



Title: MS4 Permit Update

Prepared by: Name: Tom Dietrich, Permitting Program Manager
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Purpose: To inform the Board of Managers of proposed changes to the Minnesota Pollution Control Agency's (MPCA) Municipal Separate Storm Sewer System (MS4) General Permit

Background:

The Minnesota Pollution Control Agency (MPCA) designed the Municipal Separate Storm Sewer System (MS4) General Permit (GP) as part of a coordinated effort to reduce the amount of sediment and other pollutants from entering state waters from storm sewer systems. Those regulated under the permit (Permittees) are required to develop a stormwater pollution prevention program (SWPPP) to adopt best practices in order to protect waters of the state.

An MS4 is defined by the MPCA as a conveyance or system of conveyances (i.e. storm sewer, municipal streets, catch basins, curbs, gutters, ditches, etc.) that is also:

- Owned or operated by a public entity (includes watershed districts, cities, counties, universities, highway authorities, etc.);
- Designed or used to collect and convey stormwater;
- Not a combined sewer (i.e. sanitary and storm in a single pipe); and,
- Not part of a publically owned treatment works.

The Minnehaha Creek Watershed District (MCWD) is considered an MS4 because it manages drainage ditches utilized to convey stormwater (Attachment 1). In the strictest sense, the District's MS4 is limited to those areas that drain to the ditches the MCWD manages. However, the District has viewed the MS4 GP as a watershed wide condition, since all of its member cities are Permittees as well, and subject to the requirements of the MS4 GP.

The first version of the MS4 GP was introduced in 2003, and has undergone several iterations since that time. An MS4 GP is effective for five years, after which the MPCA, in a public process, reviews, revises and reissues the GP. Once an MS4 GP has been re-issued, Permittees apply for coverage in a two part application. First by submitting an application fee and form, and second by submitting a SWPPP. The SWPPP catalogs the various ways in which a Permittee proposes to meet the provisions of the MS4 permit. Throughout the 5-year permit term, the MPCA conducts audits of Permittee MS4 programs and SWPPPs to determine compliance with the provisions of the MS4 general permit. Additionally, each June, a Permittee must submit a detailed report of its previous year's activities under its SWPPP.

The MS4 GP is structured uniquely in that it comprises six requirements that must be addressed in a Permittee's SWPPP. These requirements are termed 'Minimum Control Measures' (MCMs). Each MCM addresses a different topic in varying levels of specificity and includes actions a Permittee must follow, standards it must adhere to, or tasks it must complete. The MCMs have been the back-bone of the MS4 GP since its inception, and are generally the focus of revisions when the MPCA engages in a permit reissuance effort. A short description of each of the MCMs and what it requires is outlined below.

- MCM 1: Public Education and Outreach
 - Requires Permittees to create an education and outreach plan, and distribute educational materials on multiple stormwater water topics each calendar year, and record the results.
- MCM 2: Public Participation and Involvement
 - Requires Permittees to make their SWPPP publically available for comments and critique once per calendar year.
- MCM 3: Illicit Discharge Detection and Elimination
 - Requires Permittees to create regulatory mechanisms to prohibit illicit discharges, train relevant field staff on illicit discharge detection, procedures for investigating potential illicit discharges in the field, and process for spill response management and eliminating illicit discharge sources.
- MCM 4: Construction Site Stormwater Control
 - Requires Permittees to adopt and implement regulatory controls for construction sites with minimum standards as set forth in the GP, and to document site plan review procedures, highlight items to evaluate in the review of site plans, detail construction site inspection procedures, and document site plan reviews.
- MCM 5: Post-Construction Stormwater Management
 - Requires Permittees to adopt and implement regulatory controls for permanent management of stormwater at developed sites, with minimum standards as set forth in the GP, including BMP sequencing and legal mechanisms for long-term maintenance of structural stormwater BMPs, and to create site plan review checklists.
- MCM 6: Pollution Prevention/Good Housekeeping
 - Requires Permittees to keep inventory and records of structural stormwater BMPs, storm sewer infrastructure, material handling and storage areas, employee trainings, and best practices in such activities.

All Permittees are subject to these requirements under the MS4 GP, which includes the District and all of its member cities. In structuring the MS4 GP in this way, there is a duplication of efforts at the local level in many of these requirements. However, some substantial requirements - principally under MCM 6, apply to municipal operations, and not to the District.

The current iteration of the MS4 general permit was adopted by the MPCA in 2013. The permit expired on July 31, 2018, however, in the absence of a new MS4 general permit, the MPCA advised all Permittees to continue operating under the terms of the 2013 permit until a new general permit has been issued. Since this time, the MPCA has been working on a draft of the new MS4 general permit, and engaged the District and other Permittees in a public review process. The MPCA released a pre-public notice draft of proposed MS4 general permit language for initial comment in May 2019. The District submitted a comment letter on June 6, 2019 (Attachment 2). The MPCA published a proposed revised MS4 GP for formal public comment in November 2019. In the proposed GP, the MPCA had addressed several of the District's concerns, including exempting watershed districts from broad mandates to regulate and inspect for de-icing chemical storage and dog-waste management practices. The District provided a comment letter on January 10th, 2020 (Attachment 3). A summary of the revisions to the MS4 GP relevant to the District and the primary comments submitted are summarized below.

Summary:

The majority of the revisions to the MS4 general permit do not affect District operations, and are aimed more toward best practices for municipal operations. The District's primary comments address provisions that were present in the 2013 MS4 general permit language, and are proposed to be included in the 2020 MS4 general permit language. Broadly, the comments concern preserving the District's decision making flexibility, and allowing for regional stormwater treatment, in place of site-based treatment, as a primary best management practice. These comments and their rationale are explained in more detail below.

1. Preserving the District's ability to exercise judgment - the GP mandates that Permittees adopt and apply rules that impose uniform standards to regulate volume and other stormwater impacts. This constrains Permittees from implementing rules that make distinctions among different types of land disturbance and development,

and from considering exceptions or variances inconsistent with MS4 standards. The District has asked for clarification as to MPCA intention, and urged the MPCA to explicitly reserve a measure of flexibility to Permittees in making these sorts of judgments.

2. Sequencing and regional stormwater treatment - the proposed MS4 general permit language would require that Permittees apply a rigid preference for on-site stormwater treatment, allowing off-site or regional treatment only when certain sequencing conditions are met. One of these is a finding that on-site treatment is not "cost effective." The comments provided to the MPCA included the District's preference toward regional treatment, both because such approaches may be much more effective, more cost-efficient and more reliably maintained, and also because regional approaches are a key component of the District's collaborative business model. Additionally, the District's comments highlighted several examples of the benefits that are achievable through regional rather than on-site stormwater management. The comments urged the MPCA to remove obstacles to implementing regional treatment options in order to realize water resource outcomes that exceed those resulting from a conventional site-by-site approach.

These comments were provided in both the pre-public notice and formal public notice periods. Since the submission of the pre-public notice comments in June 2019, staff met with MPCA staff to discuss the comments provided. The MPCA outlined two important points relevant to the comments above in this meeting.

First, regarding the District's ability to exercise judgment:

- MPCA staff indicated that the MPCA does not intend to obstruct the District's flexibility to exercise judgment. The District and the MPCA have shared goals in improving water resources, and there is a joint understanding that there are scenarios that present project opportunities to achieve water resource outcomes exceeding conventional regulatory methods. In the event a project opportunity arises, MPCA staff would appreciate the District keep the MPCA abreast of developments, and indicated that there should be no issue in the District exercising its judgment in these situations (i.e. the issuance of variances or exceptions to District rules that achieve greater resource outcomes, but may not necessarily adhere to all aspects of the MS4 GP).

Second, regarding sequencing and regional stormwater treatment:

- MPCA staff indicated that they do not disagree with our business model or methods. MPCA staff stated that the subjective sequencing criterion of 'cost-effectiveness' is intentionally vague, so as to provide local regulators the flexibility to make on-site vs. regional stormwater judgments.

In summary, based on staff's meeting with MPCA staff, the most prominent concerns the District identified in the draft MS4 general permit language appear to be intentionally constructed to provide for the flexibility that the District is concerned to preserve. In short, the District's preferred business model would not be affected by the proposed changes to the MS4 general permit language. Comment was provided to MPCA in the attached January 10th letter (Attachment 3) as a formality to ensure that the comments provided in the pre-public notice period were entered as an official part of the record. Moving forward, the District is working to formalize this understanding with the MPCA, and will provide the Board with further update once this has been achieved.

The District submitted additional, more minor comments on specific components of the draft MS4 general permit language. These comments include:

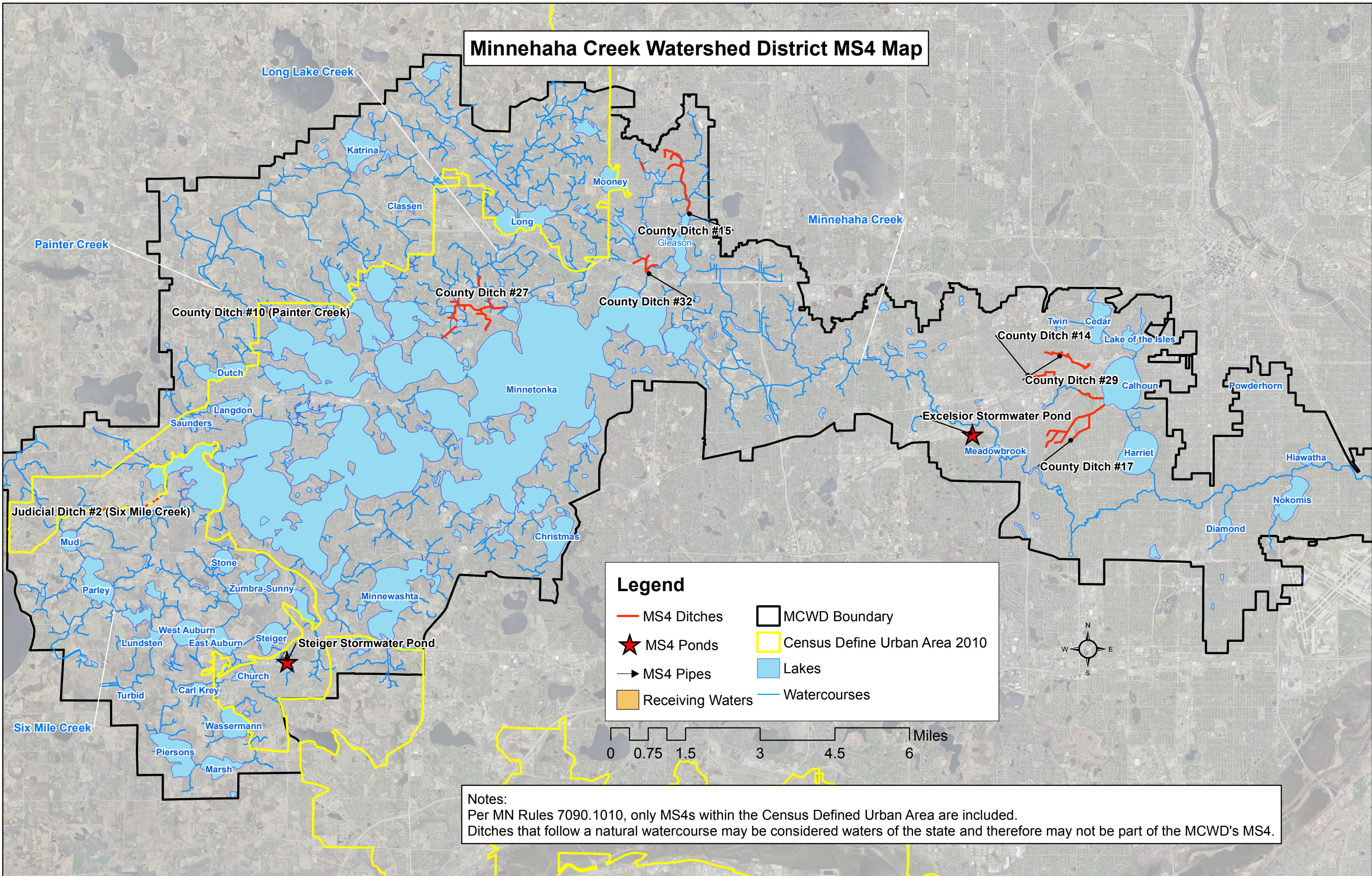
- A concern that the MPCA would mandate that Permittees inventory and inspect a large number of commercial or industrial facilities to protect against improper discharges into stormwater conveyances. Such a requirement would be cost-burdensome and would require District staff or contractors to perform inspections of industrial operations for which they are not trained. Further, this represents a duplication of efforts if municipalities are also conducting inventory and inspection of these facilities.
- A request that the MPCA clarify stormwater standards – total phosphorus and total suspended solids, two common measurable pollutants, have been removed as explicit parameters that Permittees must control. The District has asked for clarification if there are any stormwater requirements beyond the volume control standards included in the most recent draft.

Moving forward, the MPCA indicated that responses to comments and, possibly, public meetings would be held in Spring 2020 to address any outstanding concerns, with a target of adopting the new MS4 general permit by late-summer, early fall of 2020. However, with the COVID-19 developments, MPCA staff have indicated this schedule will be impacted, but the significance of the impact is not yet understood. MPCA staff will be providing Permittees with an updated schedule in the near future. Staff will keep the Board informed as developments unfold throughout the public process.

Supporting documents (list attachments):

1. Attachment 1 – Map of the District’s MS4 Ditches
2. Attachment 2 – Pre-Public Notice Comment Letter, submitted June 6, 2019
3. Attachment 3 – Formal Public Notice Comment Letter, submitted Jan. 10, 2020

Minnehaha Creek Watershed District MS4 Map



Legend

- MS4 Ditches
- ★ MS4 Ponds
- MS4 Pipes
- Receiving Waters
- MCWD Boundary
- Census Define Urban Area 2010
- Lakes
- Watercourses



Notes:
 Per MN Rules 7090.1010, only MS4s within the Census Defined Urban Area are included.
 Ditches that follow a natural watercourse may be considered waters of the state and therefore may not be part of the MCWD's MS4.



June 6, 2019

Minnesota Pollution Control Agency
Attn: Duane Duncanson
520 Lafayette Road
St. Paul, MN 55155

RE: MS4 General Permit Reissuance – Pre-public Notice Comments

Dear Mr. Duncanson:

Thank you for the opportunity to comment on the Draft MS4 General Permit.

Minnehaha Creek Watershed District (“District”) encompasses 178 square miles within Hennepin and Carver Counties. Much of the watershed is highly developed urban area within the City of Minneapolis and adjacent communities, while a large western portion of the watershed is agricultural or wooded land developing according to the comprehensive planning of land use authorities.

Formed in 1967, the District under its regulatory authority has reviewed, issued permits for and monitored thousands of development and infrastructure projects. The District’s rules for construction site and post-construction stormwater management have evolved over time and reflect careful technical and policy judgment about both water resource outcomes and how to allocate compliance burdens to best achieve those outcomes.

Under the NPDES MS4 program, the MPCA is not (aside from MCM 6) prescribing requirements for a regulated community, but setting standards for regulators including those, like the District, whose specific mandate is water resource management. Those subject to the GP share the program resource-protection commitment, and bring their own knowledge and experience as to how that is best achieved. For this reason, the District welcomes the MPCA’s use of a “pre-notice” process and encourages the MPCA to engage the District and other MS4s throughout the process and make use of our input in a collegial manner. It is our understanding that federal rules leave the MPCA considerable discretion in setting the specific parameters of the general permit and we encourage you to use that discretion.

MCM 5: Preserve Exercise of Judgment

Specifically as to MCM 5, the proposed GP standards generally reflect the state of technical consensus. The District’s broader concern is that the GP, as written, may not allow for the considered judgments (careful exemptions in the rules, variances) that allow the regulatory program to make gains efficiently and avoid the imposition of requirements in circumstances that are not cost-effective, deflect program resources and may undermine regulatory program support.

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The District would urge the MPCA to affirm that in incorporating NPDES program requirements into their regulatory programs, MS4s retain their existing flexibility as regulators to make these sorts of judgments. This is less a matter of MCM 5 content requirements, and more a matter of the approach that the MPCA will bring to program audits, and the documentation that will satisfy the MPCA that an MS4's exercise of judgment is preserving equivalency in water resource protection outcomes.

MCM 5: Sequencing and Regional Stormwater Management

The District agrees that stormwater abstraction should be achieved where site conditions allow. However, the Draft GP appears to require, for both non-linear and linear projects, that infiltration occur on site to the extent feasible before any off-site treatment may be used.

This apparently rigid preference for on-site treatment is at odds with a trend toward regional treatment, and would inhibit regional projects and partnerships that are a substantial, innovative element of the District's work. Absent localized flooding or volume-diversion impacts, the GP should not care whether volume is managed on-site or regionally (within the same receiving watershed).

First, regional facilities often are more cost-effective to both construct and maintain. In addition, maintenance is simply more reliable for fewer, larger facilities more typically owned and maintained by municipalities and other public bodies, in comparison to many smaller, scattered practices neglected by private property owners and unfunded homeowners' associations. As well, monitoring, inspecting and gaining maintenance of many small practices on private land is substantially more challenging, and the agency cost is much greater.

Second, a regional feature is more easily designed as a treatment train approach. A regional element, for practices designed and owned by public entities, allows for more innovation, a recent example being the incorporation of iron enhanced sand filtration, which tends to be avoided by developers due to its greater sophistication and irregular maintenance expense. In contrast, for example, the District partnered with the City of Victoria on a project to retrofit an existing series of stormwater retention basins with iron enhanced filtration benches, in order to manage stormwater volume and water quality impacts associated with a downtown redevelopment area. The City is able to provide this utility service to redeveloping properties and recover project cost through stormwater charges.

Third, regional stormwater management provides applicants and municipalities greater flexibility during redevelopment, while also providing treatment beyond the minimum requirements. In high-density urban areas of the District, managing stormwater to meet District rule criteria through onsite treatment can be costly and compromise economic use of a limited footprint. Through private and public partnerships, the District has achieved greater stormwater treatment and ecological benefit by constructing or facilitating regional stormwater practices that can be used to meet development and redevelopment needs.

Recently, the District partnered with the Cities of St. Louis Park and Hopkins and a private company in creation of a regional stormwater infiltration/filtration facility. The regional facility, off-site but

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upgradient from the receiving water, affords treatment capacity for the company’s expansion. In addition to the local economic development benefits from the company’s ability to grow in place, the company donated valuable land for riparian buffer and ecological preserve, and the regional facility treats another 260 acres of previously untreated urban land and right-of-way. Overall, the facility will keep some 180 pounds of phosphorus per year out of Minnehaha Creek, downstream lakes, and the Mississippi River.

As another example, the District joined with the City of Hopkins to remove an aging riparian use and replace it with community parkland. The District installed a subsurface infiltration practice in partnership with the City of Hopkins and an upgradient redeveloper of affordable housing. The off-site treatment opportunity allowed the developer to preserve a redevelopment footprint adequate for the financial feasibility of the project. The remaining capacity is available for use by other redevelopment.

The District would like to continue to be able to build partnerships and seek greater water quality, water quantity, and ecological benefits through regional stormwater management and permitting. We urge the MPCA to be sure that the MS4 GP does not place obstacles in the way of these efforts by imposing requirements or preferences for on-site treatment, or other sequencing terms, that are not essential. We also urge the MPCA to recognize the expertise and experience that MS4s bring to their own regulatory and capital programs in order to produce water resource outcomes that exceed those resulting from a conventional site-by-site regulatory approach.

Additional Specific Comments

In addition to the general concerns raised above, the District would note a number of terms in the proposed GP that bear further consideration or refinement. The more important of these are as follows:

Permit Section	District Comment
14.2(d)	It is not clear whether the MPCA intends this new mapping requirement to capture all structural BMPs required by past permits, which in the District’s case would go back decades. Also, the MPCA should clarify its “map” requirement and afford formatting flexibility, particularly where the many records involved may impede the feasibility of certain mapping concepts. Depending on the need to convert existing records to a specific format, the MPCA also should allow MS4s a reasonable period of time to complete this.
MCM 1: Public Education and Outreach	
16.6(a-d)	This requirement is extremely broad in scope and scale for MS4s with extensive urban corridors. It could implicate thousands of sites within the District, as nearly all commercial and institutional properties manage sidewalk, parking and other surfaces. Further, inventorying and assessing the priority of such sites is an undertaking that is not familiar to MS4s such as watershed districts. The MPCA should be careful to define this requirement in a way that leaves adequate judgment for an MS4 to gauge the effort that is

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	feasible and cost-effective. At base, the District believes it would be the most effective use of tax dollars for an agency such as the MPCA to develop and distribute educational materials, as opposed to having multiple MS4s (even with some MS4s in local partnerships) developing the materials, and the mechanisms to distribute them, in parallel. This would reduce duplication of public expenditures and ensure consistent messaging to private de-icing applicators.
MCM 3: Illicit Discharge Detection and Elimination	
18.6(a-c)	The District readily can incorporate salt storage requirements into its illicit discharge rule. However, the MPCA should note that the universe of properties subject to such a rule (commercial, institutional, industrial sites that apply de-icers in the winter) will number well into the thousands, and is largely distinct from the universe of sites with which the District’s inspection resources are engaged (disturbed sites, sites with prior-constructed stormwater or ecological practices). The District is as well-staffed as any watershed district in the state, but inspecting even a small fraction of sites subject to these requirements would be far beyond the District’s capacity unless the District ceased the rest of its work. Accordingly, the MPCA must recognize that the benefits of putting these requirements in the rule will come principally in conjunction with education rather than a comprehensive inspection and enforcement effort.
18.9	This paragraph is problematic in that it purports to require the District to review the nature of activities at thousands of commercial and industrial sites to assess “potential” for illicit discharge. First, the scope of such an undertaking is well beyond the District’s staff capacity. Second, it isn’t clear how “potential” for illicit discharge would be assessed, but it would seem necessarily to involve examining site operations from a chemical and industrial management perspective. This is a realm heavily regulated under federal and state law. It is one in which watershed districts don’t participate or have expertise. An attempt to engage here, through inspection activity or otherwise, would be duplicative and would raise concerns as to District staff involvement in areas where they typically do not have training or knowledge.
18.10	The District requests that the MPCA justify, on a cost-benefit basis, this level of inspection attention to ‘potential’ illicit discharge sites.
MCM 5: Post-Construction Stormwater Management	
20.10	Infiltration standards should account for two further considerations: (a) Watershed districts are not public water suppliers (PWSs) under Minn. Rules 4720. In assessing whether to require infiltration within a DWSMA, a district often looks to the PWS and defers to its judgment if it advises against infiltration. The GP should not place an MS4 in the position of mandating infiltration against the reasoned position of the PWS. (b) The District carefully considers whether its infiltration requirement should be imposed in proximity to known or suspected subsurface contamination. The GP should not place

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	the MS4 in the position of requiring infiltration against the MS4’s judgment, when that could mobilize a plume or potentially subject the MS4 to environmental liability. If the MPCA wishes to create an aggressive mandate in this regard, it should do so directly through the NPDES Construction GP.
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Thank you again for the opportunity to provide comments on the Draft MS4 GP. The District would like to participate in a collaborative review of these terms to help ensure that the MS4 GP is both effective in achieving our shared water resource goals, practicable, and a sound allocation of agency resources with respect to all of the realms of our water resource work. We look forward to the next steps in your process. Should you have any questions on the above comments, please do not hesitate to contact me at (952) 473-2855 or tdietrich@minnehahacreek.org.

Yours truly,

Tom Dietrich
Permitting Program Manager
Minnehaha Creek Watershed District

Cc: Becky Christopher, MCWD Policy Planning Manager
James Wisker, MCWD Administrator
MCWD Board of Managers

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January 10, 2020

Minnesota Pollution Control Agency
Attn: Duane Duncanson
520 Lafayette Road
St. Paul, MN 55155

RE: MS4 General Permit Reissuance – Comments on Proposed Revisions to General Permit

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Under the NPDES MS4 program, the MPCA is not (aside from MCM 6) prescribing requirements for a regulated community, but setting standards for regulators including those, like the District, whose specific mandate is water resource management. Those subject to the GP share the program resource-protection commitment, and bring their own knowledge and experience as to how that is best achieved. For this reason, the District welcomes and encourages the MPCA to engage the District and other MS4s throughout the process and make use of our input in a collegial manner. It is our understanding that federal rules leave the MPCA considerable discretion in setting the specific parameters of the general permit and we encourage you to use that discretion.

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Specifically:

- May an MS4's stormwater rules make distinctions between activities in the same category (linear, non-linear) where some are held to a higher standard, others to a lower, but the overall level of water resource protection achieves MEP?
- Does an MS4 retain its authority to grant a variance under variance criteria?

The District would urge the MPCA to affirm that in incorporating NPDES program requirements into their regulatory programs, MS4s retain their existing flexibility as regulators to make these sorts of judgments. This is less a matter of MCM 5 content requirements, and more a matter of the approach that the MPCA will bring to program audits, and the documentation that will satisfy the MPCA that an MS4's exercise of judgment is preserving equivalency in water resource protection outcomes.

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MCM 3: Illicit Discharge Detection and Elimination	
18.9	This paragraph is problematic in that it purports to require the District to inventory and inspect the nature of activities at hundreds of commercial and industrial sites where there is “storage of large quantities of significant materials that could result in an illicit discharge”. First, this standard is not well defined. Second, the scope of such an undertaking is well beyond the District’s staff capacity. Third, it isn’t clear how “large quantities of significant material” that might result in an illicit discharge” would be assessed, but it

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	would seem necessarily to involve examining site operations from a chemical and industrial management perspective. This is a realm heavily regulated under federal and state law. It is one in which watershed districts don't participate or have expertise. Requiring watershed districts to engage in this realm would be duplicative and would raise concerns as to District staff involvement in areas where they typically do not have training or knowledge. This mandate raises significant safety and liability concerns for the District.
18.10	The District requests that the MPCA justify, on a cost-benefit basis, this level of inspection attention to 'sites where storage of large quantities of significant materials that could result in' illicit discharge.'
MCM 5: Post-Construction Stormwater Management	
20.7	The prepublication text retained a treatment requirement for TSS and TP, which appears to have been deleted. The District requests clarification regarding the pollutant removal requirements of this rule provision. Are there requirements applicable to TSS, TP or any other pollutants beyond the volume control standards (beyond the general requirement of 13.2 that the SWPPP reduce pollutant discharge to the MEP)?

Thank you again for the opportunity to provide comments on the Draft MS4 GP. The District would like to participate in a collaborative review of these terms to help ensure that the MS4 GP is both effective in achieving our shared water resource goals, practicable, and a sound allocation of agency resources with respect to all of the realms of our water resource work. We look forward to the next steps in your process. Should you have any questions on the above comments, please do not hesitate to contact me at (952) 473-2855 or tdietrich@minnehahacreek.org.

Yours truly,

Tom Dietrich
 Permitting Program Manager
 Minnehaha Creek Watershed District

Cc: Becky Christopher, MCWD Policy Planning Manager
 James Wisker, MCWD Administrator

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MINNEHAHA CREEK



WATERSHED DISTRICT

QUALITY OF WATER

QUALITY OF LIFE

MCWD Board of Managers

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