



Sunrise River Watershed Management Organization

Memo

To: LSCWP Policy Committee Members
From: Janet Hegland
SRWMO Vice Chair and SRWMO Representative on LSCWP Policy Committee
CC: Jamie Schurbon
Date: 9/19/2022
Re: SRWMO Participation in Lower St. Croix Watershed Partnership (LSCWP)

Since the inception of the Lower St. Croix Watershed Partnership (LSCWP), there has been discussion as to whether the LSCWP should be organized as a Joint Powers Collaborative or a Joint Powers Entity.

In 2020, Policy Committee members agreed to organize as a Joint Powers Collaborative despite recommendations by multiple county/municipal and watershed organization's attorneys recommending a Joint Powers Entity. The decision to organize as a Collaborative was agreed to by the Policy Committee contingent on an agreement to revisit the organizational structure in one year.

One year later, at the January 24, 2022 LSCWP Policy Committee meeting with 11 Policy Committee members present, 6 members expressed support to transition to an entity (JPE) with only one member in support of retaining the JPC model and the other four members either ambivalent or not expressing an opinion on the record. Staff was directed to prepare a report/recommendation for the 4.25.22 meeting.

At the 4.25.22 LSCWP Policy Committee mtg, recommendations of the LSCWP Planning Committee (a subset of the LSCWP Steering Committee) reviewed different options for an organizational structure given the Policy Committee's interest in JPE vs JPC. The Steering Committee heard concerns on both sides of the JPC versus JPE debate and understood concerns about the continual application process feeling like a "first-come, first serve" process, and a growing desire to improve efficiency and minimize costs. Their memo outlined the preferred organizational structure of the Steering Committee, to remain a JPC while incorporating revised procedures to increase efficiencies and assurances and reduce costs, and included the following recommendations:

- Move to dissolve subcommittees and save \$25K a year
- Review WBIF proposals 2-3 times a year.
- Carve out an opportunity for PC to be able to review projects above a \$50K threshold

The memo also included an opinion of attorney Karen Ebert of MCIT regarding the risk of a JPC vs JPE, one of the other concerns expressed by several of the Policy Committee members.:

From Karen Ebert of MCIT: As to the question about what MCIT recommends, a JPE or JPC, we typically do not make such recommendations but I can advise as to the elements that go into the decision to create a new public entity or not. One of the biggest reasons that supports a new public entity is the time and resources needed to get decisions made to move forward when it has to go to 18 separate boards instead of one. So the new public entity is generally more efficient. Also, when a new entity is created, all of the liability and risk is consolidated into one public entity instead of having 18 entities that can be targeted. The IWIP is making decisions that affect property owners and other entities. The risk to the IWIP is that someone may bring a lawsuit and get the damages awarded against more than one entity. There was a case in 2006 where a school board and a city jointly operated a swimming facility for the community. They formed a joint powers but did not follow their governing documents and when a repairman was injured, both the city and school board had to pay up to the tort caps. So the injured party was able to recover double what he would have received if the joint powers operated as one entity. In this case the IWIP, if formed as a JPE, would be at risk for one tort cap (limit on damages or money paid out as awarded by court after lawsuit); but could be subject to up to 18 tort caps if not consolidated.

The risk that the IWIP faces is one of liability for violation of open meeting law and data practices arising out of board meetings. There could also be risk for lawsuits by property owners or other entities for damage to property or changes in water/land within the jurisdiction of the IWIP. Generally the lawsuits I have seen that involve watersheds, swcd's and similar entities are the open meeting violations. However, the legal climate can change at any time.

*This information is consistent with the information that MCIT routinely provides when it trains on Joint Powers. While we do not like to tell our members how to operate, we can provide the pros and cons of some actions. **The county attorney or other legal advisor is in a much better position to give legal advice relative to your questions. The information contained in this message should not be considered legal advice or coverage advice.***

Below are articles that are on our website, mcit.org

<https://www.mcit.org/resource/the-abcs-of-jpes-joint-powers-entities/>

<https://www.mcit.org/resource/a-joint-powers-entity-needs-its-own-coverage/>

<https://www.mcit.org/resource/cooperative-delivery-services-joint-powers-agreements/>

The concern of risk was addressed by Chair Miron: *“We worked with the county attorney on this issue, who suggested minimal risk of liability. As participants, I feel we have more knowledge of what’s going on throughout the watershed. Washington County is excited to see projects happen whether they are led by watersheds or SWCDs. It is very hard to get rid of an entity once it’s formed.”* The Steering Committee’s recommendations were passed by the Policy Committee, despite an attempt to amend the motion to first allow for communication back to the partners about accepting the potential liability risk created by the LSCWP Collaborative. Vice Chair Chris Dubose suggested the Policy Committee revisit the organizational structure again next year.

At the 7.25.22 LSCWP Policy Committee meeting two project requests, both above the \$50K threshold recommended by the LSCWP Planning Committee at the 4.25.22 LSCWP Policy Committee meeting, were brought to the Policy Committee for approval. The concerns raised by four members of the Policy Committee was the “last minute” submission of these large projects that have been in development for years, a “process problem” that would require committing 2023 funding to these projects in advance of announcing 2023 funding opportunities to other partner entities and the shifting of funds from the previously established project categories to accommodate these requests. I am also personally troubled by members of the Policy Committee voting to fund their own projects, which clearly can be viewed as a conflict of interest (for which there is no official policy addressing what constitutes a conflict).

The decision to recommend funding of these projects illustrates the lack of robust policy and procedures guiding the LSCWP actions and decisions made on the fly like this create potential liability for the partners in this JPC. The SRWMO Board unanimously shared these concerns including the conflicted roles members of the Policy Committee hold when voting to fund their own organization’s projects, and the potential risk it creates for the partners of the JPC.

The LSCWP Collaborative has great intentions, but by design (Collaborative instead of Entity), no one is in charge to ensure relevant policies are created, implemented and followed and the lack of such an organizational structure, defined policies and procedures and the repeated “kicking the can” to address this risk to the next meeting or the next year gives the SRWMO Board little confidence that anything will change substantively in the near future but we’d like to see this concern addressed as a priority. As such, the SRWMO board voted unanimously that it is in the best interest of the SRWMO to request the LSCWP Policy Committee make timely and substantive changes towards becoming a JPE or the SRWMO may elect to leave the partnership. We took this action understanding fully that withdrawing eliminates the opportunity to obtain funding through this body and we sincerely hope we do not have to resort to that measure. The SRWMO respectfully requests this memo be included in the upcoming September 26th meeting packet and discussion of our request included as an agenda item at that meeting.