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**MEMORANDUM**

To: Laura Jester  
From: Troy Gilchrist  
Re: Local Water Plan Approval Process and Recommendations  
Date: July 18, 2018

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I was asked to review the statutory process the Commission is to follow when reviewing and acting on local water management plans and to identify options available to the Commission. This issue arose in part over a question on how the review period is to be interpreted and delays associated with updating local official controls (ordinances) to implement changes in both the watershed plan and the local water plan. Because this process is affected by statute, rule, and language in the watershed plan, it seemed most appropriate to set out my findings and recommendations in a memo. This is by no means a complete analysis of every aspect of the process and it does not identify every possible option, but it should serve to give the Commission a better understanding of the process and its limited review and approval authority.

**Updating Local Water Plans**

A city is required to prepare or update its local water plan when a watershed plan is adopted or amended. Minn. Stat. § 103B.235, subd. 1(a). Similarly, Section 5.3.1 of the watershed plan requires member cities to revise their local water plan. Also, a city's land use plan is required by Minn. Stat. § 473.859, subd. 2(a) to include the local water plan required by Minn. Stat. § 103B.235. This requirement is supported by Minn. R., part 8410.0160, subp. 2, which indicates the local water plan must be a chapter of a city's comprehensive plan.

The required contents of a local water plan are set out in Minn. Stat. § 103B.235, subd. 2 and Minn. R., part 8410.0160, subp. 3.

“Each local water plan shall be adopted not more than two years before the local comprehensive plan is due. Extensions of local comprehensive plan due dates do not alter the local water plan schedule.” Minn. R., part 8410.0160, subp. 6.

### **Process to Review Local Water Plans**

The process for reviewing and approving a local water plan is primarily set out in Minn. Stat. § 103B.235, but a local water plan is also required to have a section called “Amendments to Plan” that is to set out an amendment process that conforms to the plan amendment procedures set out in the watershed plan. Minn. R., part 8410.0160, subp. 4. The primary steps and timelines in the review process are as follows (all references are to Minn. Stat. § 103B.235 unless indicated otherwise):

- (1) After consideration, but before adoption, a city shall submit its local water plan “to the watershed management organization for review for consistency with the watershed plan . . .” Subdivision 3. There is a single review clock that begins to run for all of the review agencies at the same time, so the periods of review mentioned here all start on the same day and run concurrently.
- (2) At the same time, the city is to submit the local water plan to the Metropolitan Council (Met Council) and, if there is a county groundwater plan, to the County. Subdivisions 3 & 4.
- (3) The Met Council is to complete its review with 45 days and must forward its comments to the Commission and the city. Subdivision 3a. If it fails to complete its review within that period the Commission is to continue with its review without the Met Council’s comments. Subdivision 3a.
- (4) The Commission is to consider the comments received by the Met Council and is to review the local water plan within 60 days, unless the city grants an extension. Within that period the Commission “shall approve or disapprove the local plan or parts of the plan.” Subdivision 3. “If the [Commission] fails to complete its review within the prescribed period, the local plan shall be deemed approved unless an extension is agreed to by the [city].” Subdivision 3.
- (5) After approval of the local water plan by the Commission, the City is required to “adopt and implement” its local water plan within 120 days.
- (6) A city is to notify the Commission within 30 day of adopting the local water plan. Section 5.3.1.2.

### **Updating Official Controls**

Following the work to update, review, and adopt the local water plan, the city is required to amend its official controls as may be needed to reflect the changes in the local water plan within 180 days of the Commission’s approval of the local water plan. There is also reference in the

watershed plan indicating that a city is to revise its official controls affected by the watershed plan “within 2 years of adopting of the BCWMC Plan.” Section 5.3.1. Once revised, the city is to notify the Commission within 30 days of adoption of the amended official controls. Section 5.3.1.2. Based on the last update to the watershed plan I understand the period for city’s to have updated their official controls was September 2017.

### **Potential Consequences**

A question that naturally arises from this discussion is what happens if a city fails to adopt a local water plan or to update its official controls? If a city fails adopt a local water plan, because that plan is a required part of a city’s comprehensive plan the Met Council would presumably not approve the comprehensive plan. Under Minn. Stat. § 473.175, subd. 3, if a city fails to adopt a comprehensive plan the Met Council is authorized to commence a civil action to compel compliance.

If a city fails to adopt a local water plan in accordance with Minn. Stat. § 103B.235 “or has not adopted the implementation program described in the plan”, that constitutes a condition that would potentially authorize the Commission to regulate the use and development of land within the city. Minn. Stat. § 103B.211, subd. 1(3)(i). Arguably, the two year period provided in the BCWMC watershed plan is part of the implementation program and so a city’s failure to comply grants the Commission the authority of a watershed district under Chapter 103D. A similar argument could be made if a city fails to adopt official controls within the 180 day period. I am not recommending the Commission pursue this option, but exercising the authority could result in the Commission becoming a permitting authority in floodplain, greenbelt, and open space areas within the city. Minn. Stat. § 103D.345.

### **Discussion**

The timeline for the Commission to complete its review and action on a proposed local water plan is very tight, particularly when you consider it may not receive the Met Council’s comments until the 45<sup>th</sup> day of the 60 day review period. This has resulted in discussions between the Commission and the member cities regarding the need for extensions to the review period. Such extensions give some relief to the 60 day review period, but there is still the looming deadline for cities to complete their local water plans, get them approved, and to include them in their updated comprehensive plan that must be submitted for approval by the Met Council in the near future.

In addition to the challenges associated with the limited review period, I understand there is also a question about whether the Commission should approve a local water plan if the ordinance amendments needed to implement them are not presented with the plan. Because the statute expressly gives a city 180 days after approval of the local water plan by the Commission to amend its official controls, it seems clear the Commission cannot refuse to approval the local water plan solely because the city has not yet amended its official controls. This two-step process of updating the plan and then acting to amend the official controls is similar to the updating of a city’s comprehensive plan and then amending its official controls as needed to remain consistent with the updated plan.

There is an argument that if a city has failed to update its official controls within two years of the watershed plan being updated as required in Section 5.3.1 of the watershed plan, that the proposed local water plan is not consistent with the watershed plan and therefore is not eligible for approval. However, for the reasons I set out below regarding the appropriate scope of the Commission's approval authority, I do not recommend the Commission attempt to focus on status of a city's official controls to determine whether its local water plan is consistent with the watershed plan.

Developing, processing, and adopting ordinance amendments is a time-consuming process for cities. At a minimum, there is notice, a public hearing, a recommendation to the city council, and then action by the city council. If the city is a charter city, two readings are often required and the ordinance does not go into effect for 30 days after adoption. Therefore, unless the proposed amendments to the official controls are not substantially prepared by the time approval of the local water plan is requested it will be difficult for a city to get everything done to adopt the amendments within 180 days. Given that reality, I recommend working with cities to develop a plan that contains specific steps and deadlines for adopting the amendments to bring them into compliance with the updated local water plan.

### **Recommendations**

- I do not recommend denying a local water plan because a city did not amend its official controls within two years of the Commission having updated its watershed plan or because a city has not drafted or adopted amendments to its official controls based on changes in its proposed local water plan. The statutory scope of the Commission's review is whether the local water plan is consistent with the watershed plan. The approval authority does not mention the Commission's review of the official controls or any proposed amendments to them. Any attempt to deny a local water plan based on factors outside of the permissible scope of review is subject to challenge as an arbitrary and capricious decision. Put another way, a denial of the local water plan, or of any part of it, must be limited to identifiable inconsistencies with the watershed plan.
- A conditional approval is possible, but it has the practical effect of an approval and so has little direct impact on a city. From a strictly legal perspective, if a city fails to meet a condition of approval the Commission could attempt to argue the approval has been lost, but short of going to court to seek a specific remedy the city moves forward regardless of whether the Commission attempts to revoke the approval.
- The Commission could review its policies regarding a city's eligibility to receive CIP funding and take action as may be needed to indicate those cities that have not adopted an approved local water plan or have failed to adopt official controls within the watershed plan or statute are not eligible for CIP funds.
- To help ensure a city follows through with its statutory obligation to adopted amendments to its official controls within 180 days of the local water plan approval, consider encouraging a city to specifically set out as part of the local water plan an

implementation plan that includes the adoption of amendments to its official controls. Alternatively, the Commission could explore entering into a memorandum of understanding with a city that establishes a plan and timeline for adopting amendments to the official controls.

- Consider amending the required “Amendment to Plans” section of the watershed plan to require a more detailed process as part of the local water plan for adopting amendments to the city’s official controls. For example, the comprehensive plan updated statutes contains the following language that appears to encourage the same outcome:

“The comprehensive plan shall provide guidelines for the timing and sequence of the adoption of official controls to ensure planned, orderly, and staged development and redevelopment consistent with the comprehensive plan.” Minn. Stat. § 473.858, subd. 1.

- An option I do not recommend, but which is available to the Commission, is to bring a mandamus action against a city that fails to amend its official controls within the 180 day period. The requested order would seek to compel the city to comply with its statutory obligation to develop and adopt the amended official controls.