



Highway Department


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MEMORANDUM

TO: Cass County Commission

FROM: Jason Benson, County Engineer 

DATE: May 30, 2023

SUBJECT: Cass County and City of Fargo Memorandum of Understanding for the Cass County MS4 Permit

Cass County has a Municipal Separate Storm Sewer Systems (MS4s) permit through the ND Department of Environmental Quality. Generally, this permit covers our Highway Department facilities in West Fargo and several areas along Cass Highways 81 and 31 north and south of Fargo. We have a very small number of facilities compared to the City of Fargo with their long list of storm water retention ponds, lift stations, and storm water outfalls.

These facilities are subject to the requirements of Section 402 of the Clean Water Act, as enforced by the NDPDE permitting program. In addition, the general permit process places less of an administrative burden on the issuing authority than the individual permitting process. The general permits require baseline control practices aimed at minimizing the impact of stormwater discharges to waters of the state.

In 2022 we completed an audit with the state of North Dakota reviewing our MS4 permit and the required compliance criteria. Through the audit, the state requested that the responsibilities of the County and City be formally documented for the extraterritorial area of the City of Fargo. The County and City jointly compiled and reviewed the attached MOU outlining the responsibilities for each jurisdiction. Both entities had their respective attorneys review and comment on the MOU. The City of Fargo approved this agreement on May 15, 2023.

We also want to establish the Deputy County Engineer as the designated representative who will be the party's representative with respect to any matters relating to the repair and/or maintenance of the elements identified in this MOU which may be in dispute or requiring agreement under the terms of this Agreement.

SUGGESTED MOTION:

Move to approve the Cass County and City of Fargo Memorandum of Understanding for the Cass County MS4 Permit and Deputy County Engineer as the designated representative for dispute resolution.



CONTRACT APPROVAL

REQUIRED BY DEPARTMENT:

DEPARTMENT: Highway Department DATE OF REQUEST: 05-30-2023

COMPANY REQUESTING CONTRACT: Cass County and City of Fargo

BRIEF PROJECT DESCRIPTION: MOU for Cass County MS4 Permit

NEW CONTRACT OR CONTRACT RENEWAL

REQUIRED BY STATE'S ATTORNEY OFFICE:

STATE'S ATTORNEY SIGNATURE: *Kevin Nauman* 6/1/2023

STATE'S ATTORNEY COMMENTS:

Approved as to form.

REPORT OF ACTION

PUBLIC WORKS PROJECTS EVALUATION COMMITTEE

8

Type: Memorandum of Understanding

Location: Extraterritorial

Date of Hearing: 5/8/2023

<u>Routing</u>	<u>Date</u>
City Commission	5/15/2023
PWPEC File	X
Project File	Jody Bertrand

APPROVED BY THE BOARD OF CITY COMMISSIONERS

5-15-23

The Committee reviewed a communication from Division Engineer, Jody Bertrand, regarding a Memorandum of Understanding with Cass County for MS4 permits in extraterritorial (ET) areas.

Cass County completed an audit with the state of North Dakota reviewing their Municipal Separate Storm Sewer System (MS4) permit and the required compliance criteria. Through the audit, the State requested that the responsibilities of the County and the City be formally documented for the ET area of the City of Fargo. The County and City jointly compiled a Memorandum of Understanding (MOU) outlining the responsibilities for each jurisdiction.

Staff is seeking approval of the MOU with Cass County for the MS4 responsibilities of each jurisdiction within Fargo's ET area.

On a motion by Tim Mahoney, seconded by Ben Dow, the Committee voted to recommend approval of the MOU with Cass County for the MS4 responsibilities within the City's ET area.

RECOMMENDED MOTION

Concur with the recommendations of PWPEC and approve the MOU for storm water management with Cass County for the MS4 responsibilities within the City's ET area.

PROJECT FINANCING INFORMATION:

Recommended source of funding for project: _____

Developer meets City policy for payment of delinquent specials
 Agreement for payment of specials required of developer
 Letter of Credit required (per policy approved 5-28-13)


Yes	No
_____	_____
N/A	_____
_____	N/A
_____	_____
N/A	_____

COMMITTEE

Tim Mahoney, Mayor
 Nicole Crutchfield, Director of Planning
 Steve Dirksen, Fire Chief
 Michael Redlinger, City Administrator
 Ben Dow, Director of Operations
 Steve Sprague, City Auditor
 Brenda Derrig, City Engineer
 Terri Gayhart, Finance Director

Present	Yes	No	Unanimous
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Bruce Grubb
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

ATTEST:


 Brenda E. Derrig, P.E.
 City Engineer

C: Kristi Olson

Memorandum

To: Members of PWPEC
From: Jody Bertrand, Division Engineer
Date: May 8, 2023
Re: Memorandum of Understanding (MOU) with Cass County for MS4 Extraterritorial Responsibilities

Background:

Cass County completed an audit with the state of North Dakota reviewing their Municipal Separate Storm Sewer System (MS4) permit and the required compliance criteria. This permit allows for discharging of storm water to waters of the state by following the criteria established in the National Pollutant Discharge Elimination System (NPDES). Through that audit, the state requested that the responsibilities of the County and City be formally documented for the extraterritorial area of the City of Fargo. The County and City jointly compiled and reviewed the attached MOU outlining the responsibilities for each jurisdiction. Both entities had their respective attorneys review and comment on changes/modifications.

Recommendation:

Approve the Memorandum of Understanding (MOU) with Cass County for the MS4 responsibilities for each jurisdiction within Fargo's extraterritorial (ET) area.

MEMORANDUM OF UNDERSTANDING FOR STORM WATER MANAGEMENT

This Memorandum of Understanding (“MOU”) is entered into between the City of Fargo, a North Dakota municipal corporation whose address is 225 Fourth Street North, Fargo, North Dakota 58102 (“City” or “Fargo”), and Cass County, North Dakota, a North Dakota political subdivision, whose address is 211 9th Street South, Fargo, North Dakota 58103 (“Cass County” or “County”).

WHEREAS, North Dakota Century Code § 40-05.1-06 and Article 3 of Fargo’s Home Rule Charter authorizes Fargo to enter into contracts; and

WHEREAS, North Dakota Century Code § 11-09.1-05 and Article 2 of Cass County’s Home Rule Charter authorizes Cass County to enter into contracts; and

WHEREAS, City and Cass County wish to enter into this Agreement for the purpose of establishing the Parties’ responsibilities with respect to Storm Water Management Program within the City of Fargo’s Extraterritorial Jurisdiction.

NOW, THEREFORE, the Parties agree to clarify and describe in this Agreement the specific Storm Water Management Program tasks each Party will implement in the City of Fargo’s Extraterritorial Jurisdiction.

A. Acronyms Used in this Agreement

- 1) BMP – Best Management Practice
- 2) ESCP – Erosion and Sediment Control Plan
- 3) ETJ – Extraterritorial Jurisdiction
- 4) IDDE – Illicit Discharge Detection and Elimination
- 5) MS4 – Municipal Separate Storm Sewer System
- 6) SWMP – Storm Water Management Program
- 7) SWPPP – Storm Water Pollution Prevention Plan

B. Purpose

- 1) The Parties agree to work cooperatively with the goal of efficient and effective coordination to implement the City’s Storm Water Management Plan in concert with the County’s Storm Water Management Plan.

- 2) These cooperative efforts will address the implementation of the Program Elements and Best Management Practices (“BMPs”) specified in the City’s and County’s respective Phase II MS4 General Permits that are relevant to the City’s ETJ.
- 3) Sections B through G of this Agreement describe the specific tasks, coordination, and responsibilities of each Party and taken together demonstrate the intent of the Parties to effectively exercise their power and authority to meet the storm water management goals established in their respective Phase II MS4 General Permits.
- 4) Unless otherwise specifically noted, the Parties agree that this Agreement applies to the ETJ of the City of Fargo that is located within Cass County, North Dakota, and to no other areas in either’s jurisdiction.

C. Public Education and Public Participation Program

- 1) General. The Parties agree to work cooperatively to implement certain public education, public outreach, public involvement, and public participation programs.
- 2) Education and Outreach.
 - a) The Parties agree to continue to collaborate and cooperate regarding existing public education and outreach program efforts to improve environmental awareness by residents, and to periodically review, adjust, or expand these efforts to be effective and consistent with the respective storm water programs.
 - b) The Parties agree to cooperate on regional training and outreach efforts to assist businesses and construction site personnel to improve compliance with Fargo/Cass County standards for development permits, construction Storm Water Pollution Prevention Plans (“SWPPPs”), and Erosion and Sediment Control Plans (“ESCPs”).
 - c) The Parties agree to share the content of existing storm water, SWPPP, and ESCP educational materials (with each Party bearing the reproduction costs for the materials it produces) and consultation resources.
 - d) The Parties agree to consult with one another to assist on storm water related program content for each Party’s storm water program websites and to include, as appropriate, hyperlinks to the other Party’s website on each of its own program websites.
 - e) The County agrees to include the City’s storm water related materials and announcements in the County’s broadcasts or website, if requested by the City.

D. Illicit Discharge Detection and Elimination

- 1) General. The Parties agree to work cooperatively to implement Illicit Discharge Detection and Elimination (IDDE) programs to reduce or eliminate illicit discharges to the MS4s and surface waters in the State.
- 2) Compliance Evaluations of Illicit Discharges.
 - a) Fargo Cass Public Health (FCPH) acts as the liaison between the City of Fargo and the ND Department of Environmental Quality (NDDEQ). FCPH notifies the NDDEQ of reported spills which occur within city jurisdiction to allow for proper cleanup activities to occur which meet the NDDEQ standards and requirements. The City agrees to lead implementation of inspection duties and notify the NDDEQ for enforcement if illicit discharges are witnessed, identified or reported through public complaints. Corrective actions will be coordinated and completed by the responsible Parties.
 - b) The County will report illicit discharge complaints or requests for assistance to the City and the NDDEQ, including mal-functioning on-site sewage facilities and problems regarding discharges associated with development subject to City-issued permits.
 - c) The Parties agree to regularly share information on illicit discharges from commercial and industrial activities and facilities. Information shared will include inventories of such facilities and results from inspection and monitoring activities.
 - d) The Parties will routinely exchange up-to-date lists of IDDE-related inspection staff contacts, including assigned roles and territories, whenever these lists are updated.
- 3) Emergency Response.
 - a) The Parties agree to continue the implementation of the Emergency Management Plan to address discharges and dumping of oil, hazardous materials, or other pollutants.
 - b) The County will maintain its lead role in emergency response to address discharges and dumping of oil, hazardous materials, or other pollutants on a County roadway, County right-of-way, or County-owned property. The City will coordinate with the applicable Cass County Emergency Services District personnel in accordance with the established Emergency Management Plan.
 - c) If a spill occurs on private property, the property owner/responsible party would be responsible for taking action through NDCC 33.1-16-02.1-11(4).
 - d) The Emergency Management Plan will be maintained by the Parties and will include staff contacts, telephone numbers for 24-hour access, assigned roles and territories, procedures for referral between the Parties, processes for updating contact lists, and convening periodic meetings.

4) IDDE Regulations.

- a) To the extent practicable in consideration of their respective regulatory authority and staff enforcement resources, the Parties will develop lists of allowable non-storm water discharges and conditions for discharges that are the same or similar.
- b) Any additional County IDDE regulations and programs implemented must be consistent with City IDDE codes and program activities.

5) IDDE Training.

- a) The City will develop an IDDE training program for city inspectors and staff, as described in the City's SWMP.
- b) To the extent practicable, the Parties agree to notify each other of opportunities for IDDE training, such that joint development and implementation of training sessions may be attained and cost effective, when appropriate.

E. Construction Development Permit Review and Inspection Programs

- 1) General. The Parties agree to work cooperatively to implement and enforce programs to reduce pollutants in storm water runoff from construction activities that result in land disturbance. The Parties agree to undertake efforts to develop and incorporate a subdivision storm water inspection and enforcement program into the single office review and joint city/county code of subdivision regulations as appropriate.
- 2) Final Inspections. The Parties agree to continue coordinated final inspections of new subdivisions.
- 3) Infrastructure Construction Inspection and Monitoring.
 - a) The City agrees to continue a lead role in the Fargo ETJ on behalf of both Parties on review, inspection, and enforcement of ESCP and permanent BMPs on construction projects. These projects are still subject to applicable City and County subdivision and site plan permits.
 - b) The Parties agree that public interest or other factors may result in the need for the additional involvement of the County for SWPPP/ESCP inspection of construction activities as requested.
 - c) Based upon the nature of an issue and in consideration of the authority of each Party, staff of each Party will promptly refer the matter and share inspection-related information through agreed upon protocols and contacts.
 - d) The Parties will each provide points of contact for receipt of data, information, or reports from the other Party, in an instance when there is insufficient evidence that a person has commenced a development activity with authorization from either the City of Fargo or Cass County.
 - e) The Parties will routinely exchange up-to-date lists of inspection and related staff contacts, including assigned roles and territories, whenever these lists are updated.
 - f) Following execution of this Agreement, the Parties will develop and implement

more detailed procedures for staff to follow in the ongoing implementation of this Section and this Agreement.

- 4) Construction Site Storm Water Controls Training.
 - (a) The City will develop a construction site storm water controls training program for city inspectors and staff, as described in the City's SWMP.
 - (b) To the extent practicable, the Parties agree to notify each other of opportunities for construction site storm water controls training for City and County inspectors and staff, such that joint development and implementation of training sessions may be attained, when appropriate.
- 5) The County agrees to notify the City of the staff contacts who wish to receive notice of draft revisions to technical standards.

F. Post-Construction Storm Water Management

- 1) General. The Parties agree to work cooperatively to develop, implement, and enforce programs to reduce post-construction pollutant discharges in storm water runoff from new development and redevelopment. The City of Fargo storm water requirements are outlined in the "Policy on Storm Water Discharge and Treatment Requirements" (as amended or adopted).
- 2) Permanent Water Quality Control Monitoring and Enforcement.
 - (a) In the City ETJ, the County will continue its existing monitoring and enforcement program for permanent detention and water quality control structures.
 - (b) For water quality control ponds that also serve as flood detention structures and where the detention structure is integral to a County roadway, the County will carry out the inspection and enforcement responsibilities for the combined structures.
 - (c) For flood detention and water quality control structures associated with County land facilities, parks, and preserves, the County will lead in carrying out the inspection and enforcement responsibilities. If the City wishes to inspect such a structure, it will first provide advance notification to the County point of contact, to provide the County the opportunity for joint inspection.
 - (d) The Parties agree to continue their outfall mapping and monitoring program, as described in both Parties' SWMP.
 - (e) The Parties agree to cooperate in this effort where possible, including sharing information, MS4 map data, and records relating to specific water quality control and flood detention structures identified on site plans and design specifications as available, staff contacts, staff roles, staff territories, and the referral of cases between the Parties.
 - (f) The Parties agree to coordinate to ensure comparable information is maintained in their respective pond database inventories in order to most- efficiently perform and coordinate the agreed-on responsibilities.
- 3) Structural Storm Water Controls Training.
 - (a) Each party will develop a structural storm water controls training program of

structural best management practices constructed for areas of development and redevelopment for inspectors and staff, as described in the respective SWMP.

- (b) To the extent practicable, the Parties agree to notify each other of opportunities for structural site storm water controls training for inspectors and staff, such that joint development and implementation of training sessions may be attained, when appropriate.

- 4) Maintenance of County Roads. Until annexation by the City, the County will continue to maintain any accepted County road and right-of-way, in accordance with all related BMPs described in the County SWMP (Minimum Control Measure for Storm Water Pollution Prevention and Good House Keeping.)

G. Pollution Prevention (Good Housekeeping)

- 1) General. The Parties agree to work cooperatively to develop, implement, and enforce programs to reduce storm water pollution from open space maintenance, snow disposal, vehicle and building maintenance, land disturbances, and storm conveyance system maintenance plan.

- 2) Illegal Dumping Control.

- a) The Parties agree to continue to collaborate and cooperate regarding enforcement of illegal dumping as a source control.
- b) The Parties agree to share the content of existing illegal dumping education materials (with each Party bearing the reproduction costs for the materials it produces) and consultation resources.
- c) The County agrees to lead implementation of an inspection and enforcement program that identifies illegal dumping and seeks corrective actions by responsible Parties.
- d) The County will notify the NDDEQ and FCPH of illegal dumping activities.

H. Coordination and Reporting

- 1) Points of Contact.

- (a) The Parties agree to designate staff points of contact for each of the program areas listed above in Sections B through G to coordinate development and implementation.
- (b) This information shall include staff-assigned roles and territories, where appropriate.

- 2) The Parties agree to meet as needed to ensure program coordination.

NOW THEREFORE, in consideration of the mutual terms, covenants, conditions, and agreements contained herein, it is hereby agreed by and between the Parties as follows:

1. Dispute Resolution.
 - a. Fargo and Cass County will each designate a representative who will be the party's representative with respect to any matters relating to the repair and/or maintenance of the elements identified in this MOU which may be in dispute or requiring agreement under the terms of this Agreement. Such representative may be changed from time to time. The representatives will be responsible for resolving any dispute between the Parties concerning this Agreement and for the scheduling of maintenance and repairs.
 - b. If the designated representatives cannot agree with respect to any matter requiring agreement or with respect to any dispute concerning this Agreement, the Parties will submit the matter to their respective Boards (or a committee established by the Board) to resolve the dispute.

2. Term. The term of this Agreement will be twenty (20) years, with an expiration date of December 31, 2040. This Agreement will automatically renew for successive periods of twenty (20) years unless the City has taken over the responsibility of these roadways pursuant to this Agreement.

3. Release and Waiver. In consideration of the mutual promises of the Parties and to the fullest extent permitted by law, each party assumes all risk of personal injury or death and property damage or loss from whatever causes arising while that party, its agents, employees or designees are conducting work pursuant to this MOU and each party releases the other party, its officers, employees, agents or designees relating to or arising out of that Parties', agents, employees or designees work pursuant to this MOU, whether known or unknown, foreseen or unforeseen, liquidated, unliquidated, fixed, contingent, material or immaterial, disputed or undisputed, suspected or unsuspected, asserted or unasserted, direct or indirect, at law or in equity, from the beginning of time, and each party understands and acknowledges the significance of such release and waiver and hereby assumes full responsibility for any injuries, damages or losses that it may incur as a result of its execution of this MOU.

4. Notice. Any notice or election required or permitted to be given or served by any party to this MOU upon any other will be deemed given or served in accordance with the provisions of this MOU if said notice or election is (a) delivered personally, or (b) mailed by United States certified mail, return receipt requested, postage prepaid, and in any case properly addressed as follows:

If to Fargo:

City of Fargo
ATTN: City Auditor
Fargo City Hall
225 Fourth Street North
Fargo, ND 58102

If to Cass County:
ATTN: County Administrator
211 9th Street South
Fargo, ND 58103

Each such mailed notice or communication will be deemed to have been given on the date the same is deposited in the United States mail. Each such notice or communication will be deemed to have been given upon the delivery. Any party may change its address for service of notice in the manner specified in this MOU.

5. Time is of the Essence. Time is of the essence of each provision of this entire MOU and of all the conditions thereof.
6. Entire Agreement. This MOU constitutes the entire and complete agreement between the Parties and supersedes any prior oral or written agreements between the Parties. It is expressly agreed that there are no verbal understandings or agreements which in any way change the terms, covenants and conditions set forth herein, and that no modification of this MOU and no waiver of any of its terms and conditions will be effective unless in writing and duly executed by the Parties.
7. Amendments. No amendment, modification, or waiver of any condition, provision or term will be valid or of any effect unless made in writing signed by the party or Parties to be bound, or a duly authorized representative, and specifying with particularity the extent and nature of such amendment, modification or waiver.
8. No Forbearance. The failure or delay of any party to insist on the performance of any of the terms of this MOU, or the waiver of any breach of any of the terms of this MOU, will not be construed as a waiver of those terms, and those terms will continue and remain in full force and effect as if no forbearance or waiver had occurred and will not affect the validity of this MOU, or the right to enforce each and every term of this MOU.
9. Remedies. Except as expressly and specifically stated otherwise, nothing herein will limit the remedies and rights of the Parties under and pursuant to this MOU.
10. Binding Effect. All covenants, agreements, warranties, and provisions of this MOU will be binding upon and inure to the benefit of the Parties and their respective representatives, successors, and assigns.
11. Governing Law. This MOU has been made and entered into under the laws of the State of North Dakota and said laws will control its interpretation. Any litigation arising out of this MOU will be brought in the venue of State District Court in Cass County, North Dakota, and the Parties waive any objection to venue or personal jurisdiction.
12. Rules of Construction. The Parties acknowledge that they have had the opportunity to review this MOU, and that they have an equal bargaining position in this transaction. No rule of

construction that would cause any ambiguity in any provision to be construed against the drafter of this document will be operative against any party to this MOU.

13. Representation. The Parties, having been represented by counsel or having waived the right to counsel, have carefully read and understand the contents of this MOU, and agree they have not been influenced by any representations or statements made by any other Parties.
14. Headings. Headings in this MOU are for convenience only and will not be used to interpret or construe its provisions.

(Signatures appear on the following pages)

Dated this 15 day of ~~April~~ ^{May} 2023.

CITY OF FARGO, NORTH DAKOTA, a
municipal corporation

By:  _____
Dr. Timothy J. Mahoney, M.D., Mayor

ATTEST:

 _____
Steve Sprague, City Auditor

Dated this ____ day of April 2023.

CASS COUNTY, NORTH DAKOTA

Chad M. Peterson, Board Chairman

ATTEST:

Brandy Madrigga, Finance Director