

STATE OF MINNESOTA  
MINNESOTA POLLUTION CONTROL AGENCY

Adoption of Rules Governing Stormwater Permits,  
Minn. R. 7001.1020, 7001.1035, and 7001.1040;  
Water Quality Permit Fees, Minn. R. 7002.0220 and  
7002.0250; and the Stormwater Regulatory Program,  
Minn. R. ch. 7090.

AMENDED ORDER  
ADOPTING RULES

OAH Docket No. 12-2200-16166-1  
Governor's Tracking No. AR140

**WHEREAS:**

1. All notice and procedural requirements in Minn. Stat. ch. 14, Minn. R. ch. 1400, and other applicable law have been complied with.
2. The Minnesota Pollution Control Agency (MPCA) received nine comment letters on the proposed rules including two requests for a public hearing. As identified in the Notice of Intent to Adopt Rules published in the October 18, 2004, *State Register*, if 25 or more persons submit valid written requests for a public hearing on the rules, hearings will be held following procedures in Minn. Stat. §§14.131 to 14.20. The MPCA did not hold public hearings on the proposed rules because fewer than 25 requests were received. The MPCA received no requests for notice of submission to the Office of Administrative Hearings (OAH).
3. The MPCA submitted the proposed rules on May 16, 2005, to the OAH for review and approval. The MPCA adopts the Amended Order Adopting Rules (Order) with the attached letter of approval from Administrative Law Judge (ALJ) Steve M. Mihalchick, dated May 31, 2005, (hereinafter referred to as ALJ Letter) and incorporates the ALJ Letter into this Order (Attachment 1).
4. The MPCA has made changes to the proposed rules to address several of the technical corrections recommended in the ALJ Letter. As noted in the ALJ Letter, the ALJ's recommendations are not defects in the rules but merely made for clarification purposes. The ALJ determined that the recommended changes, if made by MPCA, were needed and reasonable and do not make the changed rules substantially different than originally proposed.
5. The MPCA has also made changes to the proposed rules as a result of comments received during the public comment period. Changes to the proposed rules are discussed in item 6 below. The MPCA's response to other comments received that did not result in rule changes is found in Attachment 2 (Responses to Comments). Attachment 2 is incorporated herein by reference.

6. The MPCA finds that the following changes to the proposed rules are not substantially different based on the criteria set forth in Minn. Stat. § 14.05, subd. 2. The changes are set forth in the revised version of the rule attached to this Order and are described below; specifically, why each change is reasonable and does not make the rule substantially different.

While the issue of substantial difference is discussed with regard to each change described below, in general, all the changes described below do not make the rule substantially different because they are clearly within the scope of "Subject of the Rules." Specifically, permit requirements for regulating stormwater discharges from three main sources: municipal separate storm sewer systems (MS4s), construction activity, and industrial activity as announced in the Notice of Intent to Adopt Rules. These changes are a logical outgrowth of the Notice and the comments submitted in response to the Notice, as described below. Finally, the Notice provided fair warning that these rule changes could result because: the commenter clearly understood that this rule would result; the rule is not greatly different than originally proposed; specifically, these changes raise no new subject matter not addressed in the proposed rules; and these changes do not alter the persons who are affected by the rules. Therefore, under the listed criteria of Minn. Stat. § 14.05, subd. 2, the rule with the following changes is not substantially different from the rule originally proposed.

Item 6.1.4 describes the change the ALJ states the MPCA should consider and why the MPCA does not intend to make the change.

## 6.1 Discussion of Suggested Changes Made by ALJ Steve M. Mihalchick

### 6.1.1 ALJ Letter, Page 1 - Changes to Part 7090.0060

The last sentence in part 7090.0060 identifies the locations where the document incorporated by reference under this part, the National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) Construction Stormwater General Permit, can be found; these locations include the State Law Library and the MPCA Internet site. The ALJ recommends that the address of the State Law Library be amended to reflect the change from Constitution Avenue to Rev. Dr. Martin Luther King, Jr. Blvd. The ALJ also recommends that a period be added at the end of the web address to punctuate the end of the last sentence of part 7090.0060. The MPCA agrees with the ALJ's recommended changes. The address change is needed and reasonable because it will make the rule less confusing by identifying the correct address of the State Law Library. It is also reasonable to make corrections in punctuation.

These two changes do not make the rules substantially different than originally proposed because they are clearly within the scope of "Phase II NPDES Permit Requirements" as announced in the Notice; specifically, permit requirements for small construction activity. The effects of this rule do not differ greatly from the effects of the originally proposed rule because like the proposed rule, these rule changes identify where the document that is incorporated by reference can be found.

The final rule reads as follows:

7090.0060 INCORPORATION BY REFERENCE.

For the purposes of parts 7090.2000 to 7090.2060, the storm water discharge design requirements, construction activity requirements, and the requirements of Appendix A in the Minnesota Pollution Control Agency document General Permit Authorization to Discharge Storm Water Associated With Construction Activity Under the National Pollutant Discharge Elimination System/State Disposal System Permit (NPDES/SDS) Program (construction storm water permit) are incorporated by reference. This document is subject to change every five years. For purposes of parts 7090.2000 to 7090.2060, all references to the construction storm water permit must be construed as referring to the most current version, which at the time this chapter was adopted was Permit No: MN R 100001, issued on August 1, 2003. This document can be found at the Minnesota State Law Library, Minnesota Judicial Center, 25 ~~Constitution Avenue~~ Rev. Dr. Martin Luther King, Jr. Blvd., St. Paul, Minnesota 55155, the Minnesota Pollution Control Agency offices, and the Minnesota Pollution Control Agency Internet site at the following address:  
<http://www.pca.state.mn.us/water/stormwater/stormwater-c.html>.

6.1.2 ALJ Letter, Page 2 - Changes to Part 7090.0080, Subpart 3

The ALJ recommends adding the term "one proposed plan" in the first and second sentence of the definition of "common plan of development or sale" in part 7090.0080, subp. 3. The MPCA agrees with the ALJ's recommended change. This is not a new term because it was a term that existed in this definition in the rules as originally proposed. This change adds clarity and consistency to the term "one proposed plan" as it is used in these sentences. This change is needed and reasonable in order to use consistent terminology throughout the definition.

This change does not make the rules substantially different than originally proposed because it is clearly within the scope of "Phase II NPDES Permit Requirements" as announced in the Notice; specifically, permit requirements for small construction activity. The effects of this rule do not differ greatly from the effects of the originally proposed rule because consistent use of the term "one proposed plan" in subp. 3, does not change the rule's meaning.

The final rule reads as follows:

7090.0080 DEFINITIONS.

Subp. 3. **Common plan of development or sale.** "Common plan of development or sale" means one proposed plan for a contiguous area where multiple separate and distinct land disturbing activities may be taking place at different times, on different schedules, but under one proposed plan. "One proposed plan" is broadly defined to include design, permit application, advertisement, or physical demarcation indicating that land-disturbing activities may occur.

6.1.3 ALJ Letter, Page 2 - Changes to Part 7090.1010, Subpart 1, Item A

The ALJ recommends inserting two commas to clarify that the resident capacity, occupancy, or population of 1,000 or more applies to each of the publicly owned entities listed in the example in subpart 1, item A. The MPCA agrees with the ALJ's recommended change. This change is needed and reasonable because it clarifies that resident capacity, occupancy, and population are the criteria that are applied to each of the publicly owned entities when determining if MS4 permit requirements are met.

This change does not make the rule substantially different because it is clearly within the scope of "Phase II NPDES Permit Requirements" as announced in the Notice; specifically, when MS4s are required to obtain permit coverage. The effects of this rule do not differ greatly from the effects of the originally proposed rule because like the proposed rule, these rule changes identify when an NPDES/SDS Stormwater Permit is required for MS4s.

The final rule reads as follows:

7090.1010 MS4 PERMIT REQUIREMENTS.

A. MS4s located in an urbanized area in whole or in part, that are regulated in accordance with Code of Federal Regulations, title 40, section 122.26(a)(1)(iii) and (iv), and (a)(9)(i)(A), including any publicly owned entity, such as a military base, hospital, prison or correctional facility, college, or university, with a potential resident capacity, bed count occupancy, or average daily user population of 1,000 or more.

6.1.4 ALJ Letter, Page 2 - Changes to Part 7090.0080, Subpart 9; Part 7090.2010, Subpart 1, Item B; Part 7090.2020, Subpart 2, Item A; and Part 7090.3010, Subpart 1, Item B

The ALJ notes that the MPCA has used the word "including," or some form of the word, and the phrase "including, but not limited to" in several places throughout the rules. The ALJ Letter identifies the rule parts cited above as examples where one or both of the phrases are used. The ALJ comments that the alternating use of these words and phrases, sometimes within the same rule part, creates the impression that the MPCA seeks to designate exclusive lists as distinct from inclusive lists or examples, thereby creating some ambiguity for readers. However, the ALJ also notes that in some instances the rule mirrors existing federal or state rule language. The ALJ states the MPCA should consider deleting the phrase "but not limited to" where it appears in the rules.

The phrase "but not limited to" is used in two rule parts; part 7090.0080, subp. 9, the definition of no exposure and part 7090.2020, subp. 2, rules for emergency construction. The proposed rule for no exposure is consistent with the federal rule at 40 CFR 122.26(g), and establishes what constitutes a condition of no exposure. In this definition where the phrase "but are not limited to" precedes a list of industrial materials or activities, the list is meant as examples of such materials or activities, as it would be difficult and nearly impossible to provide an exclusive list of all such examples under this rule part. Similarly, in the proposed rule for emergency construction where the phrase

"but not limited to" precedes a list of emergency situations, the list is also meant as examples of such situations. As stated in the Statement of Need and Reasonableness (SONAR) at page 24, "...based on the MPCA's experience implementing the Phase I construction program, it is difficult to define all of the potential situations where true emergencies and the related response actions may require permit coverage." Because the MPCA did not intend for the lists in these rule parts to be exclusive, the phrase "but (are) not limited to" is used to infer that the listed examples are not the only such examples that may apply in these rule parts and accordingly, should not be limited to such.

In contrast, at rule parts 7090.2010, subp.1, item B and 7090.3010, subp.1, item B, rules that establish when an NPDES/SDS stormwater permit is required, where the word "including" precedes a list of factors, the MPCA intended to list only those factors that would be considered in the Commissioners' determination that a discharge may cause or contribute to a violation of a state or federal water quality rule or regulation. The SONAR at page 62 states "In making this determination the Commissioner will consider the size of discharge, the quantity and nature of the discharge, and the location of the discharge to waters of the state." Because these factors are known to potentially have an adverse impact on water quality, the MPCA intended that each factor should be included for consideration in determining whether a discharge will cause or contribute to an exceedance of water quality standards.

Therefore, for the reasons stated above, the MPCA does not intend to delete the phrase "but not limited to" or to make changes to the rule parts cited in item 6.1.4 containing the word "including."

## 6.2 Discussion of Suggested Changes Made by the U.S. Environmental Protection Agency (EPA).

### 6.2.1 EPA Letter, Page 4 - Comment to Change Part 7090.0080.

The EPA comments that the definition of the term surface waters appears to be less stringent than the federal regulations and statute and requests that the MPCA explain and support this proposed rule. The term surface waters was used solely in the proposed rules in part 7090.2030, Best Management Practices (BMPs) Required for Conditional Exclusion Projects. Under the proposed rules, certain feedlot and conservation practice project construction activities conditionally excluded from applying for permit coverage would have been required to comply with specific erosion prevention and sediment control BMPs established in the rules. However, the proposed rules for the conditional exclusion under part 7090.2020 and the associated BMPs under part 7090.2030 are being deleted, as discussed in items 6.2.5 and 6.2.6 below. Consequently, the term surface waters is no longer used in these rules and the definition of surface waters in part 7090.0080 is not needed. Therefore, it is reasonable to delete the definition of surface waters.

The discussion of why this change is not a substantial change is addressed in items 6.2.5 and 6.2.6 below.

6.2.2 EPA Letter, Page 1 - Comment to Change Part 7090.1010.

The EPA comments that the time frames for part 7090.1010 permit applications for MS4s regulated by federal rules are not consistent with the federal permit deadline of March 2003, and that the rule provision appears to be less stringent for these MS4s than the federal requirements. The proposed rules at part 7090.1010, subpart 1, establish that a permit is required within the specified time period for MS4s identified in items A to C of this subpart. The proposed rules do not identify the Phase II federal permit deadline of March 2003, because this implementation date has passed and most, if not all, of these federally regulated MS4s have already applied for and obtained permit coverage. Rather, the proposed rules under item A cite the federal rule that regulates Phase I and Phase II MS4s that are federally mandated for permit coverage. The federal rule at 40 CFR 122.26 (a)(1)(iii) and (iv), requires large and medium MS4s to obtain permit coverage by October 1, 1994. Under 40 CFR 122.26(a)(9)(i)(A), small MS4s are regulated pursuant to 122.32 and 122.33(c)(1), which requires permit coverage for federally mandated small MS4s by March 10, 2003.

The EPA further comments that the proposed rules provide each MS4 (apparently both those regulated under the federal regulations and those selected for regulation by the state) to have 18 months from the date they meet the criteria to submit a permit application. The federal rule at 40 CFR 122.33(c)(2), requires that small MS4s designated by the permitting authority must apply for permit coverage within 180 days of notice, unless the permitting authority grants a later date. The MPCA by rule is granting designated MS4s an additional 12 months to apply for permit coverage. The 18 month deadline for application submittal under items B and C applies to small MS4s proposed for designation under these rules, and future designations by the Commissioner, respectively.

The MPCA does not agree that the proposed rules are less stringent than the federal requirements because item A cites the federal regulations that require permit coverage for federally mandated MS4s, and as noted above, 40 CFR 122.33(c)(2), provides for a date later than 180 days of notice for designated MS4s to apply for permit coverage. However; the MPCA understands that the proposed rule at subpart 1 could be confusing to the public because it says a "permit is required within the specified time period for MS4s identified in items A to C," but the rule only identifies the time period in items B and C (18 months); not the March 2003, deadline for federally mandated small MS4s in item A. Therefore, the MPCA will change subpart 1, and strike the wording "within the specified time period." Doing so does not change the rule's meaning or the time frames for MS4 Permit application. This change is reasonable because it will make the rule less confusing by removing language that makes reference to a specified time period, a time period that has not been specifically identified in each item A to C, as is stated in the proposed rule.

This change does not make the rule substantially different because it is clearly within the scope of "Phase II NPDES Permit Requirements" as announced in the Notice; specifically, when MS4s are required to obtain permit coverage. This change is a logical outgrowth of the Notice and comments submitted by EPA, as summarized above. Finally, the Notice provided fair warning that this rule change could result because: EPA

clearly understood that this rule would result; and the rule is not greatly different than originally proposed, as the rule does not change the time frames for MS4 Permit application submittal.

The final rule reads as follows:

7090.1010 MS4 PERMIT REQUIREMENTS.

Subpart 1. **Permits required.** An NPDES/SDS storm water permit is required ~~within the specified time period~~ for MS4s identified in items A to C. An owner or operator of an MS4 must submit a complete permit application requesting a permit. Once an MS4 is required to obtain a permit, the requirement remains in effect until the requirement is removed pursuant to subpart 4, item B.

6.2.3 Change to Part 7090.2010, Subpart 1A (see EPA Letter, Page 1 - Comment to Change Part 7090.2020).

The proposed rules at part 7090.2010, subpart 1A, establish that a construction stormwater permit is required if a person is conducting construction activity except for construction activities identified under part 7090.2020. Subpart 1A will be revised by striking the wording that says "except for construction activities identified under part 7090.2020." Under the proposed rules, certain feedlot and conservation practice project construction activities that meet the requirements of part 7090.2020 were conditionally excluded from the requirement to submit a permit application. However, the proposed rules for the conditional exclusion under part 7090.2020 are being deleted for the reasons discussed in item 6.2.5 below. Consequently, the wording "except for construction activities identified under part 7090.2020" is no longer needed. It is reasonable to delete rule language that will no longer be applicable under part 7090.2010. It is also reasonable to make this rule change in order to be reflective of and consistent with other changes that will be made to the proposed rules as discussed in item 6.2.5.

This is not a substantial change because it is clearly within the scope of "Conditional Exclusion for Certain Feedlot and Agricultural Construction Activities" as announced in the Notice. This change is a result of the MPCA's response to the comments received regarding the conditional exclusion and is a logical outgrowth of the Notice and comments submitted in response to the Notice. Finally, the Notice provided fair warning that this rule change could result because: the commenter clearly understood that this rule would result; the rule is not greatly different than originally proposed; and the effects of the rule do not differ from the effects of the proposed rule because the Notice clearly stated that feedlot and conservation practice projects conditionally excluded from the requirement to apply for construction stormwater permit coverage, would not be exempt from the Stormwater Regulatory Program.

The final rule reads as follows:

7090.2010 CONSTRUCTION ACTIVITY PERMIT REQUIREMENTS.

Subpart 1. **Permits required.** An NPDES/SDS construction storm water permit is required if:

A. a person is conducting construction activity ~~except for construction activities identified under part 7090.2020~~; or

6.2.4 EPA Letter, Page 1 - Comment to Change Part 7090.2010, Subpart 4.

The EPA comments that the proposed rules under part 7090.2010 for the "emergency exemption" are not consistent with and less stringent than federal regulations; the proposed rule provided that utility companies and local governments would be able to begin construction without getting permit coverage first. The SONAR at page 24 states "In these cases it may not be feasible or practical, or in the interest of protecting the public and environment, to delay construction activity to mitigate the immediate impacts of such disasters in order to meet the federal requirements for permit application." Though the intent of the proposed rule for emergency construction is to focus on providing better environmental protection when emergency situations arise by ensuring compliance with the BMPs in the Construction Stormwater General Permit incorporated by reference in the rule, rather than requiring the emergency response entity to implement a permitting process, such as a delayed permit application (see SONAR at page 65), the MPCA agrees with EPA's comment and will make the following changes to the proposed rules. These changes are reasonable because they provide a simplified administrative process that will accomplish permit coverage for emergency construction activities, as required by EPA, yet still provide the intended immediate response capabilities that were included in the original proposed rule. Additionally, it is reasonable to make changes to rule language that the EPA has determined is less stringent than federal regulations because state rules must be as stringent as, or may be more stringent, than federal rules.

6.2.4.a Change to Part 7090.2010, Subpart 4.

Subpart 4 will be moved to part 7090.2020 and renumbered as subp. 2. As discussed in item 6.2.5 below, a new subpart 1, will be added to part 7090.2020 that will allow for the Commissioner to notify owners and operators of construction activities that they are covered under the Construction Stormwater General Permit under specific circumstances, even if a permit application has not been submitted. Because this change to part 7090.2020 will apply to emergency construction activities, it is necessary and reasonable to move and renumber subp. 4.

6.2.4.b Change to Part 7090.2010, Subpart 4A and C.

Subpart 4 will be revised by deleting the wording under subp. 4A, that says "may begin before the submittal of a permit application if:" and by deleting subp. 4C, the rule provision establishing the deadline for submittal of a permit application for emergency construction activity. These changes specifically address EPA's comment. It is reasonable to delete rule language that will no longer be applicable under part 7090.2020.

6.2.4.c Change to Part 7090.2010, Subpart 4A(1).

Subpart 4A(1) will be revised by adding the word "must" and changing the word "notifies" to "notify" so it reads "the owner must notify the commissioner when the construction activity begins." Subpart 4A(1) will no longer be a separate subitem and will become part of subp. 4A. Under part 7090.2020, owners and operators of construction activities that meet specific requirements will be notified by the Commissioner that they are covered under the Construction Stormwater General Permit. This change is reasonable because it makes clear that notifying the Commissioner is a requirement under this subpart.

6.2.4.d Change to Part 7090.2010, Subpart 4A(2).

Part 7090.2010 will be revised by deleting subp. 4A(2). Under the proposed rules, it was necessary to establish the requirement for owners and operators of emergency construction activities to comply with the permit requirements incorporated by reference in these rules to ensure that they implemented stormwater BMPs without having applied for permit coverage before beginning construction. Owners and operators of emergency construction activities that meet the requirements of part 7090.2020, subpart 1, will now be covered under the Construction Stormwater General Permit as notified by the Commissioner and accordingly, are required to comply with the requirements of the permit. Therefore, the requirement for these owners and operators to comply with the requirements of the permit as incorporated by reference in the proposed rules is no longer needed because the Commissioner's notice will include a copy of the permit, and owners and operators should know, by reading the permit, the requirements they should comply with. This change is reasonable because the requirements of subp. 4A(2), will no longer be applicable under part 7090.2020.

These changes do not make the rules substantially different. These changes are clearly within the scope of "Phase II NPDES Permit Requirements" as announced in the Notice; specifically, permit requirements for small construction activity. Further, these changes are a logical outgrowth of the Notice and comments submitted by EPA in response to the Notice, as summarized in item 6.2.4 above. Finally, the Notice provided fair warning that this rule change could result because EPA clearly understood, and in fact indicated that change should result when they commented that the proposed rule was less stringent than federal regulations. The rule is not greatly different than originally proposed; owners and operators of emergency construction activities must still meet the same notification requirements, and the effects of this rule do not differ greatly from the effects of the originally proposed rule because like the proposed rule, this rule change relieves the burden on owners and operators of emergency construction activities of the requirement of applying for permit coverage, yet like the proposed rule still requires them to comply with the stormwater management requirements of the Construction Stormwater Permit.

The final rule reads as follows:

7090.2020 NPDES/SDS CONSTRUCTION STORM WATER GENERAL PERMIT COVERAGE

Subp. 42. **Emergency construction.**

A. Construction activities are required to minimize the impacts of an emergency situation, including but not limited to floods, tornadoes, and severe storms, presenting imminent threat to human health, public drinking water, or the environment ~~may begin before the submittal of a permit application if:~~

~~(1) The owner must notify the commissioner when the construction activity begins; and~~

~~(2) the owner and operator comply with the construction activity requirements, and the requirements of Appendix A in the construction storm water permit as incorporated by reference in part 7090.0060.~~

B. Emergency construction notification must be completed by letter, telephone, or facsimile and include:

(1) the owner's name, and the name of the construction company if different than the owner;

(2) the address or description of the location where the construction activity is occurring;

(3) a list of the cities, counties, and townships where the construction activity is occurring;

(4) the approximate acres to be disturbed by the construction activity; and

(5) a brief description of the emergency situation.

~~C. A permit application must be submitted to the commissioner within seven days of the emergency construction start date.~~

6.2.5 EPA Letter, Page 1 - Comment to Change Part 7090.2020.

The EPA comments that the proposed rules for the conditional exclusion of certain feedlot and conservation practice projects from the requirement to apply for permit coverage are less stringent and more narrow in scope than federal regulations. Though the general intent of the proposed rule is to streamline the permit process for certain feedlot facilities and relieve the administrative burden for landowners who voluntarily conduct conservation practice projects through state or federal financial assistance (see SONAR at pages 24-28), the MPCA will address EPA's comment by deleting part 7090.2020, subpart 1, which proposed the conditional exclusion. As discussed in item 6.2.5.a below, the MPCA will add a new part 7090.2020, subpart 1, in place of the conditional exclusion to address these types of construction activities. It is reasonable to delete rule language that the EPA has determined is less stringent than federal regulations because state rules must be as stringent as, or may be more stringent, than federal rules.

This is not a substantial change because it is clearly within the scope of "Conditional Exclusion for Certain Feedlot and Agricultural Construction Activities" as announced in the Notice. This change is a logical outgrowth of the Notice and comments submitted by EPA, as summarized above. Finally, the Notice provided fair warning that this rule

change could result because: EPA clearly understood, and in fact indicated that change should result when they commented that the proposed rule was less stringent than federal regulations; and the effects of the rule do not differ from the effects of the proposed rule because the Notice clearly stated that feedlot and conservation practice projects conditionally excluded from the requirement to apply for Construction Stormwater Permit coverage, would not be exempt from the Stormwater Regulatory Program.

6.2.5.a Change to Part 7090.2020, Subpart 1.

Part 7090.2020 will be revised by adding a new subpart 1, which provides that the Commissioner shall notify owners and operators of emergency and feedlot construction activities of one to less than five acres that they are covered by the NPDES/SDS Construction Stormwater General Permit even if an application for permit coverage has not been submitted. Subpart 1 is based in part on the federal rule at 40 CFR 122.28 (b)(2)(vi), which says that "the Director may notify a discharger...that it is covered by a general permit even if the discharger...has not submitted a notice of intent to be covered." Similar to the proposed rules for the conditional exclusion which established that specific requirements be met, subpart 1, also requires that owners and operators of emergency and feedlot construction activities meet these same specific requirements in order to be eligible for a notification of permit coverage. Subpart 1 also states that owners and operators that meet these requirements may request an Individual NPDES/SDS Construction Stormwater Permit. Subpart 1 will not apply to conservation practice projects as discussed below in item 6.2.5.c.

Under the proposed rules, the provision for emergency construction and the conditional exclusion for feedlots applied to all construction activity. Under the new subpart 1, notification of permit coverage will be limited to emergency and feedlot construction activities of one to less than five acres. Owners and operators of emergency and feedlot construction activities of five acres or greater will need to apply for construction permit coverage. For larger emergency construction activities, the MPCA will continue to use its' enforcement discretion, as it has in the past. The MPCA expects that feedlots conducting larger construction activities of five acres or greater will likely be Large Concentrated Animal Feeding Operations that are covered under the NPDES/SDS General Permit for feedlots, which incorporates the requirements of the NPDES/SDS Construction Stormwater General Permit.

Subpart 1 is similar to the proposed rules for emergency construction because it focuses on environmental protection, rather than application process, and is similar to the proposed rules that would have conditionally excluded feedlots because it streamlines the permit process for certain feedlots conducting construction activities (see SONAR at pages 23-26).

Subpart 1 does not make the rule substantially different because it is clearly within the scope of "Phase II NPDES Permit Requirements" as announced in the Notice; specifically, permit requirements for small construction activity. This notification of permit coverage keeps regulated parties under the Stormwater Regulatory Program, but provides an administrative process for permit coverage, when certain requirements are met, even if an owner or operator has not submitted an application. Because this

notification of permit coverage does not apply to all construction activity, it is necessary and reasonable to identify what types of projects are eligible for this notification. And because this notification of coverage under the Construction Stormwater General Permit is not a requirement, it is necessary and reasonable to clarify owners and operators of the identified construction activities have the option to request an Individual NPDES/SDS Construction Stormwater Permit.

This change is a result of the MPCA's response to EPA's comments regarding the conditional exclusion and is a logical outgrowth of the Notice and comments submitted in response to the Notice. Finally, the Notice provided fair warning that this rule change could result because: the commenter clearly understood that this rule would result; the rule is not greatly different than originally proposed; and the effects of this rule do not differ greatly from the effects of the originally proposed rule because the rule still reduces the regulatory burden on owners and operators of certain emergency and feedlot construction activities of the requirement of applying for permit coverage, while still maintaining regulatory oversight.

The final rule reads as follows:

7090.2020 NPDES/SDS CONSTRUCTION STORM WATER GENERAL PERMIT COVERAGE

Subpart 1. **Scope.** The commissioner shall notify owners and operators of construction activities that disturb one to less than five acres of soil and meet the requirements in subpart 2 or 3 that they are covered under the NPDES/SDS construction storm water general permit even if the owner or operator has not submitted a permit application. Owners and operators that meet the requirements of subpart 2 or 3 may request an individual NPDES/SDS construction storm water permit in accordance with chapter 7001.

6.2.5.b Change to Part 7090.2020, Subpart 2.

Subpart 2 will be renumbered as subp. 3. In the first sentence of subp. 2, the wording "eligible under subpart 1" and the term "animal holding facility" will be deleted. The first change corrects the sentence so it reads properly. The term "animal holding facility" is no longer used in the state's feedlot program; therefore it is not needed in this subpart.

The second sentence of renumbered subp. 2, starting with "The owner or operator must:" will be revised so it reads "must apply for and obtain the appropriate permit, and if no permit is required...complete the preconstruction notification submittal requirements..." This change consolidates the requirements of renumbered subp. 2A-D, and references the feedlot rule that contains the appropriate permits, rather than individually identifying the feedlot permits under part 7020.0405, as was proposed in the original rules. With this change, subp. 2A-D, is not needed and will be deleted.

These changes do not make the rules substantially different. These changes are clearly within the scope of "Conditional Exclusion for Certain Feedlot and Agricultural Construction Activities" as announced in the Notice; specifically, that the MPCA is proposing a streamlined permitting procedure for feedlots if specific eligibility criteria are met. These changes are a result of the MPCA's response to the comments received

regarding the conditional exclusion and are a logical outgrowth of the Notice and comments submitted in response to the Notice. Finally, the Notice provided fair warning that these rule changes could result because: the commenter clearly understood that this rule would result; the rule is not greatly different than originally proposed; and the effects of this rule do not differ greatly from the effects of the originally proposed rule because the specific eligibility criteria have not changed, the rule merely consolidates the criteria that were proposed in the original rule.

The last rule provision in the proposed subp. 2 will be deleted. This provision applied to feedlot owners and operators conducting construction activity that were not subject to the feedlot permit or notification requirements, and required them to comply with the BMPs in part 7090.2030 or apply for a Construction Stormwater Permit. The proposed conditional exclusion is being deleted in response to EPA's comment and consequently, the associated BMPs in part 7090.2030 will also be deleted, as discussed in item 6.2.6 below. Because these feedlot owners and operators do not need to apply for a feedlot permit or meet notification requirements, there is no current administrative process in MPCA's feedlot rules to identify these projects in order for the Commissioner to make a notification of permit coverage. Therefore, owners and operators of these sites will be required to apply for a Construction Stormwater Permit for their construction activities under part 7090.2010, subp. 2. The number of these projects is expected to be minimal (see SONAR at page 68).

This is not a substantial change because it is clearly within the scope of "Conditional Exclusion for Certain Feedlot and Agricultural Construction Activities" as announced in the Notice; specifically, that feedlot construction activities would not be exempt from the Stormwater Regulatory Program. This change is a result of the MPCA's response to EPA's comments regarding the conditional exclusion and is a logical outgrowth of the Notice and comments submitted in response to the Notice. As discussed in item 6.2.5.a above, a new subpart 1, under part 7090.2020 was added in place of the conditional exclusion in order to provide a streamlined permitting procedure for feedlot construction activities, as originally proposed.

The Notice provided fair warning that this rule change could result because EPA clearly understood, and in fact indicated that change should result when they commented that the proposed rule was less stringent than federal regulations. Though feedlot owners and operators who do not meet the eligibility criteria under renumbered subp. 2, will now need to apply for stormwater permit coverage for their construction activities; this rule is not greatly different than originally proposed, and the effects of this rule do not differ greatly from the effects of the originally proposed rule for several reasons. First, the Notice clearly stated that feedlot construction activities would not be exempt from the Stormwater Regulatory Program; under the original proposed rules feedlots owners that do not need to apply for a feedlot permit or meet notification requirements were provided an option; comply with the BMPs in rule or apply for a Construction Stormwater Permit. With this rule change, although owners and operators of these sites will need to apply for a Construction Stormwater Permit, this is not a new requirement because it was a requirement that existed under the proposed rules. Second, the Notice stated that the MPCA was proposing a streamlined permitting procedure for two groups of regulated parties, including feedlots. Feedlot owners and operators that do not need to apply for a feedlot permit or meet notification requirements under the current MPCA feedlot rules

are still required to comply with the MPCA feedlot rules and therefore, it would not be overly burdensome for these sites to be regulated under the Construction Stormwater Permit Program and it would not be an overly burdensome regulatory requirement for them to obtain stormwater permit coverage by completing and submitting a permit application.

The final rule reads as follows:

7090.2020 NPDES/SDS CONSTRUCTION STORM WATER GENERAL PERMIT COVERAGE

Subp. ~~2~~3. **Feedlots.** Construction activities are ~~eligible under subpart 1 for the purposes of building a new or expanded animal feedlot, or manure storage area, or animal holding facility or performing related maintenance. The owner or operator must~~ apply for and obtain the appropriate permit under part 7020.0405, other than an NPDES permit, and if no permit is required under part 7020.0405, the owner or operator must complete the preconstruction notification submittal requirements under part 7020.2000, subpart 5.

6.2.5.c Change to Part 7090.2020, Subpart 3.

Part 7090.2020 will be revised by deleting subp. 3, the requirements for conditionally excluded conservation practice projects. As discussed in item 6.2.5 above, EPA commented that the proposed rules for the conditional exclusion of conservation practice projects from the requirement to apply for permit coverage are less stringent and more narrow in scope than federal regulations. Under the original proposed rule, certain conservation practice projects were proposed to be conditionally excluded because they are typical types of projects that reduce or prevent erosion and control sediment runoff, and are done on a voluntary basis by landowners using state or federal financial assistance (see SONAR at pages 27-28).

After the public comment period for these proposed rules, the MPCA became aware of correspondence from EPA that addresses the question of whether conservation practices to control non-point source pollution activities from agricultural activities are a regulated construction activity under the NPDES Stormwater Regulatory Program. The correspondence stated that "earth disturbances associated with the installation of conservation practices associated with agricultural activities are not required to obtain NPDES Stormwater Permit coverage for construction activities. Examples of these practices may include grassed waterways, diversions, water and sediment control basins, terraces, grade stabilization structures, and lined waterways." These types of conservation practice projects were identified in subp. 3.

Though the MPCA understands that the correspondence is a draft document that has not, to date, been published on EPA's NPDES Web site (as the correspondence indicates was the intent); it clearly indicates that these types of projects, which MPCA previously interpreted as requiring Construction Stormwater Permit coverage, are considered to be excluded from NPDES permit coverage under the federal exclusion for agricultural activities at 40 CFR 122.3(e). Consequently, the MPCA has determined that this rule provision is no longer needed, and therefore it is reasonable to delete this subpart.

This is not a substantial change because it is clearly within the scope of "Conditional

Exclusion for Certain Feedlot and Agricultural Construction Activities” as announced in the Notice. This change is a logical outgrowth of the Notice and comments submitted by EPA in response to the Notice. The Notice provided fair warning that this rule change could result because: EPA clearly understood, and in fact indicated that change should result when they commented that the proposed rule was less stringent than federal regulations. The effects of the rule do not differ from the effects of the proposed rule because the purpose of the proposed rules is to establish when construction activities are required to obtain Phase II NPDES Permit coverage.

#### 6.2.6 Change to Part 7090.2030.

Part 7090.2030, the BMPs required for conditional exclusion projects, will be deleted. The SONAR at page 71 states “Because application for a construction stormwater permit, and subsequently the development and implementation of a SWPPP which contains site specific BMPs, is not required for these conditionally excluded projects, BMPs for these projects are established in these proposed rules.” As discussed in item 6.2.5 above, the proposed rules establishing the conditional exclusion under part 7090.2020, subpart 1, will be deleted. With the new part 7090.2020, subpart 1, owners and operators of emergency and feedlot construction activities that meet specific requirements will be notified that their construction activities will be covered under the Construction Stormwater General Permit. Consequently, because these activities will be covered under the Construction Stormwater General Permit, which requires stormwater management practices and BMPs, the BMPs are no longer needed in these rules. Therefore, it is reasonable to delete part 7090.2030.

This change does not make the rule substantially different because it is clearly within the scope of “Conditional Exclusion for Certain Feedlot and Agricultural Construction Activities” as announced in the Notice; specifically, that these activities would need to comply with specific BMPs established in the rules. Because the part 7090.2030 BMPs were a requirement of the proposed conditional exclusion, which is being deleted, this change is a logical outgrowth of the Notice and comments submitted in response by EPA, as discussed above in item 6.2.5 above. Finally, the Notice provided fair warning that this rule change could result because: the commenter clearly understood that this rule would result; and the rule is not greatly different than originally proposed because although the part 7090.2030 BMPs are being deleted, the Construction Stormwater General Permit, under which certain groups of persons who were notified of the original proposed rules will be covered, also requires stormwater management practices and BMPs.

#### 7. The rules are needed and reasonable.

**IT IS ORDERED** that the above captioned rules, in the form set out in the *State Register* on October 18, 2004, with modifications as indicated in the Revisor's draft file number AR3513, dated June 8, 2005, are adopted pursuant to authority vested in me by Minnesota Statutes, section 116.03, subdivision 1(c).

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Sheryl A. Corrigan, Commissioner  
Minnesota Pollution Control Agency

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Date

**RESPONSE TO COMMENTS**

This attachment contains the Minnesota Pollution Control Agency's (MPCA) response to other comments on the proposed stormwater rules received by the MPCA that did not result in rule changes. The MPCA staff divided its responses by each comment letter received.

- A. Summary of Comments
- B. Response to Individual Comments
  - 1. City of Redwood Falls
  - 2. City of Willmar
  - 3. St. Croix Basin Water Resources Planning Team
  - 4. Minnesota Department of Transportation
  - 5. Minnesota Asphalt Pavement Association
  - 6. Minnesota Chamber of Commerce Water Quality Subcommittee
  - 7. Minnesota Public Works Association
  - 8. Minnesota Board of Water and Soil Resources
  - 9. U.S. Environmental Protection Agency (EPA) - Region 5

**A. Summary of Comments**

The proposed rules governing the Stormwater Regulatory Program were placed on a 30-day public notice period from October 18, 2004, through November 18, 2004. Nine entities commented on the proposed rules. Comments were submitted regarding each of the three Stormwater Program areas; Municipal Separate Storm Sewer Systems (MS4s), construction activity, and industrial activity. In general, comments focused on the following topics: 1) MS4s proposed for designation and designation criteria; 2) construction activity and owner responsibilities, guidance, permit requirements incorporated by reference, and the conditional exclusion for conservation projects; and 3) industrial activity no exposure exclusion and impervious areas. The comments and/or questions, paraphrased for clarity, and the MPCA response to the comments are provided below. The complete comment letters are included in this attachment.

**B. Response to Individual Comments**

- 1. **Comments by Sara A. Triplett, Mayor, city of Redwood Falls, Redwood Falls, Minnesota. Letter received November 8, 2004.**

**Comment 1-1:** The city of Redwood Falls has been designated one of the cities that will be required to obtain a permit for our discharge of storm sewers to special or impaired waters. The MPCA has not demonstrated that the city has caused or has any impact on the impairment.

**Response 1-1:** The federal rules at 40 CFR 123.35(b) require the MPCA to establish designation criteria to evaluate whether a stormwater discharge results in or has the *potential* to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts. The federal rule provides broad flexibility in how these designation criteria are weighed in order to best account for watershed and other local conditions.

The city of Redwood Falls is proposed for automatic designation under these rules (see SONAR at page 49 and Appendix I) because it is located outside of the urbanized area, has a population of a least 5,000, and discharges or has the potential to discharge to a special or impaired water. Due to the close proximity of the city of Redwood Falls to a special or impaired water (i.e.

the Minnesota River, a Scenic and Recreational River; Ramsey Creek, a Trout Stream; and the Redwood and Minnesota Rivers, which are listed as Impaired Streams on the MPCA 2004 Clean Water Act, Section 303(d) List of Impaired Waters), and the city's discharges, the city's municipal stormwater runoff has the potential to adversely impact the water quality of these waters.

Urban development increases the amount of impervious surface; stormwater discharges are generated by runoff from land and impervious areas such as paved streets, parking lots, and building rooftops. These designation criteria take into account both real and potential water quality impacts from urban runoff at the local and watershed level. The MS4s of population 5,000 or more proposed for automatic designation under these rules are, in general, growing communities.

**Comment 1-2:** We object to the proposed rule in its entirety, on the basis that the MPCA is in the process of setting the Total Maximum Daily Loads (TMDLs) for the receiving streams in question and have not yet identified the source and/or allocations.

**Response 1-2:** These rules establish the permit requirements under the National Pollutant Discharge Elimination System Phase II federal stormwater regulations for regulating stormwater discharges from MS4s, construction activity, and industrial activity. The process of setting TMDLs for waters listed as impaired is a very distinct and separate process from that of this rulemaking.

Allocations have been set for phosphorus for stormwater sources for the approved Lower Minnesota River Dissolved Oxygen TMDL. The city of Redwood Falls is part of the cumulative problem of phosphorus in the Lower Minnesota River. For MS4 communities permitted under the Municipal Separate Storm Sewer System General Stormwater Permit, if an implementation plan has been developed for an EPA-approved TMDL, the permittee must review the adequacy of their Stormwater Pollution Prevention Program to meet the TMDL allocation set for stormwater sources.

**2. Comments by Mel Odens, Public Works Director, city of Willmar, Willmar, Minnesota. Letter received November 16, 2004.**

**Comment 2-1:** EPA provides the MPCA the discretion to regulate small MS4s located outside of an urbanized area if the MPCA determines that the MS4s stormwater discharge causes or has the potential to cause an adverse impact on water quality. What is the documented stormwater pollutant problem that MPCA has determined for the city of Willmar?

**Response 2-1:** The city of Willmar is proposed for automatic designation under these rules because it is located outside of the urbanized area and has a population greater than 10,000 based on decennial census data. Population is established as a defining criterion in the federal regulations. The EPA established the 10,000 population threshold primarily for prioritization purposes based on the likelihood of adverse water quality impacts at this population level. The MPCA agrees and therefore establishes this population threshold as criteria for automatic designation in these rules. More people in higher populated areas generally results in more impervious surface, more runoff, and the greater likelihood of adverse impacts on watersheds and their receiving waters.

**Comment 2-2:** Would MPCA be amenable to discussing alternative designation criteria, and if so, consider a group discussion with other small MS4 communities similar to the city of Willmar?

**Response 2-2:** The rules include a broad range of factors upon which a

designation can be based. The designation criteria in the rule are largely based on input the MPCA received from MS4 stakeholders during rule development. These stakeholders included various municipal governmental entities and associations and representatives from several cities that are also proposed for designation under these rules (see Statement of Need and Reasonableness [SONAR], Appendix C). Opportunity for comment on the proposed rules was provided during the public notice period. Although the city of Willmar submitted comments on these proposed rules, no alternative designation criteria were submitted for consideration.

**Comment 2-3:** Has the MPCA considered a credit based funding alternative to assist local communities with new regional water quality ponds? If a pond is built to accommodate new and existing impervious surface would MPCA consider allowing the city of Willmar to sell the existing treatment to new developers for the purposes of collecting funding to build another regional pond elsewhere?

**Response 2-3:** In lieu of constructing a stormwater pond on their own site, a developer can use a regional pond provided that it meets the requirements of Part III.3.C of MPCA Permit No: MN R 100001, General Permit Authorization to Discharge Stormwater Associated With Construction Activity Under the National Pollutant Discharge Elimination System/State Disposal System Permit (NPDES/SDS) Program, issued on August 1, 2003. The owner must obtain written approval from the applicable governmental unit or private entity that owns and maintains the regional pond identifying that the regional pond can meet the criteria identified in the construction stormwater permit. How use of the regional pond is paid for is determined by the owner.

**Comment 2-4:** Designation criteria in part 7090.1010, subp. 2, should be defined to reduce ambiguity.

**Response 2-4:** Because MS4s are not all alike, the application of these criteria is meant to be geographically specific. Consistent with the federal recommended criteria, the rules are intended to provide flexibility in how these criteria are weighed in order to account for varying local and watershed conditions, and to allow for a more tailored case by case analysis in designating an MS4 (see *National Pollutant Discharge Elimination System-Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges*, 63 Fed. Reg. 1562 [1998]). Defining these factors would not allow for such an analysis, and would greatly limit the flexibility of these rules. The designation process set forth in the rule provides for public participation in designating MS4s. The public notice which is required to identify the criteria and the basis for the draft designation, gives the public an opportunity to comment and raise issues which the MPCA should consider in making the designation.

**3. Comments by Pamela Davis, Coordinator, St. Croix Basin Water Resources Planning Team, Little Canada, Minnesota. Letter received November 17, 2004.**

**Comment 3-1:** The St. Croix Basin Water Resources Planning Team (St. Croix Basin Team) recommends that the MPCA require permits for the North Branch, Forest Lake, and Chisago Lake communities. The letter states that the St. Croix Basin Team has recently recommended a 20 percent reduction in phosphorus loading into the St. Croix Basin to begin a reversal of the ecological degradation that has already occurred; and that the stormwater rules can impact that goal. The St. Croix Basin Team further states that the North Branch, Forest Lake, and Chisago Lake communities need to be considered

for MS4 designation since they have rapidly growing communities and are located either in proximity to an impaired water or special waters such as the St. Croix River, which is an Outstanding Resource Value Water.

**Response 3-1:** The rule automatically designates approximately 44 small MS4s located outside of the urbanized area; these include municipalities with a current population of 10,000 or more, and municipalities with a population of 5,000 to 10,000 that discharge or have the potential to discharge to a special or impaired water. Forest Lake and North Branch are automatically designated for MS4 permit coverage under the proposed rules because they meet the criteria established for designation under this rulemaking. Forest Lake is proposed for designation based on 2000 Census Bureau population 14,440. North Branch is proposed for designation based on 2000 Census Bureau population 8,023, and discharge or potential discharge to a special or impaired water (see SONAR, Appendix I for waterbody name and type). Consequently, Forest Lake and North Branch will be required to apply for permit coverage within 18 months of when this rule becomes final (see SONAR at page 47). The communities of Chisago City and Chisago Lake Township, 2000 Census Bureau population 2,622 and 3,276, respectively, did not meet the criteria for automatic designation under this rulemaking. However, the proposed rules establish that stormwater permit coverage is required for these communities should they meet these designation criteria based on future decennial census or approved municipal boundary adjustment, and discharge or potential to discharge to a special or impaired water. In addition, the rules also establish additional criteria on which the MPCA may designate an MS4. These designation criteria and the petition process in part 7090.1010, subs. 2 and 4, allow for future designations of MS4s not automatically designated for permit coverage under this rule or federal rule.

**4. Comments by Richard Elasky, Chief Environmental Officer, Minnesota Department of Transportation, St. Paul, Minnesota. Letter received November 17, 2004.**

**Comment 4-1:** For the most part, these rules appear to formalize and clarify procedures and permits that the MPCA is currently implementing and enforcing.

**Response 4-1:** Comment noted. These proposed rules establish the permit requirements under the NPDES Phase II Federal Stormwater Regulations. The MPCA implemented the Phase II Stormwater Program in March 2003, to meet the federal permit requirements for regulating stormwater discharges from MS4s, construction activity, and industrial activity. Therefore, many regulated parties that require permit coverage under these proposed rules have already applied for and obtained a Stormwater Permit for their regulated source.

**Comment 4-2:** The SONAR does not include the Minnesota Department of Transportation (MNDOT) estimated cost to comply with the MS4 requirements provided to the MPCA Citizens' Board in May 2002. MNDOT estimated the cost to comply with the MS4 requirements in the Metro area to be \$4,000,000 per year. MNDOT has also estimated a similar amount to be expended in the other MS4 areas. Therefore, the cost to MNDOT and the state is substantial.

**Response 4-2:** MNDOT presents in its comment letter an estimate that was made for a different proceeding. This was a meeting of the MPCA Citizens' Board to consider a draft of a General Stormwater Permit for MS4s. MNDOT's testimony on that occasion was limited to the \$4 million cost estimate for its Metro Division. They had not at that time estimated costs for other regions. It appears now that they believe all other regions will also incur costs of nearly \$4 million.

MNDOT, in its 2002 testimony, characterized the added cost as "substantial." Their testimony also said, "The addition of permit requirements above those recommended by USEPA places a regulatory burden on MNDOT that, with its current resources, will be very difficult to achieve."

Although MNDOT raised the issue with respect to the MS4 Permit, it is addressed in the same general context in the proposed rules' SONAR at page 114:

"Proposed stormwater rules will require changes in MNDOT procedures. Road construction projects will have to adopt BMPs. MNDOT estimates the new requirements will increase road construction cost by 1 to 1.5 percent. The effect of road construction cost increases on state revenues is unclear. MNDOT could manage cost increases as the MPCA plans to do - by redirecting current staff and other resources. On the other hand, MNDOT could request a new legislative appropriation to cover the new costs. No MNDOT representative has told the Agency how the Department plans to cover the increased cost."

MNDOT's operating budget exceeds \$2 billion. It appears that MNDOT's resources have been sufficient to cover new costs, since MNDOT has continued operations in compliance with the conditions of the general permit for MS4s. The MPCA remains unaware of a) how MNDOT arrived at their cost estimate, and what portion of those costs were already being incurred under the previous permits; and b) how MNDOT covers the new cost, whether it is through realignment of work schedules or a new appropriation. The MPCA acknowledges that appropriate measures to protect the State's water resources do come at a cost.

**Comment 4-3:** Inserting permit provisions into the rule would appear to make them more permanent and difficult to change, establish them as baseline requirements for future permits, and may limit regulated entities from implementing innovative and cost effective methods to achieve stormwater quality goals.

**Response 4-3:** The Construction Stormwater General Permit is reissued every five years. Some permit requirements such as Best Management Practices (BMPs) are likely to change with permit reissuance due in part to new and changing BMP technology. For this reason, the MPCA purposely referenced only the permit parts that contain stormwater management practices, not the specific requirements and BMPs contained in these parts. The parts of the permit incorporated by reference are: Part III. Stormwater Discharge Design Requirements; Part IV. Construction Activity Requirements; and Appendix A, which includes Requirements for

Discharges to Special Waters, Additional BMPs for Special Waters, and Requirements for Discharging to Wetlands. Further, the administrative process for permit reissuance includes statutory requirements for public notice and comment. Interested parties will be able to participate and comment on the permit requirements during the public process.

**5. Comments by Richard O. Wolters, Executive Director, Minnesota Asphalt Pavement Association, New Brighton, Minnesota. Letter received November 18, 2004.**

**Comment 5-1:** Some construction projects, particularly housing developments have stormwater problems before they begin. Many projects begin without correct stormwater management plans that adequately address the sediment and erosion issues.

**Response 5-1:** Comment noted. The MPCA does not have the resources needed to review all Stormwater Pollution Prevention Plans given the large number of applications submitted for Construction Stormwater General Permit coverage under the Phase II Stormwater Program. The MPCA recognizes that to ensure Stormwater Pollution Prevention Plans are properly developed and implemented, continued efforts are needed to educate and train owners and operators conducting construction activities of their responsibilities in complying with the construction permit and required stormwater management practices.

**Comment 5-2:** Plans created for a development often do not address the excavation of homes and the development of lots as structures are being built. Road contractors as a co-permittee are powerless to control the development of the lots, and most often the owner of the development does not have systems in place to deal with the homebuilders either. Contractors (i.e. utilities and road construction) should be allowed to amend the projects stormwater permit and assign the co-permittee to the new, controlling operation or back to the owner/developer of the project (i.e. the home construction/individual lot development). By doing so, the party who has control of the project can control the stormwater management issues and BMPs.

**Response 5-2:** For permitted construction sites where the owner or operator changes before construction on the site begins or is completed, (e.g. an original developer may subdivide and sell a portion of the property to various homebuilders), the requirements for change of coverage under Part II.B.5 of MPCA Permit No: MN R 100001, General Permit Authorization to Discharge Stormwater Associated With Construction Activity Under the NPDES/SDS Program, issued on August 1, 2003, must be complied with. An owner or operator that acquires ownership of a portion of property that is covered under an existing Construction Stormwater Permit must either obtain permit coverage or submit a subdivision registration form to the MPCA, and implement a Stormwater Pollution Prevention Plan for their portion of the site, which their construction activities will impact. The new owner is responsible for the stormwater management practices for the site. If there is no change of coverage, the permittee(s) is responsible for the construction site until a Notice of Termination is submitted to the MPCA. The proposed rules establishing the regulatory requirements for the subdivision owner registration are found at part 7090.2060.

**6. Comments by Keith Hanson, Minnesota Power, Duluth, Minnesota, on behalf of the Minnesota Chamber of Commerce Water Quality Subcommittee. E-mail received November 18, 2004.**

**Comment 6-1:** The Chamber of Commerce states that their comments are not directed at the proposed rule but at the need to develop guidance to address issues which were discussed at meetings the MPCA held during development of the proposed rule. The Chamber recommends guidance be developed and completed prior to the 2005 construction season for the following topics: 1) criteria to determine connected actions or common plan of development; 2) criteria to determine area of disturbance; and 3) governance within a MS4 jurisdiction.

**Response 6-1:** Comment noted. The MPCA will continue to work with utility representatives to advance the work effort specific to construction activities conducted for the purposes of utility installation that began during the development of these proposed rules.

**7. Comments by Angela Popenhagen, Bonestroo & Associates, Inc., Roseville, Minnesota, on behalf of the Minnesota Public Works Association. Letter received November 18, 2004.**

**Comment 7-1:** Several of the factors identified as designation criteria in part 7090.1010, subp. 2.B, upon which the Commissioner may designate an MS4 are unduly vague terms as no clear definition has been provided.

**Response 7-1:** See response 2-4.

**Comment 7-2:** An industrial site may receive an exclusion for no exposure even though it may have large impervious areas (parking lots, building footprints) that may cause water quality degradation. In those cases where the industrial site discharges into an MS4, the MS4 is left to improve water quality degraded by the industrial site runoff.

**Response 7-2:** Current federal stormwater regulations do not require permit coverage for stormwater discharges from an industrial facility's exposed areas that are separate from industrial activities, such as runoff from office buildings, parking lots, lawns, and other non-industrial areas (see *National Pollutant Discharge Elimination System-Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges*, 64 Fed. Reg. 68783 [1999]). Stormwater discharges from these non-industrial areas are not regulated under the existing Industrial Stormwater Permit Program because they are not stormwater discharges associated with industrial activity. Accordingly, these non-industrial areas at an industrial facility do not need to be assessed as part of the no exposure certification. However, a facility operator that has certified a condition of no exposure should be aware that they may be required to obtain permit coverage. Under part 7090.3060, subp. 5.E., the MPCA has the authority to deny a no exposure certification. For example, there may be a circumstance where a facility can meet the conditions of the no exposure exclusion however stormwater discharges from the facility, such as runoff from impervious surfaces, may cause adverse impacts on receiving waters.

**Comment 7-3:** There is no enforcement mechanism for an MS4 subject to permitted or non-permitted (e.g. shopping centers, multiple housing complexes) discharges into its system.

**Response 7-3:** The MS4 Permit Program regulates discharges from municipal separate storm sewer systems. The definition of a municipal separate storm system does not include individual buildings. These types of buildings may have a municipal separate storm sewer but they do not have a system of conveyances. A municipality may want to adopt a stormwater management ordinance or other regulatory mechanism to control runoff from individual sources into its system.

**8. Comments received by Al Kean, Chief Engineer, Minnesota Board of Water and Soil Resources, St. Paul, Minnesota. E-mail received November 18, 2004.**

**Comment 8-1:** The Board of Water and Soil Resources (BWSR) suggests that conservation practice projects conditionally excluded in the proposed rules (part 7090.2020, subp. 3), include wetland restoration, enhancement or creation because these projects use the design standards, specifications and construction inspection requirements of the Natural Resources Conservation Service and BWSR, and involve federal and/or state funding, as required in the rules.

**Response 8-1:** The MPCA did not include wetland restoration as a conservation practice in the proposed rules for several reasons. Some wetland restoration projects pose a higher risk for environmental harm due to their size, scope and duration, and their proximity to receiving waters. Unlike conservation practice projects that typically last less than two weeks (see SONAR at pages 69-70), wetland projects typically result in exposed soils during construction that last months and often years. Due in part to the duration of these projects, the level of project oversight often is not as stringent as that provided for other types of conservation practice projects that are conducted by a contractor hired by the individual landowner, and where a financial incentive exists to complete the project in a timely and appropriate manner. Additionally, wetland restoration projects viewed by MPCA staff in the past have been lacking in erosion and sediment control practices. Since these projects are usually hydrologically connected to other waters in the area, there is a high potential for any discharge of sediment from the site to harm other waters. Therefore, the MPCA has determined that these projects should not be conditionally excluded from coverage under the Construction Stormwater Permit.

**9. Comments by U.S. Environmental Protection Agency Region 5, Office of Regional Counsel, Chicago, Illinois. E-mail received November 18, 2004.**

In addition to the comments submitted by EPA that resulted in rule changes (see items 6.2.1 - 6.2.6 in the Order Adopting Rules), EPA submitted the following comments.

**Comment 9-1:** The MPCA should request an updated Attorney General statement that addresses the state's authority to adopt the rules.

**Response 9-1:** As discussed in the Order Adopting Rules, items 6.2.1 - 6.2.6, the MPCA will make changes to the proposed rules to address EPA's comments. With these changes, the MPCA believes it has responded to any EPA concerns about authority and the MPCA's authority to adopt these rules as identified in the SONAR at pages 10-11 is adequate. In addition, the MPCA has been implementing the NPDES Permit Program for stormwater since at least the early 1990s, without any prior need to update or add to its existing statutory authorities. For these reasons, the MPCA believes that no updated Attorney General statement is needed.

**Comment 9-2:** For purposes of an authorized federal NPDES Program, EPA cannot authorize the state to implement federal program authorities in Indian country absent an explicit application and subsequent EPA approval to do so. The issue of the scope of the proposed rules with respect to Indian lands should be addressed in an updated Attorney General statement.

**Response 9-2:** The MPCA, with these proposed rules for the Stormwater Regulatory Program, is not submitting an application to implement the NPDES Stormwater Program in Minnesota on Indian lands and therefore, this rule should not be interpreted as such. A scope of coverage is addressed in these proposed rules in part 7090.0010 and further clarified in the Order Adopting Rules, items 6.2.1 - 6.2.6. Therefore, the MPCA believes an updated Attorney General statement is not needed on the scope of coverage issue.