

MEETING DATE: June 11, 2015

TITLE: Adoption of Rule Policy for MS4 Compliance

RESOLUTION NUMBER: 15-XXX

PREPARED BY: Tom Dietrich, Permit & Compliance Coordinator

E-MAIL: tdietrich@minnehahacreek.org

TELEPHONE: 952-641-4518

REVIEWED BY: Administrator Counsel Program Mgr. (Name): James Wisker
 Board Committee Engineer Other

WORKSHOP ACTION:

<input checked="" type="checkbox"/> Advance to Board mtg. Consent Agenda.	<input type="checkbox"/> Advance to Board meeting for discussion prior to action.
<input type="checkbox"/> Refer to a future workshop (date): _____	<input type="checkbox"/> Refer to taskforce or committee (date): _____
<input type="checkbox"/> Return to staff for additional work.	<input type="checkbox"/> No further action requested.
<input type="checkbox"/> Other (specify): _____	

PURPOSE or ACTION REQUESTED:

Adoption of rule-interpretive policies to achieve compliance with the revised Municipal Separate Stormsewer System (MS4) Permit

PAST BOARD ACTION:

August 8, 2013 - Resolution 13-111: Authorization to Submit MS4 Permit Application to the Minnesota Pollution Control Agency

SUMMARY:

On August 1, 2013, the Minnesota Pollution Control Agency (MPCA) issued the revised General NPDES/SDS Permit for Municipal Separate Storm Sewer Systems (MS4s). The MCWD is a mandatory MS4, meaning that it is required by federal law to apply for coverage under the permit and revise its Stormwater Pollution Prevention Program (SWPPP) to meet new permit conditions. The District was issued coverage under the new permit on March 17, 2014.

MS4 permittees are required to develop, implement, and enforce regulatory mechanisms to meet the terms of the permit, including illicit discharge detection and elimination, construction site stormwater runoff control, and post-construction stormwater management.

A comparative analysis performed by Wenck Associates, Inc. examined the District's current Stormwater Management rule requirements against the MS4 permit. In the Wenck Technical Memorandum dated April 20, 2015 (attached), the District's engineer concluded that the District's Stormwater Management rule is equivalent to the MS4 permit requirements, and the intent of protecting water quality is the same. In continuing to require projects within the District to meet the requirements of the Stormwater Management rule, the District will be in

conformance with the MS4 general permit requirements for post construction stormwater management on an overall watershed basis.

While the overall intent of the District's rules are consistent with the new MS4 permit, there are certain criteria included in the permit that are not specifically addressed in the District's Erosion Control and Stormwater Management rules. These include:

- Requirements for the use of temporary sedimentation basins
- Limitations and restrictions on the use of infiltration techniques

Staff, working in tandem with Smith Partners, explored the mechanisms available to supplement District rules to ensure compliance with the MS4 permit. The MPCA's guidance document states that, "Regulatory mechanism(s)" may consist of "contract language, an ordinance, permits, standards, or any other mechanism, that will be enforced by the permittee". Legal analysis of the guidance document concluded that an enforced policy in the permitting process could effectively implement regulatory mechanism requirements applicable to the MCWD. Thus, policy is a sufficient supplement to MCWD rule language in lieu of rule revisions.

Staff proposes the adoption of the policies outlined in the attached resolution that elucidate existing rule provisions, rather than undertaking a rulemaking process. Through the inclusion and enforcement of these proposed policies, legal analysis concurs that the District will be in compliance with the MS4 permit (see attached Smith Partners memo).

RESOLUTION

RESOLUTION NUMBER: 15-XXX

TITLE: **Adoption of Rule Policy for MS4 Compliance**

WHEREAS, in light of its ownership and operation of a small municipal stormwater management facility, the Minnehaha Creek Watershed District (MCWD) has been designated a Municipal Separate Storm Sewer System owner/operator, subject to permitting requirements under 33 United States Code section 1342; and

WHEREAS, promulgation by the Minnesota Pollution Control Agency of National Pollutant Discharge Elimination System general permit MNR0400000 for Municipal Separate Storm Sewer System operators on May 22, 2013 and the applicability of the general permit to the MCWD's operations have produced a need to explicate certain interpretations of MCWD rule provisions applicable to erosion control and stormwater management; and

WHEREAS, staff's and the MCWD's engineer's experience with analyzing permit applications supports a determination that the following policies are consistent with and follow from the provisions of the MCWD Erosion Control and Stormwater Management Rule;

NOW, THEREFORE, BE IT RESOLVED that the Minnehaha Creek Watershed District Board of Managers adopts the following rule-interpretive policies and directs staff to analyze permit applications submitted to MCWD and assess compliance with issued permits in accordance with same:

1. **Erosion and sediment control plans** must include temporary sedimentation basins and must provide that all runoff from disturbed areas drain to temporary sedimentation basins designed in conformance with subsection III.C of the Minnesota Pollution Control Agency's *General Permit to Discharge Stormwater Associated with Construction Activity No. MN R100001*, as may be amended. (See Erosion and Sediment Control Rule subsection 5a(6), (10); 5b(1).)
2. **Stormwater management plans** will be assessed for compliance with the MCWD Stormwater Management Rule in accordance with the following:
 - a. Structural BMPs to infiltrate runoff as means of meeting the stormwater-volume management requirement in paragraph (3)(c)(1) or the best-management practice requirement in paragraph (3)(c)(4) of the MCWD Stormwater Management Rule will not be permitted where:
 - i. An industrial facility is not authorized to infiltrate stormwater under an applicable state or federal permit;
 - ii. Vehicle fueling and maintenance occur;
 - iii. Seasonally saturated soils or bedrock is found three feet or less from the designed bottom of the BMP;
 - iv. Infiltration presents a cognizable potential to mobilize contaminants in soil or groundwater.
 - b. Where an applicant demonstrates one or more the site conditions listed in paragraph 2a of this policy, the applicant must submit a stormwater management plan providing compliance with the reduced volume abstraction requirement in paragraph (3)(c)(2) of the MCWD Stormwater Management Rule through means other than infiltration and providing

phosphorus control in an amount equivalent to that which would be achieved through abstraction of one inch of rainfall from the site's impervious surfaces.

- c. In addition to the site conditions listed in paragraph (3)(c)(2) of the MCWD Stormwater Management Rule supporting a determination that it is not feasible to provide one inch of volume control for runoff from a site's impervious surface, the following also may be analyzed:
 - i. conditions supporting a runoff-infiltration rate of 8.3 inches per hour or more;
 - ii. the presence of a Drinking Water Supply Management Area.
- d. All documentation requirements in paragraphs (3)(c)(i), (ii) and (iii) of the MCWD Stormwater Management Rule apply to permit-application analyses under this policy.

Resolution Number 15-XXX was moved by Manager _____, seconded by Manager _____.
Motion to adopt the resolution ___ ayes, ___ nays, ___ abstentions. Date: _____.

Secretary Date: _____

Technical Memo



To: Minnehaha Creek Watershed District

From: Chris Meehan, PE, Wenck Associates, Inc.
Megan Beyer, PE, Wenck Associates, Inc.

Date: April 20, 2015

Subject: MS4 Permit – District Rule Requirements and Equivalency

The purpose of this memo is to summarize the findings of an analysis of the equivalency of the MCWD's Stormwater Management Rule to the MS4 general permit requirements for post construction stormwater management (Part III.D.5 of the MS4 permit). The equivalency analysis is based on review of the MS4 permit and the MPCA's *Technical Support Document for the Post-Construction Stormwater Management Conditions in the General Stormwater Permit (MNR040000) for Small Municipal Separate Storm Sewer Systems* dated May 2014 (MPCA document wq-strm4-59e).

Based on review of the guidance found in the MPCA's support document, the requirements of the MCWD's Stormwater Management Rule are equivalent to, and meet the intent of, the MS4 permit requirements for post construction stormwater management. The support document states that "*the MPCA believes that the objectives of the post-construction stormwater management conditions for new development will be met if any of the following treatment requirements are adopted into the post construction stormwater management program*". One of the treatment options provided in the document is to "*retain a runoff volume equal to one inch times the area of the proposed increase of impervious surfaces on-site*". For redevelopment projects, the document applies the new development treatment requirements to the new increase of impervious surface. Therefore, the District's volume control requirement of abstraction of the first one inch of rainfall from the site's impervious surface for non-exempt new development and redevelopment projects is equivalent.

A second option provided in the document to achieve the post construction treatment requirements is to "*design and construct stormwater management practices that preserve the pre-development runoff conditions following construction*". The District rule requires rate control for both new development and redevelopment projects is another demonstration of equivalency to the intent of the MS4 permit post construction stormwater management requirements. Also, where the 1.0 inch abstraction for volume control is infeasible, the District Rule requires abstraction of at least 0.5 inches and phosphorus control equivalent to the full 1-inch abstraction. This is consistent with the guidance in the MPCA's support document which also requires that full treatment of TSS & TP still be met or mitigated even if the full volume reduction component can't be met. Since the guidance indicates that the full post construction stormwater management requirements are met through the one inch abstraction the TSS requirement is also addressed in the District's Rule.

In summary, the District's Stormwater Management rule is equivalent to the MS4 permit requirements, and the intent of protecting water quality is the same. By continuing to require projects within the District to meet the requirements of the Stormwater Management rule, The District will be in conformance with the MS4 general permit requirements for post construction stormwater management on an overall watershed basis.



Old Republic Title Building
400 South Second Avenue
Suite 1200
Minneapolis, MN 55401
(612) 344-1400
www.smithpartners.com

MEMORANDUM

TO: MCWD regulatory staff
FROM: Michael Welch
RE: Rule Policy for MS4 compliance
DATE: April 16, 2015

Courtney Hall requested that counsel provide an opinion on the legal efficacy of staff's proposed adoption, by the Board of Managers, of interpretive policy to comply with specific requirements imposed on the MCWD regulatory program to comply with the National Pollutant Discharge Elimination System General Permit for small Municipal Separate Storm Sewer Systems. Staff intends to propose the adoption of policy that elucidates existing rule provisions, rather than undertaking a rulemaking process. We conclude that the adoption of policies in lieu of rule changes will fulfill the purpose of conforming MCWD's regulatory program to the specific MS4 general permit elements meant to be addressed by the policies.

Sections 4 and 5 of the MS4 general permit require that permittees (e.g., the MCWD) implement "regulatory mechanisms" that impose specific performance standards enumerated in the general permit. The permit further states such "Regulatory Mechanism(s)" may consist of "contract language, an ordinance, permits, standards, or any other mechanism, that will be enforced by the permittee." The general permit does not further or differently define the term "Regulatory Mechanism," but the application for reauthorization under the general permit envisions that ordinances, contract language, policy/standards, permits, rules and "other" (to be described by the applicant) may be used to address post-construction stormwater management control requirements. As a pragmatic matter, the efficacy of a policy is limited to the extent to which it adds to or expounds on provisions in the MCWD rules; a policy that interpreted or applied a rule provision in a manner contrary to the text of the rule would not serve as a permanent regulatory mechanism for purposes of MS4 compliance. I.e., a policy can fill in gaps, but it should not contradict or substantially vary from a rule provision.

Given the flexibility inherent the agency's interpretation of "regulatory mechanism," we find that a policy *that is enforced* in the permitting process and via, when necessary, permit terms and conditions will effectively implement regulatory mechanism requirements applicable to the MCWD.

Please note that, in its May 31, 2013, application for coverage under the new MS4 general permit, MCWD identified only rules among the regulatory mechanisms available to it; the application did not include policy/standards. Further, in representing its plans to take certain specific steps to come into compliance with the general permit, the MCWD stated that it "will undertake a rule revision process to ensure its rules are consistent with the permit." Given that the agency certified MCWD's compliance with and coverage under the general permit based on representations made in the permit, the MCWD should specifically note in a submission of information to the agency describing the steps taken to comply with the general permit that it elected to adopt interpretive policies instead of undertaking a rulemaking. (This recommendation is made cognizant of and notwithstanding the agency's indication that it does not require and will not formally approve any such submission from MCWD.)

I trust that this memo addresses the questions and needs for which you requested it. Please contact me with any questions.