



Overlaps and Gaps – Results of Selected Interviews

Stormwater Regulatory Framework Supplement to Issue Paper “C”

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To: Minnesota Stormwater Manual Sub-Committee

From: EOR and CWP

I. BACKGROUND

Issue Paper “C” on the Stormwater Regulatory Framework listed the various state, federal, and local (county, watershed, regional) regulatory programs that must be referenced when managing stormwater in Minnesota. All of the material in that Issue Paper will eventually become part of the Manual. The MSC was also interested in identifying the overlaps and gaps associated with stormwater regulation in the state. This supplement uses the experience of the consultant team and several interviewed regulated and regulating parties to assess those overlaps and gaps. The interviewee selection criteria are listed in the next section.

This analysis is split from Issue Paper “C” because it will not become part of the Manual. Rather, it is an attempt to take advantage of the attention on stormwater regulation that we are experiencing with the Manual production and the activities of the Stormwater Steering Committee to provide information on how the regulatory system is working. It captures the opinion of several regulated and regulating communities at a transitional point in time when documentation of regulatory difficulties could generate some simplification and reform. Since regulatory streamlining is such a major stormwater issue, this supplemental information can be used to evaluate the perspectives of several key parties.

The following material is based on interviews with organizations and individuals to obtain additional perspectives. Issue Paper “C” addressed the stormwater regulations and

permitting authorities. This supplement includes jurisdictional, process, funding, inspection and enforcement, programmatic, and research gaps and overlaps.

II. INTERVIEWS

Although many of the overlaps and gaps existing in Minnesota stormwater management are obvious to most practitioners, a select group of affected parties was interviewed to extract their perspective. Not every group representing different practitioners was interviewed because of the budget constraints within which we operate. The key parties interviewed were selected because of the major role they play in stormwater regulation as a regulator or a regulated party. Other groups and agencies with programs related to stormwater, that is they play no direct regulatory role or if their role is minor, were not interviewed.

The following groups were involved in interviews:

- Minnesota Chamber of Commerce (March 7, 2005)
- Minnesota Pollution Control Agency (March 21, 2005)
- League of Minnesota Cities/Association of Metropolitan Municipalities, Minnesota Public Works Association and Minneapolis Public Works (March 22, 2005)
- Watershed District/Watershed Management Organizations and Board of Water and Soil Resources (March 29, 2005)
- Minnesota Department of Health Source Water Protection (March 29, 2005)

Overall, 24 people were either at the interviews or submitted comments to be read by the interviewing consultant staff.

The two analyses that follow draw from information obtained by the consultant team or from input derived from the interviews. Some of the information is identified by source, but some is not where confidentiality was requested. The Manual Sub-Committee charge to the consultant team in putting Issue Paper C together was to assemble facts and not to make recommendations for change. At MPCA's request, the Issue Paper was split from the overlaps and gaps analysis because the Paper will evolve into the Manual, while this supplement is merely a collection of information for further consideration. As such, the following analyses will not be accompanied by consultant recommendations for change. Where offered, interviewee comments on solutions ("*Solutions offered*") are included in the appropriate section so as not to artificially screen input. "*Potential constraints*" are identified when there could be some difficulty related to implementing the solutions offered.

Finally, although most of the information offered is very accurate and gets to the root of regulatory difficulties, some of the material offered in the interviews is vague and opinions offered could be without merit, biased in a single direction or based on only partially correct information. No attempt was made to filter this input because of the need to capture the opinion of the party being interviewed. All of the comments

received are presented in the comments paragraph and are not separated by interview source. The comments are presented as factual statements, but the reader is cautioned to use judgment in assessing their validity.

Overlap Opinions

This section examines the overlaps or duplication that are perceived in jurisdictional, enforcement and programmatic authority over the same resources or activity at the Federal, State, and local levels.

Jurisdictional

J -1). There are too many regulating stormwater authorities including local, watershed, state, and federal. Any of these can veto a project, even if all others have issued a permit. On the other hand, each entity brings its unique perspective and should be considered an asset that assures comprehensive coverage. By-passing this coverage would require some level to sacrifice its oversight.

Solutions offered. Some cities and watershed organizations would like to see a unified watershed approach through which the statewide program could be administered on a cooperative watershed level with state oversight, similar to the WCA program. This would take advantage of the value added by watershed organizations in working beyond political boundaries. The “Qualified Local Program” option offered in Minnesota could be one way to accomplish this, but the stringent requirements might be inhibiting this program. Partners implementing the watershed program would be communities, watershed organizations, counties and local permitted stakeholders.

Potential constraints. The regulatory program operates within guidelines and rules established through federal and state law. Some of the changes suggested would require a change in the law or at least an agreement by the oversight agency (such as EPA) that a new approach could be pursued. While not practiced in Minnesota, the suggestions above on the watershed permitting and QLP approaches are apparently approved by the EPA for use in other states.

J-2). More coordination/simplification is needed for construction permitting. There is no need to have up to four permits (LGU through MS4, MPCA NPDES, watershed organization, SWCD/County) for the same construction project, often with different requirements (possibly contradictory). The relationships between MS4 communities and watershed organizations is too variable to characterize, but there are situations in which communities would prefer handing over permit authority to a watershed organization to relieve the community of issuing permits. In other situations, the communities would prefer watershed standards set by a watershed group and implemented by the community.

Solutions offered. Eliminate the many layers of construction permitting in favor of a single permit, like WCA. This could be issued under a watershed umbrella with state oversight, if it could be assured to be adequate.

Potential constraints. As with J-1, there are constraints within which the Minnesota regulatory framework operates. The input of different review authorities has been designed over the years to reflect resource protection strategies from several perspectives. If such a change is ever pursued, these perspectives would need to be guaranteed to meet legislative and regulatory responsibilities.

J-3). BWSR (WCA) and MPCA (7050 rules) have wetland regulation inconsistencies, which can result in conflict among regulating agencies. For example, while WCA gives local entities control (with State oversight) over many wetland activities, it does not require a water quality impact assessment that 7050 provides. Some see WCA deficiencies in exemptions that overlook major problems, and others see 7050 as “trump card” that is played without any process. MPCA and others, however, view 7050 as a safety net that catches projects that adversely impact a resource and might otherwise not be caught.

Wetland protection is included in the regulatory jurisdiction of the Army Corps of Engineers, MPCA, BWSR (WCA oversight), and local governments including counties, municipalities, and watershed organizations. Programs for use and protection of wetlands can differ significantly even when some state permit approval is given by state agency. For example, a local adopted water management plan could identify the “use” of a degraded wetland for stormwater storage based on a local function and value assessment. The community may have the state’s permission to use the wetland this way through WCA, only to find that 7050 is used by MPCA to claim an adverse impact and no permit issuance – which is “the state’s position” on this example wetland?

Solutions offered. MPCA safety net oversight is consistent with its legislative charge, but it needs to develop a predictable process for its use consistent with other state and federal law. Make all programs consistent with WCA, since this set state wetland policy when it was adopted. 7050 does not automatically stop a project, it merely requires that the applicant to follow the avoid, minimize, and mitigate sequence. All possible regulations need to be checked before a project can logically proceed with certainty.

Potential constraints. State and federal law have evolved to offer various approaches to resource protection. There is no single wetland policy in effect, so simplification would need to address a complex suite of law. Perhaps formal agreements among the regulating agencies on conduct of reviews would work as a good first step.

J-4). Linear projects can cross areas regulated by MS4, MPCA (CGP, 401 and 7050), DNR (protected waters), COE (404), Native American tribe (EPA if so designated), watershed organization (WD/WMO), and possibly others. Obtaining permits from each entity is burdensome and should be replaced with a single “state” permit.

Solutions offered. Some standardization or unification of review is needed, such as a single state permit. Others oppose this as a loss of local review authority that deprives a community of its right to control impact on local resources.

Potential constraints. Getting cooperation among the many regulating entities is certainly possible, but asking any of them to waive their right to review potential impacts within their jurisdiction will be difficult. There is currently no vehicle to issue a single linear permit.

J-5). The number of permits required from municipality, watershed, MPCA, DNR, COE, Health, etc. results in hefty permit application fees that can become onerous.

Solutions offered. None.

Potential constraints. Regulating agencies need to recover the costs associated with their permit programs. Asking them to lower or waive fees would leave them short of program funds.

J-6). The Met Council plans on becoming a bigger player through its Water Resources Management Policy Plan, which would lead to even more regulatory overlap.

Solutions offered. Limit the Council to its planning charge from the legislature.

Potential constraints. The Metropolitan Council plays a significant role in regional land use planning, which includes resource protection. The planning role is not likely to evolve into a regulatory role.

J-7). Where there are stringent federal regulations covering an industrial activity, such as storage of chemicals or routing of transmission lines or oil pipelines, and where such regulations cover stormwater management, additional local and state coverage should be waived in favor of the “primary” regulator or maybe a system of primacy adopted wherein a community could adopt federal/state requirements by reference in its SWPPP. This could also address conflict on facility descriptions between SWPPP requirements and the federal Department of Homeland Security. The regulating agencies also should recognize the value of such programs as ISO 14001 and Rural Utility Service Standards, and credit industry that participates with fewer overlapping requirements.

Solutions offered. The waiver provision could be pursued for programs found to adequately address stormwater management as part of a larger regulatory structure. Often these federal programs are regulated in Minnesota through delegation to the state.

Potential constraints. The perspective of state and local interests must be assured in these “primary” programs for those interests to be comfortable. Where MPCA has a state delegated program, cooperation among programs could help.

Enforcement

E-1). Cities end up doing most enforcement, but MPCA provides a state level authority with steeper penalties and can intervene even if things are going smoothly. The cities are usually better at immediate on-site enforcement via tickets and stop work orders, but the MPCA has the larger legal threat. Unfortunately, the MPCA process requires court action and is cumbersome.

Solutions offered. Get a more easily used enforcement mechanism for MPCA or have them work through city/watershed authorities.

Potential constraints. MPCA operates under federal program mandates and state enforcement laws that would need change to get the methods above authorized.

Programmatic

P-1). MS4, MPCA and watershed organizations all have construction permitting programs. The required MS4 construction element, MPCA Phase II CGP and possible watershed organization permits for construction cause confusion among permittees, especially when requirements differ.

Solutions offered. See item J-2 above.

Potential constraints. The construction program of the MS4 communities and MPCA CGP are mandated federal programs. Variations in implementing these charges might not be possible without legislative change.

P-2). 7050.0186 contains sequencing requirements that can come in after WCA, 404, DNR, and wetland comprehensive plan permits have already been issued. City authority often overlaps with others, but unless an over-riding authority is designated, this will likely continue because cities will always act to protect the city's interest.

Solutions offered. See item J-3 above.

Potential constraints. See item J-3 above.

Gap Opinions

This section examines the gaps that exist in jurisdictional, funding, process, inspection and enforcement, and research programs related to stormwater management in Minnesota.

Jurisdictional

J-1). There is no stormwater permitting relationship between MS4 communities and their industrial permit holders, other than possibly through the mandate to identify and eliminate illicit discharges. Stormwater from these facilities is usually discharged into the MS4 system. With an essentially unfunded state industrial permit program, communities might receive polluted stormwater in industrial site runoff.

Solutions offered. City (MS4) participation in industrial operations can occur through city-issued permits, SWPPPs and stormwater utility fees.

Potential constraints. MPCA coordination of MS4-industrial permits would require increased funding of the industrial NPDES program.

J-2). Communities whose source drinking water area extends outside of their municipal boundaries (i.e., Mississippi River and wellhead protection communities) have no real way to affect stormwater decisions in other communities. Right now the CGP requires a SWPPP to “...ensure protection of drinking water supply management areas...” and the proposed MS4 permit amendment requires that MS4 communities identify “vulnerable” source water protection areas and “...develop a plan to address (their) protection...”. The meaning of these phrases is not clear. Mn/DOT needs to become a major player in the source water protection plans for the Mississippi River corridor because of all of the transportation lines near and across the river upstream of the three city intakes. Potential “contaminants of concern” need to be identified by suppliers so that communities know what to include in their pollution prevention programs.

Solutions offered. Adopt the amended MS4 permit language. Incorporate drinking water protection as an essential component of the watershed based approach mentioned in the overlaps item J-1. MDH notes that only the vulnerable supplies need to be defined in the CGP citation. MDH should work with the MS4 and CGP programs to provide guidance on the unclear phrasing in the rules.

Potential constraints. Few legislative options exist for MDH to implement source water protection programs besides cooperative ventures among MDH, other state agencies and water suppliers.

J-3). Metro area stormwater is over-regulated while out-state areas are under-regulated. Perimeter townships without controls build right up to city borders (especially at metro fringes) often without good regulations or enforcement programs, and then defer to SWCD or county water plans without good enforcement. Cities are often forced to annex these areas to fix problems caused there or inherit the problems once annexation occurs.

Solutions offered. Institute better statewide watershed based stormwater planning that covers all parts of the state with minimum protections.

Potential constraints. The suggested solution would require a change in state stormwater management law and better funding.

J-4). Cities have little control over stormwater at large commercial areas like shopping malls and multi-family housing units unless new construction is proposed.

Solutions offered. Implementation of stormwater utilities may begin to fill this gap as communities base charges on the amount and character of runoff from all land uses within its jurisdictions.

Potential constraints. Opportunities for entering into these discussions are limited to situations that open through the regulatory process (new construction or expansion), unless community programs exist.

J-5). In order for stormwater credits to work, MPCA needs to develop a system wherein the stormwater permit staff could work with communities for credits that in effect alter sizing criteria. This would also increase review time and would also create a staffing gap for MPCA.

Solutions offered. Possible permit amendment authorizing credits and design changes based upon them is needed to avoid a lawsuit if the regulations are not covered as currently written.

Potential constraints. Staff is limited and rule flexibility needs to be evaluated. MPCA may have the discretionary authority to roll credits into the existing program.

J-6). Seasonal population swells in resort areas like Brainerd lakes communities are not included when determining MS4 communities even though stormwater management issues may be significant due to the seasonal population influx.

Solutions offered. Use seasonal population changes as a factor in designating MS4 communities.

Potential constraints. MPCA staff limits to conduct these evaluations.

J-7). Some construction site activities, such as concrete mixing and washout clean-up, are not included in the MPCA permit sufficiently.

Solutions offered. 7050 can be used if a water quality problems occur. MS4 SWPPPs can adopt specific construction related provisions to control these types of problems.

Potential constraints. None apparent.

J -8). Routine ditch maintenance does not appear to be covered by any stormwater management regulations.

Solutions offered. This can be done with the permits that are issued by the ditch authority or can be one effective use of MPCA's 7050 authority if an adverse impact is noted.

Potential constraints. There is some reluctance by ditch authorities to operate outside of the "ditch repair" authority because of the complexity and cost associated with larger ditch maintenance activities.

J-9). Out-state there is a county focus to stormwater management and not watershed focus. There is also a significant lack of planning for stormwater management even at the city level.

Solutions offered. See the overlaps analysis item J-1.

Potential constraints. See overlaps analysis item J-1.

J-10). Local governments are actively pursuing volume control through infiltration in an effort to meet NPDES Phase II requirements and protection of surface water resources. There are currently no State or Federal standards or permit programs regulating stormwater infiltration and potential impacts to the groundwater system. Currently, there are recommendations for separation distance between infiltration facilities and water tables and also a notification process for Class 5 injection wells (EPA).

Solutions offered. Exercise caution when planning and building these types of BMPs. Develop careful guidance in the Manual.

Potential constraints. Properly documenting the effects of infiltration will require monitoring programs, which means increased funding.

J-11). Wellhead protection programs are charged with identifying surface drainage areas in conjunction with groundwater flow paths for drinking water supplies. However, there are no minimum State or Federal permits for groundwater quality protection within these areas.

Solutions offered. See item J-2 above.

Potential constraints. See item J-2 above.

Funding

F-1). MPCA staff for stormwater program review and inspections is minimal, and industrial staffing is essentially non-existent. This staffing shortage dramatically affects the Agency's ability to fulfill its responsibilities.

Solutions offered. Since increased funding is not likely in the near future, anything the Agency could do to delegate its permitting authority, with proper oversight, would help free it to concentrate on priority program and enforcement needs. See also overlap analysis item J-1.

Potential constraints. State agency funding is subject to statewide budget constraints and collection of fees (see also overlaps item J-5).

F-2). A funding gap exists in implementing TMDL's through the SWPPPs, resulting in community economic impact because they will be a primary implementing agency for improving impaired waters. City resources for responding to stormwater matters are stretched thin. Cities need to participate in TMDL studies, but can't afford to dedicate staff to the process or aren't asked to participate. This is a dilemma because there is a need for more stakeholder involvement in development of TMDLs.

Solutions offered. The 2005 Clean Water Legacy Act (if funded), stormwater utilities or special funding through the TMDL implementation plan could generate funds for local implementation.

Potential constraints. Funding from the Clean Water Legacy Act is not assured at this time and a program for special TMDL funding sources has not been defined.

F-3). Funding for the non-degradation study and implementation in the amended MWS4 permit doesn't yet exist.

Solutions offered. MPCA is examining ways to get this funded.

Potential constraints. An existing source of funds has not been identified.

F-4). Assessing the statewide value of the stormwater infrastructure is needed to quantify its value to the State.

Solutions offered. Funds from stormwater utilities could begin to address this.

Potential constraints. There are no plans for a statewide survey of this type.

Process

P-1). There is no set process for when, where or how MPCA enters into wetlands issues via its 401 and 7050 authority. Project managers think they're covering wetland issues with WCA and Corps, but the MPCA may enter into wetland issues through stormwater permits and require more mitigation after all of the other permitting is complete. Inundation of wetlands is not covered in WCA or 404, but can be covered by MPCA (under 7050) as a regulatory element, but the process is ill-defined and unpredictable as to if or when MPCA will get involved.

Solutions offered. MPCA needs to define a process for when, where and how it will exercise its wetland authorities. Fulfilling its legislative charge to protect all waters of the state is recognized, but the method it uses is mysterious and in need of definition.

Potential constraints. Finding the MPCA staff time to develop the process guidance.

P-2). The “Qualified Local Program” designation by EPA could be used to delegate permitting authority to local units and fill the staffing gap for MPCA permits. However, no Minnesota communities have requested this status because of the requirements for designation.

Solutions offered. MPCA could work with interested communities or watershed organizations to obtain QLP designation on a pilot basis.

Potential constraints. Lack of state and local knowledge of the program and the likely need to obtain EPA approval to pursue its use.

P-3). If a water body is declared “impaired” and put on the 303(d) list, it could be years before an implementation plan is in place. In the meantime, it is conceivable that the MPCA and the community cannot issue NPDES permits for the pollutant for which the water body is impaired.

Solutions offered. Although this is possible, MPCA uses its authority judiciously and will work with communities to improve the impaired water.

Potential constraints. Accelerating the TMDL program would need additional program and implementation funding (possible if the Clean Water Legacy Act passes in the 2005 legislative session).

P-4). Local permits are usually issued without proof of needed state permits.

Solutions offered. Many responses focused on the need for permit coordination, possibly through the watershed approach noted in the overlap analysis item J-1. The simplest solution would seem to be a required check-off prior to proceeding locally.

Potential constraints. None identified other than the additional staff time needed to process the permit.

P-5). Linear project (highways, transmission lines, pipelines) managers would like special provisions to allow them latitude for installation of appropriate BMPs specific to linear projects. These provisions exist in the stormwater permit, but ROW limits, cost, FHWA safety mandates, and run-on volume from adjacent land often present difficulties that might be solvable if a single entity issued a permit.

Solutions offered. Local entities object to waiving permit provisions because they use these to assure local resource protection that might not be viewed in the same light by other regulators. Communicating these interests to the permittee up-front is currently the best way to assure a smooth process.

Potential constraints. Limited funds for linear project BMPs and need for local resource impact review.

P-6). There is an unfulfilled need for uniform inspector training across jurisdictions so that state and local inspectors are noting and requiring the same things.

Solutions offered. Education and training programs are as essential as ever, yet they are easily cut in times of reduced funding. Some training is available (NEMO, CPESC, etc.), but a unified state inspector training program is needed.

Potential constraints. Creation and funding of a program.

P-7). The lack of an emergency provision in the CGP means that utilities often have to initiate emergency responses without the required seven-day Notice of Intent to construct.

Solutions offered. Although this was identified by industry as a problem, MPCA has never penalized a utility for rapid response to an emergency and does not feel this presents a problem. The MPCA Commissioner has the authority to waive the NOI for an emergency.

Potential constraints. Communication between the MPCA and the industry in need of emergency action takes time, but has not proven to be problematic.

P-8). Some local stormwater standards are more stringent than state standards in the CGP and some less stringent so it creates confusion and differing requirements to attain permits, especially in linear projects that cross many boundaries.

Solutions offered. See item P-5 above.

Potential constraints. See item P-5 above.

P-9). The SWPPPs for projects smaller than 50 acres disturbed are not reviewed by the MPCA. A construction project could easily slip by without producing a SWPPP.

Solutions offered. Anyone who tries to construct a project without following state and federal law does so at their own risk. The MS4 SWPPP should also develop a process to assure that these plans are checked whenever an inspector visits the site.

Potential constraints. Staff time needed to check SWPPPs at all sites.

P-10). The process of turning over a site from a developer to a set of builders often means that the stormwater provisions agreed to by the developer are not implemented because so many new people are involved and their priorities are not focused on stormwater. Builders can make promises that are not transmitted to individual builders and their parts of the site.

Solutions offered. Communities need to adopt development programs that mandate implementation of development requirements adopted throughout the permitting process. Economic sureties seem to work the best.

Potential constraints. The need to develop and adopt local standards for implementation of site development agreements.

Inspection and Enforcement

IE-1). MPCA's enforcement ability is a very unwieldy process through courts. MPCA is minimally staffed to inspect projects

Solutions offered. Several groups would like to see the Agency have ticketing authority in the field for smaller issues. Currently they don't have stop work orders, escrows, or smaller fines such as cities do. The 10 JPA pilot program may help address this in the future by entering cooperative agreements to delegate authority.

Potential constraints. Legislative change would be required to obtain a new enforcement authority for the MPCA.

IE-2). Minnesota is currently only one of four states that has no monitoring provision required for industrial permits. MPCA has no staff assigned to coordinate such an effort.

Solutions offered. None at this time.

Potential constraints. New funding for MPCA staff would be needed to address this gap.

Research

R-1). There is an information gap on the impact of infiltration and CI on groundwater and where infiltration facilities should not be located.

Solutions offered. See item J-10 above.

Potential constraints. See item J-10 above.

R-2). Stormwater utilities collect a lot of money, but information on how much is collected, where it is going, how it is used, and especially the value of the infrastructure is not being gathered. This information could be used by other communities to help them start a program or by the state to show the value of good stormwater management.

Solutions offered. No recommendations were offered.

Potential constraints. No effort to obtain this information is currently planned.

R-3). Guidance on non-degradation and BMPs for volume reduction based on good research is needed by communities.

Solutions offered. Some of this information will be in the Manual. MPCA is working to get non-degradation guidance to communities.

Potential constraints. Time is needed to assemble this information and the 30 non-degradation communities need it soon.

R-4). There is little research that shows the current effect of the increased regulatory attention on stormwater over the past many years. We have not verified with good monitoring data that the programs in place have in fact had a benefit or that they are deficient and need more attention.

Solutions offered. Cease all “new” activity in stormwater until an assessment is done on statewide stormwater management effectiveness and future needs.

Potential constraints. No effort to obtain this information is currently planned.

R-5). Many impaired waters are improperly categorized without a good database. Dramatic and stringent improvements might be required with no possibility of ever eliminating use impairment if the water body is improperly classified.

Solutions offered. A more careful analysis should be done prior to listing.

Potential constraints. MPCA staff time to review each 303d listing for accuracy.