §103E.705, and will maintain adequate records of schedules and inspections. The inspection will determine whether the PDS is providing beneficial drainage, and whether it may require maintenance. If a PDS may require removal of an obstruction or other maintenance, the Project and Land Manager will consult internally and with legal counsel to determine next steps.

*This guidance is for MCWD internal use only. It is not intended to and does not create any right or expectation in any third party. The Board of Managers may amend this guidance or make exceptions to it as it deems appropriate. In implementing the MCWD regulatory program, staff may exercise judgment and deviate from the terms of this guidance on the basis of specific circumstances, so as to best fulfill MCWD purposes.*

**Policy No.:** \_\_\_\_\_  
**Policy Title:** Enforcement  
**Adopted by:** Board of Managers  
**Date Adopted:** \_\_\_\_\_  
**Date(s) Amended:** \_\_\_\_\_  
**External Requirements:** None

**MINNEHAHA CREEK WATERSHED DISTRICT  
ENFORCEMENT POLICY**

**A. INTRODUCTION**

**1. Enforcement Approach**

The District has a number of tools available to bring parties into compliance with District rules and permits. These tools range from communications that prompt voluntary action to court proceedings of both a civil and criminal nature.

The District follows a principle of graduated enforcement. This means that, typically, compliance action begins with communications that assume that a permittee or a party working without a permit, when advised as to the need to take certain action, will take it. Staff will use methods increasingly coercive in nature, and of increasing consequence for the non-compliant party, until compliance is achieved.

There is, however, no single prescribed sequence. The steps that staff will take will depend on the nature and extent of violation, the urgency of correcting the violation, staff's judgment as to the violator's knowledge and intention, the involvement of other regulatory entities, and other features of the specific matter. In a case where harm is occurring or imminent, or where other circumstances warrant, staff may depart from the principle of graduated enforcement and move directly to more coercive enforcement tools.

As directed below or at other appropriate times, staff should consult with the permitting department manager or the administrator as to the appropriate next step.

The principle of graduated enforcement also requires reasonable staff diligence to ensure that enforcement steps don't lag and the pressure toward compliance is steadily increased. The non-compliant party should perceive an incentive to comply sooner rather than later, and should not be given the impression that delay will cause the matter to be forgotten. Similarly, when a deadline to take a certain action is stated, either as guidance or as mandatory, it should allow enough time for the non-compliant party to take the specified action, but should not allow more time than is reasonably necessary. It should assume that the non-compliant party will act with reasonable diligence.

**2. Specific Direction**

In communications with non-compliant parties, it is important to state clearly in writing the nature of the violation, its location on the site, the steps the party is requested to take, and within what time frame the steps are expected to be taken. This is important for two reasons. First, the District begins with the assumption that the non-compliant party, when informed, will act responsibly. Second, when a

non-compliant party has not acted responsibly, clarity creates a record and provides a foundation for effective coercive enforcement.

While it is important to be specific as to how the site condition deviates from the permit or approved plans, and as to the steps the party should take, it also is important to avoid directing specific means and methods (except for directing that the work conform to the permit/plans). If the District representative directs a party to design or install a site feature in a particular way, the District will assume certain enforcement and possibly liability risks if the feature fails. If a party proposes to resolve a compliance issue by deviating from the permit terms or approved plans, this never should be resolved verbally on site, unless the matter is minor (e.g., an element of an ESC plan) and staff promptly documents in writing.

Where the non-compliance is work without a permit, the District communication nearly always will request or direct that work cease until an after-the-fact permit has been issued. If staff finds there is no immediate threat to water resources, staff may make an exception to this rule. In doing so, staff should consider carefully whether allowing work to continue risks weakening the property owner's compliance incentive or the District's enforcement profile.

### **3. Levels of Graduated Enforcement**

The text that follows outlines enforcement tools as they fall into the four levels of graduated enforcement:

- Level 1: Request for Voluntary Compliance
- Level 2: Staff Enforcement Action
- Level 3: Board Enforcement Action
- Level 4: Court Action

## **B. ENFORCEMENT PROCEDURES**

### **1. Request for Voluntary Compliance**

**a. General Considerations.** A request for voluntary compliance includes transmittal of an inspection report, correspondence that accompanies or is independent of an inspection report, and a notice of probable violation (NOPV).

The purpose of these tools is to notify the responsible party of apparent non-compliance with District rules or a District permit, to inform the party of steps to address the non-compliance, and to establish an expectation as to the time to correct the matter. These communications also allow for the recipient to advise the District of facts or circumstances that may be relevant to whether there is, in fact, a violation, or to how the non-compliance is best addressed. A Level 1 communication should be clear that it is requesting voluntary compliance, but that mandatory steps may be undertaken if compliance isn't achieved voluntarily.

Graduated enforcement also includes gradual elevation of communications to non-compliant parties. Initial communications will be from staff or the permitting department manager. In accordance with staff's judgment as to the path that is most likely to be effective, communications may be signed by the

administrator or District counsel or, after briefing at a board of managers meeting, by the board president or other manager.

**b. Notice of Probable Violation.** An NOPV is an elevated form of request for voluntary compliance. It is not an order, but is structured similar to an order. The intent is both to frame the non-compliance matters in a clear and formal way, and to suggest to the non-compliant party the order that will be forthcoming if compliance isn't voluntarily achieved.

Staff are to use the District's current template in preparing an NOPV. The template requires a careful stating of each separate violation (with a citation to permit or rule), the action to be taken, and the deadline to take it. The template also contains standard terms as to enforcement steps that may follow if the requested actions aren't taken.

An NOPV may be used in conjunction with three follow-up steps in the event that compliance isn't achieved:

- It may simply be a step in graduated enforcement to be followed by further Level 1 or Level 2 staff action.
- In the NOPV, the party may be requested to appear before the board of managers at a specified time to review the site condition with the managers.
- In the NOPV, the party may be advised of a formal compliance hearing, at a stated place and time, before the board of managers.

Issuance of an NOPV is to be coordinated with the permitting department manager. Advising the non-compliant party to appear before the board (bullet 2 or 3) also should be coordinated in advance with the administrator. If timely compliance occurs, the appearance is not necessary and the matter is removed from the board agenda. Staff should plan to inspect the site shortly after the deadlines given, and, if compliance actions have not occurred, should promptly take next enforcement steps as indicated in the NOPV or as staff otherwise determines appropriate.

## **2. Staff Enforcement Action**

**a. Authority.** As set forth in the Enforcement Rule, section 2, the board of managers has delegated to the administrator the authority to issue compliance orders. Such an order is issued, with legal force, before the recipient has the opportunity to appear before the board to dispute the facts or the order's directives. For that reason, a staff compliance order should be issued with care, and only when the following circumstances exist:

- Substantial harm to water resources is occurring or threatened
- The harm results, or would result, from violation of a District rule or permit
- Action is needed to address the harm before the board will have the chance at a scheduled meeting to deliberate and issue an order

A staff compliance order always is to be coordinated with the administrator and District counsel. At the time that an order is issued, a compliance hearing before the board will be scheduled. The compliance order is to be explicitly limited in duration to the time necessary for the board to hold the compliance hearing and, as necessary, to issue a board order that supersedes the staff order (typically, 15 or 21 days). An order may be signed by the administrator or the permitting department manager. In the latter case, the file should document the administrator's concurrence.

**b. Drafting the Order.** The compliance order is to utilize the current template. Similar to the NOPV, but moreso, the order must be carefully structured. Each asserted violation must be set forth individually and include:

- Citation to the specific rule or permit term being violated
- A description of the violation
- The water resource harm caused or threatened by the violation
- The specific action the recipient is directed to take to cease or mitigate the violation
  - Cease specified activity
  - Apply for an after-the-fact permit
  - Take affirmative action
- The deadline to take the indicated action

The order always must be directed to the named permittee or, if there is no permit, the property owner. If an identifiable contractor is performing the work, the order should be directed to the contractor as well. The order template will contain additional language advising of the compliance hearing before the board, the recipient's rights, and the potential consequences of failing to comply with a staff or board order. The order should include, and reference, any recent inspection report that is the basis for the stated findings of violation. Staff may include other documents as will provide further detail as to the violations named or the directives given. The directives ordinarily should be limited to what is necessary to prevent or limit further water resource impact until the board has had the opportunity to consider and issue a superseding order.

In the same manner as for an NOPV, staff should schedule an inspection for shortly after relevant deadlines in the order has occurred. After the inspection, staff is to consult with the permitting department manager and, as appropriate, the administrator to decide the next step. If compliance has not been achieved, staff will continue to prepare for the scheduled board compliance hearing. If it has been achieved, any remaining cease and desist in the order can be withdrawn and the board hearing cancelled. Partial compliance may or may not warrant cancelling the hearing. In this case, staff should consult with the permitting department manager and, as appropriate, with counsel.

**c. Delivery and Follow-up.** A compliance order must be delivered in a timely way to each named party. First, timely delivery documents that the District considers the matter important and prevents stated deadlines from becoming infeasible. Second, the order normally will serve as notice for the board compliance hearing, and so must be given to the recipient sufficiently before the board hearing to provide due process.

Staff must use a means of delivery that confirms receipt. This may include hand delivery by staff or a courier, or use of public/private mail that provides confirmation of delivery. Email transmittal is

acceptable if the recipient is willing to confirm receipt by email from the recipient's email address, or if staff uses a software platform that reliably documents that the order has been received and opened at recipient's email address. This may be used initially, before determining whether another method is needed. Written documentation of receipt must be put into the record of the board compliance hearing. Staff should consult with counsel as to the means of order delivery in a specific case.

### **3. Board Enforcement Action**

**a. Authority.** The board of managers has the authority, after notice and hearing, to issue a compliance order. Like a staff order, a board order may direct a non-compliant party to apply for an after-the-fact permit, cease specified activity, or take affirmative actions. A board order also may direct reimbursement of District enforcement costs as allowed by statute, authorize a District demand on a financial assurance, or vacate an existing permit.

Importantly, before entering a site to perform compliance work on behalf of a non-compliant party, or before directing a contractor to do so, staff will ask the board to hold a compliance hearing and issue an order finding a violation. The order is the foundation for the District to enter the site to perform the compliance work, and for the District to reimburse itself for the cost of the work from the financial assurance of the non-compliant party.

**b. Procedure.** A recommendation for a board compliance hearing is to be communicated to the permitting department manager and to receive the administrator's concurrence. The administrator will consult with the board president and provide for the hearing to be placed on the board's meeting agenda. District counsel will advise the managers of an upcoming compliance hearing and provide necessary guidance to prepare them for it.

Notice of the time and place of the hearing must be delivered to all those who may be subject to the board order. This includes the permittee or, in the event of unpermitted work, the property owner. It should include a contractor performing the non-compliant work as well. The statute does not prescribe a specific amount of notice, but typically at least a week's notice should be given to assure due process. See subsection 2.c, above, for the means of delivering notice.

Notice will be given by means of an NOPV or an independent notice, in each case using the current District template. The standard notice text will advise the non-compliant parties that they may appear, present testimony and evidence, and be represented by an attorney. It will state the actions the board may take on finding a violation.

A compliance hearing resembles a court proceeding. It is less formal, in that witnesses are not sworn, testimony is not given in a question-and-answer format, and evidence presented through testimony and documents is not subject to courtroom rules of admissibility. The board chair will direct all proceedings.

First, staff will present the background, the evidence of violation, and a recommendation for what the board should order. Ordinarily one staff person will present the entirety of the "prosecution," but if more than one staff person has been involved in site inspection or other relevant aspects, additional staff may testify. Occasionally others, such as city or state agency staff, may present evidence as a part

of staff's presentation. Each person testifying may be questioned by the managers or the party who is the subject of the hearing. At the close of the presentation, staff will enter all of the documents assembled to support the presentation into the hearing record by describing them verbally. During preparation, counsel will assist in preparing this description for the record. Staff may supplement the original hearing record with additional documents during the presentation. Also, District counsel may question staff to draw out any necessary additional information.

Then, each party who is the subject of the hearing will respond to the presentation with testimony and evidence, and will put any additional documents into the record. At the close of the presentation, each such party will be subject to questions from the managers and, if the chair permits, questions from staff and District counsel.

When the presentations are concluded, the managers will consider the evidence that has been presented, determine whether there has been a violation, and decide on the terms of an order.

**c. Preparation.** Staff will prepare the case for violation. The first step is to assemble all relevant documents (paper and electronic) to prepare the hearing record. From all records concerning the matter, staff should remove those that are not relevant to the background or demonstration of violation, or add very little and nothing essential to it. Staff also should remove or redact those with personal information or that otherwise may be sensitive (e.g., containing confidential attorney-client communications).

In this stage staff is coordinating with District counsel, and counsel may assist in reviewing the collected documents and staff's decisions in winnowing to the hearing record. There is a benefit to the record not being more voluminous than needed, but not at the expense of losing evidence that is necessary to, or strengthens, the case. In the event that a board order is appealed to the district court, the judge will begin from the presumption that the evidence for the appeal is limited to the hearing record. Therefore, it is important that it is complete.

When the hearing record has been assembled, staff prepares a cover sheet numbering the documents in chronological or other logical order, and describing each with a title and date. Staff will deliver the record and cover sheet to the parties who are the subject of the hearing, to the managers and to District counsel, electronically or otherwise. It is preferred to provide the document set to the parties at the same time the hearing notice is delivered. At a minimum, the parties should have four days to review the documents; seven days is preferred. The managers should receive the documents at least several days before the hearing as well.

Finally, in coordination with staff, District counsel will draft a proposed "findings and order" for board consideration at the close of the compliance hearing. This, too, will be provided to the parties and the managers, preferably at least two days before the hearing. The managers will have full discretion to modify the document on the basis of the hearing and their deliberations.

A typical staff presentation outline is as follows:

- Any existing staff order
- When and how hearing notice was delivered; confirmation of receipt
- Background
  - Existing permit or lack thereof; nature of the work occurring
  - History of staff inspection or interaction with the site and parties
  - History of violations
- Description of each violation
  - Reference to specific rule or permit term violated
  - Water resource harm or potential harm
  - Action needed to correct the harm; appropriate deadline
- Additional recommendations for terms of order (e.g., directive to reimburse District cost)

The staff presentation generally might be about 20 minutes. Staff should select appropriate documents from the hearing record to accompany the presentation. Staff should preview the presentation and document selection with the permitting department manager and, as appropriate, with District counsel and/or engineer.

#### **4. Court Action**

A District rule or permit may be enforced by a court order for injunction, abatement, restoration, or other appropriate action. A violation also may be prosecuted as a criminal misdemeanor. Any court action will be initiated only at the direction of the board of managers.

Except in a very unusual circumstance, staff will not seek board approval of court action if the board has not yet issued a compliance order. First, court proceedings are expensive and time-consuming, and graduated enforcement requires that court action be limited to absolute necessity. Second, if a board order has been issued, if there is a hearing record, and if the hearing was conducted in a sound way, the district court judge will limit his or her independent scrutiny of the facts and legal findings, and generally enforce the board order. If there is no such order, the judge will conduct his or her own proceedings with witnesses and evidence, and make an independent decision with respect to matters that may be technical and not fully understood. The former is far preferable for the District.

In the event of an urgent and substantial violation, the District may consider going directly to court for a temporary restraining order or other immediate relief. If such a case arises, staff is to consult immediately with District counsel and with the administrator, who will decide whether to request an emergency meeting of the board to authorize the action.

In addition to enforcing a board order or otherwise directing compliance with District rule or permit, the court may make orders to assist the District in recovering reimbursement (such as authorizing liens on property) or to allow the District to enter property. Where the District's entry would not be intrusive or risk property damage (e.g., to install or restore erosion control measures), a board compliance order is sufficient to establish the District's right to enter. Where District entry could substantially interfere with the owner's property use (e.g., a District contractor constructing a required stormwater BMP), the District will seek judicial authority before taking steps for the action.

### **C. COORDINATION WITH OTHER AUTHORITIES**

When a compliance issue arises, staff should identify the other public authorities with regulatory jurisdiction over the activity in question and should communicate with those authorities to ascertain their degree of concern and the enforcement tools they possess. At all levels of graduated enforcement, staff should be mindful of these other authorities and carefully consider how, and when, enforcement coordination may lead to an efficient and effective resolution of the matter.

*This guidance is for MCWD internal use only. It is not intended to and does not create any right or expectation in any third party. The Board of Managers may amend this guidance or make exceptions to it as it deems appropriate. In implementing the MCWD regulatory program, staff may exercise judgment and deviate from the terms of this guidance on the basis of specific circumstances, so as to best fulfill MCWD purposes.*

**Policy No.:** \_\_\_\_\_

**Policy Title:** Financial Assurance Usage

**Adopted by:** Administrator

**Date Adopted:** \_\_\_\_\_

**Date(s) Amended:** \_\_\_\_\_

**External Requirements:** None

#### A. Purpose

This policy prescribes methods to manage and use financial assurances so that they are protected from loss or theft, available for their purpose of protecting the MCWD from costs related to permit non-compliance, and properly returned or destroyed when a permittee has fulfilled permit obligations.

#### B. Administration

1. Within 10 days after public notice period is complete, MCWD staff will notify the permittee of Financial Assurance amount required. Permittee may choose to satisfy the requirement using a Bond, Letter of Credit (LOC), or Escrow. Note that an escrow must be accompanied by a signed escrow agreement. Permittee may choose to use the MCWD template or one provided by their legal team or financial institution. If they do not use the MCWD template it will require additional review by MCWD legal counsel and permittee should be advised that they may incur additional time and cost.

#### 2. Safekeeping

a. District staff will review LOC and Bond documents received to confirm:

- i. That Bond, LOC or escrow agreement conforms to MCWD template, or to previously confirmed variation.
- ii. If a Bond, that it bears a raised seal, that the Surety's signature is notarized, that a power of attorney is attached to the Bond affirming the signatory's authority to sign, and that the power of attorney states (final representation, at bottom of power of attorney) that it is in effect on the date of the signatory's execution.

If there is a deviation, if the issuer of the LOC or Bond is doubtful, or if you have another question, consult with SP.

An original Bond or LOC is similar to a check and handled with the same care to avoid theft or loss. Staff will direct original LOC or Bond to MCWD counsel's office via USPS Certified Mail, or other courier using verified receipt services, and will notify counsel to expect delivery, including identifying permit number.

District staff scans the document and adds to the permitting file on day received. MCWD counsel notifies staff of receipt and places the original LOC or Bond in a secure file. Counsel maintains a log of all assurances held and transmits the log to designated MCWD staff monthly.

b. Cash Escrow funds received by District staff will be directed to the MCWD Office Manager for deposit. A copy of the check will be attached to the escrow agreement, scanned and added to the permit file.

c. For efficiency, permittee may deliver Bond or LOC directly to Smith Partners.

3. The District Permit Financial Officer (PFO) will monitor the counsel log of financial assurances for expiration, and will be the point of contact for counsel to direct notices of cancellation. If a financial assurance is due to expire or a cancellation notice is received, the PFO will review the permit status and determine whether the financial assurance can be closed or must be active beyond the expiration or cancellation date. If the financial assurance must remain active, District staff will advise the permittee immediately that MCWD must receive a withdrawal of the cancellation, or a replacement financial assurance in acceptable form, by a date 14 days before the termination or cancellation date, or it will make a demand on the expiring financial assurance.

#### C. Use of Funds

1. A demand on an LOC or a Bond is prepared and transmitted by MCWD counsel. Counsel will provide instructions to MCWD staff for needed assistance.

2. Notify MCWD counsel 30 days before an LOC or a bond is to expire, or on receipt of a cancellation notice from the issuer. Consult with counsel as to the need to demand on the assurance. Reasons not to do so include, for example, that there is time to secure a replacement assurance from the permittee, or that the permit work is essentially complete. Counsel practice is to transmit a demand at least 10 days before expiration or cancellation, so that if the demand is rejected, it can be timely revised and resubmitted.

3. When assurance funds are to be accessed to reimburse the MCWD for costs incurred to take compliance action on permittee's behalf, the board of managers should make a finding of violation before costs are incurred. This requires a compliance hearing before the board. Refer to policy for obtaining the administrator's concurrence to notice a compliance hearing, obtaining MCWD counsel assistance, and giving hearing notice to the permittee.

a. If the need for action is immediate, costs may be incurred before there is a chance for a compliance hearing. In this case, the hearing is to be held and a board finding made before there is a demand on the LOC or Bond, or a transfer of funds from the escrow.

b. The process of demanding funds from an LOC or a Bond typically will take about three weeks. If it is important to have the funds in an MCWD account before the work proceeds, coordinate with MCWD counsel.

4. On permit closeout, if the permittee has an outstanding balance, this may be satisfied from the financial assurance. The permittee is to be given the opportunity to pay the balance in lieu of a demand

on an LOC or a Bond; the permittee typically will prefer this. For an escrow, follow the terms of the escrow agreement as to giving notice before transferring funds from the escrow.

## 5. Permit Closeout

- a. A Bond or LOC may be released, or escrow funds returned, when the project is complete (work completed and stabilized, fees paid, as-built survey submitted, other permit stipulations fulfilled).
- b. It is the permittee's responsibility to request a permit closeout, and either a release or a return of the financial assurance. The permittee must submit the Financial Assurance Return Request form (FARR). If the financial assurance is a Bond or LOC, ask the permittee to specify whether it should be returned or destroyed. If the financial assurance is an escrow, confirm that the request for return of funds is to the same person or entity identified as the permittee in the escrow agreement. If not, consult with District counsel.
- c. Once the form is received, the site must be inspected and the permittee advised of closeout status within 45 days of MCWD receipt of the FARR. If seasonal or ground conditions do not allow you to determine whether the project is complete, you must notify the permittee of this within 45 days of FARR receipt, and advise that closeout inspection will be performed when conditions allow.
- d. Notify the permittee whether the MCWD finds that the project is complete. If the project is not complete, itemize what remains for the permittee to complete and advise of how the MCWD is to be informed when this has occurred.
- e. On permit closeout, if the permittee has an outstanding balance, this may be satisfied from the financial assurance. Advise the permittee of the amount to be paid to the MCWD within 30 days, and advise that if payment is not received, or if permittee otherwise directs, the MCWD will make a demand on the Bond or LOC, or withdraw funds from the escrow. The permittee is to be given the opportunity to pay the balance in lieu of a demand on an LOC or a Bond; the permittee typically will prefer this. For an escrow, follow the terms of the escrow agreement as to giving notice before transferring funds from the escrow. If the financial assurance held by the MCWD is insufficient, require the permittee to make payment for the difference.
- f. When the conditions for financial assurance return are met, proceed as follows:
  - i. For a Bond or LOC, transmit the FARR to District counsel and ask that the original be returned or destroyed per the permittee's request. Counsel will take the appropriate action and update the tracking log accordingly. If the permittee has requested that MCWD reimbursement be made by demand on the Bond or LOC, consult with counsel.

- ii. For an escrow, prepare and submit a check request form in the appropriate amount. Document the request to the department manager so that they may enter the action in the official log.

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Draft

**Policy No.:** \_\_\_\_\_

**Policy Title:** Financial Assurance Schedule

**Adopted by:** Board of Managers

**Date Adopted:** \_\_\_\_\_

**Date(s) Amended:** \_\_\_\_\_

**External Requirements:** None

#### A. Purpose

The MCWD Financial Assurances Rule requires a financial assurance to be submitted with a permit application to provide resources to ensure a permittee's conformance with terms of the MCWD permit and reimburse the MCWD for costs incurred to obtain that conformance.

The Rule states that the amount of the required financial assurance will be set by the Board of Managers by resolution, and is subject to periodic review and revision. Staff will review the schedule every 3-5 years and if it finds that an adjustment may be warranted it will bring a recommendation to the Board of Managers. The amount is to be set to protect the MCWD against costs incurred for:

- Application, field inspection, monitoring, consultant services and related fees authorized under Minnesota Statutes §103D.345;
- The cost to implement and maintain protective measures required by the permit; and
- The cost to remedy damage resulting from permit noncompliance or for which the permittee otherwise is responsible.

B. Schedule

<b>Erosion / Grading</b>	Type of project:	Required Financial Assurance:
	1-5 acre	\$3,000
	5-10 acre	\$5,000
	10 acre	\$7,500 + \$200/acre over 10
<b>Wetland Protection</b>	Type of project:	Required Financial Assurance:
	Wetland Alteration*	\$5,000 + \$10,000/acre; \$25,000 maximum
	*Alteration includes impact and/or replacement. For project-specific replacement alteration is the sum of impact and replacement acres. *No financial assurance is required for impact if impact doesn't require replacement under District rule	
<b>Dredging</b>	Type of project:	Required Financial Assurance:
	Dredging	Equal to project cost
<b>Shoreline / Streambank</b>	Type of project:	Required Financial Assurance:
	Rip rap, sand blankets, retaining walls, boat ramps, bioengineering	The larger of \$5,000 or cumulative feet of affected shoreline or streambank times \$100
	Multi-Project	An individual or entity may submit a single form of surety in the amount of \$25,000 to cover multiple outstanding permits under the Dredging and Shoreline Rules
<b>Stormwater Management</b>	Type of project:	Required Financial Assurance:
	Stormwater Management Facilities	\$5,000/acre of impervious area subject to treatment
<b>Floodplain Management</b>	Type of project:	Required Financial Assurance:
	Compensatory Storage	\$35/cubic yard of proposed gross fill within the floodplain

C. Form

The financial assurance may be in the form of a letter of credit, bond or cash escrow. A commercial assurance must be issued by a firm licensed to do so in the State of Minnesota. A cash escrow must be

accompanied by a signed escrow agreement. The MCWD maintains forms of letter of credit, bond and escrow agreement for permittee use and recommends that permittee use these forms.

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