



Nine Mile Creek Discovery Point
12800 Gerard Drive

Eden Prairie, MN 55346

(952) 835-2078

www.ninemilecreek.org

MEMO

TO: Nine Mile Creek Watershed District Board of Managers
FROM: Randy Anhorn
DATE: November 13, 2018
RE: City of Minnetonka Water Resources Management Plan

Background

In accordance with Minnesota Statutes section 103B.235, subdivision 3, Nine Mile Creek Watershed District (NMCWD) staff have reviewed the City of Minnetonka's draft Water Resources Management Plan (WRMP) for consistency with NMCWD's adopted fifth-generation 2017-2027 Water Management Plan (NMCWD Plan). The WRMP is a voluminous document that reflects Minnetonka's historic and earnest commitment to understanding and addressing water-resource and flooding issues in the city. This memo presents staff's findings on the WRMP. General notes pertaining to the WRMP in general and to issues of particular significance are provided first, followed by comments and notes on specific text, tables or figures in the WRMP. The memo identifies changes that must be made to the WRMP, and issues and observations the city should consider in finalizing the WRMP. The former are underlined, while the latter are not. NMCWD received the Metropolitan Council's October 26, 2018, comments on the WRMP and considered them in its review of the WRMP.

General Notes

- *Compliance with state rule.* NMCWD finds that the WRMP includes the provisions required by Minnesota Rules 8410.0160, though as noted this memo describes both required and suggested revisions and clarifications to hone the WRMP's compliance with the state rule. Overall, the WRMP does a good job in providing a water management tool for the city to follow and implement over the next ten years. It meets the requirements of Minnesota Rule 8410.0160 by including an Executive Summary, identifying water resource management objectives, identifying existing and proposed physical environment and land-use, providing a very good summary of the drainage characteristics for the 10 major drainage areas within the city – including drainage areas, runoff volumes, flow rates, identifying problem areas where the design standards are currently not being met, flood elevations, water quality modeling and recommendations for improvements to comply with current requirements.
- *Baseline data update needed.* Stormwater management, quantity and quality, presented in the WRMP is based on modeling completed for past city management plans using the U.S. Weather Bureau's Technical Paper 40 precipitation data. NMCWD has adopted the

revised National Oceanic and Atmospheric Administration precipitation frequency estimates referred to as Atlas 14 for purposes of stormwater management. Table 6-2 identifies a task for updating the hydrology and hydraulic modeling of the city's existing and future stormwater infrastructure using Atlas 14 in 2018-2020. Further specification of the start and completion dates for this task must be provided. NMCWD underscores the importance of current stormwater and flood modeling, and appreciates Minnetonka's commitment to completing the modeling update as soon as possible.

- *Funding.* In several places¹ the WRMP conditions the city's ability to achieve water-resource protection and improvement on the availability of the necessary resources. First, raising and allocating funds to projects and programs is always a challenge for governmental entities, but the WRMP needs to make an unconditional commitment to implementation, which is required by state law – Minnesota Statutes section 103B.235, subdivision 4. These notes show the city hedging on its commitment to water-resource protection and improvement, and establishing escape clauses in the event that the city's implementation falls short of goals and objectives. (Given this apparent uncertainty regarding its capacity or commitment to implementing the necessary programs and projects, the city should perhaps reconsider its sometimes-stated intent to take on implementation of official controls to fulfill the WRMP.)
- *Regulatory Authority.* The WRMP discusses allocation of regulatory authority in several different places without articulating a clear and unambiguous statement of the city's intent on the subject:
 - Executive Summary, page vii, states the city's intention to “[a]cquire and retain full permitting authority city-wide.” The third bullet on page viii states that the city's ordinances will be revised to meet watershed organizations' stormwater-management standards “and specific tasks required... .” *It's not clear what (regulatory) tasks the WRMP is referring to here.*
 - Water-quality policy 2.1.1 states, “Responsibility for enforcing water quality and stormwater management standards is assumed by the city.”
 - Policy 2.1.5 states that city will “work to obtain and maintain full permitting authority” for “water resources related projects” in the city, but policy 2.1.6 suggests that the city will in the future review watershed plans to meeting “the intent” of standards and rules. *The city should complete a review of the relevant watershed organization plans' provisions for exercise of regulatory authority before making a commitment to exercise sole regulatory authority, and must meet or exceed the standards and requirements of watershed rules, not just the intent.*
 - Policy 2.1.10 states that the city will implement rules and regulations to maintain or improve water quality and achieve standards for priority resources (*only?*).
 - Policy 2.1.13 states that the city will “continue to require implementation of stormwater” best management practices to meet applicable standards. *The city is already doubling up on NMCWD requirements? See also uncertainty created vis a vis NMCWD exercise of regulatory by policies 2.1.16 and 2.1.17.*
 - In section 4.2.3 the city states that the WRMP will be amended and submitted to NMCWD (and the other four watersheds) but does not commit to implementation of the necessary ordinances and does not provide for continue conformity with NMCWD rules.

¹ See, e.g., introduction to section 2.2; policy 2.1.9.

- In section 6.1, the WRMP states that it is the city’s intention to implement “the [s]tormwater management standards of each of the four WMOs,” and that “the city has identified the stormwater management rules that will be applied in each of the respective WMOs in the city in the future, as outlined in Appendix A...” The language appears to propose that the city will implement different stormwater-management standards in each of the four watersheds that overlap with the city, and states that the regulatory framework is outlined in the Design Guidelines and Standards that are incorporated into WRMP as Appendix A.
- Table 6-2 – the WRMP’s implementation plan – provides specifics (including a 2020 implementation date) for Minnetonka to update ordinances and assume sole regulatory authority. But there are no specifics as to ensuring that the city’s official controls will meet or exceed the standards in NMCWD rules, as required.
 - Table 6-2 also states (as does policy 2.3.1) that the city will continue to serve as the Wetland Conservation Act Local Government Unit. The WRMP must address how the provisions of NMCWD’s Wetlands Management Rule that are more protective than WCA will be implemented. In particular, notwithstanding the difference between the wetland classifications used by the city² and NMCWD,³ NMCWD’s wetlands-buffer requirements⁴ are more protective than the city’s ordinance.⁵ (Reference also policies 2.1.17 and 2.3.2.)
- Section 6.7 states the NMCWD (and the other watershed organizations) will continue to exercise regulatory authority until the city amends the WRMP and ordinances/official controls, and enters special agreements with NMCWD (and the watershed organizations) describing the terms for the transfer of regulatory authority for the relevant rule areas. *Given the uncertainty the results from the various statements in the WRMP, it may be most prudent and efficient (as clearest for property owners subject to the regulations) to simply defer exercise of regulatory authority to NMCWD until such time as the city elects to in fact pursue exercise of sole regulatory authority and has prepared the necessary WRMP and ordinance amendments to implement the shift.*
- In Appendix A, section 4.1 indicates that the city intends to continue to impose duplicate requirements with watershed organizations, and section 4.2.3 states that NMCWD will continue to “implement its regulatory program in Minnetonka” until “at least such a time as the city” elects to exercise sole regulatory authority via a plan amendment and associated further steps.

(The notes above pertain to some, but not all of the WRMP provisions related to regulatory authority and activities. Final revision of the WRMP will need to establish clarity and consistence for all statements related to water-resource protection and flood-mitigation regulatory activities.) The uncertain statements, somewhat circular cross-references and references to guidance (which is not enforceable unless incorporated into

² Subsection 3.1.10.2.

³ NMCWD Wetlands Management Rule, Appendix 3a.

⁴ *Id.*, subsection 3.4.1, requiring buffers averaging 60 feet in width on high-value wetlands, 40 feet on medium-value wetlands and 20 feet on low-value wetlands.

⁵ Minnetonka Code of Ordinances, section 300.23(5), requiring buffers 50 feet in width on Preserve wetlands, 25 feet on Manage 1 wetlands, 16.5 feet on Manage 2 wetlands, and no buffer on Manage 3 wetlands. Further, the city ordinance requires no buffer around type 1 wetlands.

ordinance) do not serve where what is required is a definitive statement of a plan and structure for implementation of official controls to protect water resources and prevent flooding. (Minnesota Rules 8410.0160, subpart 3(4), and the NMCWD Plan, subsection 6.2.1.) The WRMP must be revised to provide a clear statement of the city's intent with regard to exercise of regulatory authority; the city must include such further provisions in the WRMP as are needed to clearly provide for implementation of its decision.

In making revisions to clarify its intent, the city needs to consider subsection 6.2.1 of the NMCWD Plan, which provides a very specific framework to ensure that NMCWD and the city maintain a cohesive and protective regulatory program, as well as specifics on local-water-plan elements needed for NMCWD approval, if the city intends to exercise sole regulatory authority. The WRMP must not only commit to submitting ordinances for a determination by NMCWD that they are at least as protective as NMCWD rules, but also that they will be amended within six months of notice of amendment of the NMCWD rules. The WRMP would also have to note that the plan and ordinances would have to provide that variances from standards adopted to achieve consistency with watershed organization rules will be provided to NMCWD for review (when applicable to land within NMCWD's jurisdiction). (Minnesota Statutes section 103B.211, subdivision 1(a)(3)(ii).)

Alternatively, if the city intends to re-authorize NMCWD to continue to exercise regulatory authority – even if only until Minnetonka decides to exercise sole regulatory authority – the WRMP should specify how the city will direct potentially regulated parties to NMCWD to proceed through the permitting process.

Section 2.0 Goals and Policies

1. Under policy 2.1.4 the WRMP states that the city will require development to comply with the conditions and policies of the NPDES MS4 permit SWPPP and the WRMP. Setting aside the uncertainty to whether *redevelopment* (much more prevalent in the already fully developed city) would also be required to comply, the MS4 SWPPP pertains to city operations and neither document can be enforced on landowners unless codified by the city.
2. Policy 2.1.12 states that the city will manage lakes and wetlands to achieve city water-quality goals and standards. The WRMP should address how the city will work to achieve NMCWD standards for lakes, wetlands and the creek with the Nine Mile Creek watershed.
3. Note that “promot[ing]” replacement of wetland impacts (policy 2.3.12) within the same subwatershed is not as protective as the NMCWD rule, which requires higher-than-WCA project-specific wetland replacement ratios if replacement is not within the same subwatershed.
4. Policy 2.1.19: Note that while NMCWD welcomes requests for assistance with water-resource improvement and flood-mitigation capital projects from the city and will be glad to have the city's assistance with its projects – especially implementation of improvements to Holiday, Wing and Rose lakes listed in the NMCWD capital improvements plan – the NMCWD Plan notes that it is self-implementing, and does not require assessment of feasibility, prioritization or allocation of funding from the city for implementation.
5. Policy 2.1.28: If the city intends to exercise sole regulatory authority, it will need to

amend its ordinances to require permanent recorded maintenance obligations on private properties hosting stormwater best management practices, wetland buffers and waterbody crossings.

6. Regulation of runoff volumes from development sites only and only “to the maximum extent practical” (policies 2.5.4 and 2.5.5) would not be consistent with NMCWD standards.
7. NMCWD notes the commitment in section 2.6 generally and policy 2.6.2 specifically to develop a groundwater-conservation policy. The city must add a commitment to adopt the policy as well. (NMCWD Plan subsection 7.1.1.)
8. Section 2.6 includes discussion of the city’s continued implementation of its wellhead protection plan, and the most recent version is included as Appendix D. In accordance with the relevant requirement in subsection 7.1.1 of the NMCWD Plan, the city needs to commit to providing NMCWD with any future updates to its wellhead protection plan.
9. Policy 2.7.4 states that the city will continue to regulate to ensure erosion and sediment control, but commits only to ensuring consistency with state guidance, not NMCWD (or other watershed) standards.

Section 3.0 Physical Environment Inventory

1. Section 3.3 Watersheds and Drainage Patterns states that the central portion of the Nine Mile Creek watershed (including the area tributary to Lone Lake and Lake Minnetoga) drains to the South Fork of Nine Mile Creek. Lone Lake is actually land-locked and does not drain to the south fork unless the lake level exceeds the natural surface overflow.
2. Section 3.10.1.2 Wetland Classification – NMCWD’s wetland rule is not referenced. A comparison of the city’s Preserve and Manage 1-3 wetland classifications should be made here to NMCWD’s low, medium and high classification system or completion of such comparison should be identified as a work task in Table 6-2.

Section 4 Watershed Plans

1. Subsection 4.3.2.9 Glen Lake Outlet: A recommendation should be made to ensure that the existing tile outlet from Glen Lake is functional or identify as a work task development of a plan for replacement.

Section 5 Assessment of Issues

1. Subsection 5.2.4 NMCWD Issues: The WRMP states that water-quality monitoring “suggests” that excess chlorides are a problem in Nine Mile Creek; in fact the Minnesota Pollution Control Agency has listed the creek as impaired for chlorides. (The WRMP indeed references the TMDL completed by NMCWD for chloride.) The WRMP should further reference the 62 percent reduction in chloride loading from both public and private applicators required to meet the TMDL.
2. Section 5.8.3. (Please see comment no. 2 under Section 2.0 Goals and Plans, above.)

Section 6.0 Implementation Program

1. Section 6.2 states the city’s dedication to addressing chloride contamination through attention to road-salt application rates and systems. This language could be expanded to state awareness of NMCWD’s chloride-management education and training efforts, as well as the chloride-reduction requirement added to NMCWD’s rules in 2018.
2. Table 6-2 – NMCWD includes projects to implement improvements to Holiday, Wing and Rose lakes in the capital improvements program in the NMCWD Plan. The city

should consider clarifying, in Table 6-2, how it wishes and anticipates working with NMCWD to implement improvements to the lake; e.g., whether it intends its dedication of funds for improvements to the lakes to be supplemental to NMCWD funds or otherwise.

3. A line item should be added to Table 6-2, Implementation Program of the WRMP, for developing a model for the remaining areas within the Nine Mile Creek Watershed District that do not have P8 models developed.
4. Section 6.7 describes the official controls that comprise a critical element in the city's implementation plan. (See Minn. R. 8410.0160.0105, subp. 6; 0160, subp. 3E(4).) The list of controls here includes the WRMP and city design standards, neither of which constitutes an official control (i.e., neither may be applied as a requirement to property owners other than the city).
5. Note that subsection 6.10.2.3 states that there are seven cities in the Nine Mile Creek watershed, but then only lists six. There are in fact only six cities in the watershed: Minnetonka, Bloomington, Edina, Eden Prairie, Hopkins, Richfield. This subsection also states that all NMCWD projects will be "conducted in full cooperation with municipalities." While NMCWD is indeed committed to partnership and collaboration with watershed cities, its plan describes an implementation program that it can pursue and complete on its own. Finally, this subsection states that Minnetonka "does not have permitting authority within the NMCWD watershed," which is not, strictly speaking, accurate; rather the WRMP should state here that Minnetonka does not presently exercise regulatory authority where NMCWD rules apply.

Appendix A: Design Guidelines and Standards

1. Subsection 4.2.3 states that "General Permitting authority has been given to the NMCWD by the [Department of Natural Resources]. General Permit 1997-6112 does not provide any authority to NMCWD. Rather it provides for state work-in-waters permitting for property owners and project proponents who secure a permit from NMCWD. (See also subsection 6.10.2.3, which also misstates the relationship between NMCWD regulatory and DNR permitting.)