



STORM WATER AWARENESS WEEK

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MS4 Cities May Become Unregulated - Based on Their Census Status

Who am I ?

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Minnesota Cities Stormwater Coalition

*Municipal stormwater professionals
working together for clean water*

What is our story today?

About 11 cities and townships in Minnesota were allowed to become unregulated under the MS4 permitting program in late 2025, because of changes in their Census status.

To the best of my knowledge, this has not happened before.

This information and experience may be relevant and replicable for small communities in other states.

First, some terminology...

Before the 2020 Census, the Census used two terms for areas that exceeded set population densities:

“*urbanized areas*” – pop. of 50,000 and more

“*urban clusters*” – pop. less than 50,000

In the 2020 Census, they changed to just “*urban areas*”, but they included population numbers for every area.

This caused problems for EPA and the MS4 program because they had used the term “*urbanized area*” in the federal rules that established the entire program.

EPA changed their terminology to “*urban area with a population of 50,000 or more people*” in their rules.

I am going to use the term “*urbanized area*” because it is clear and easier to say.

Most MS4-permitted communities are regulated because of their Census status. They are wholly or partially within an urbanized area.

In Minnesota, we have three other criteria for regulation:

Pop. of 10,000 or more

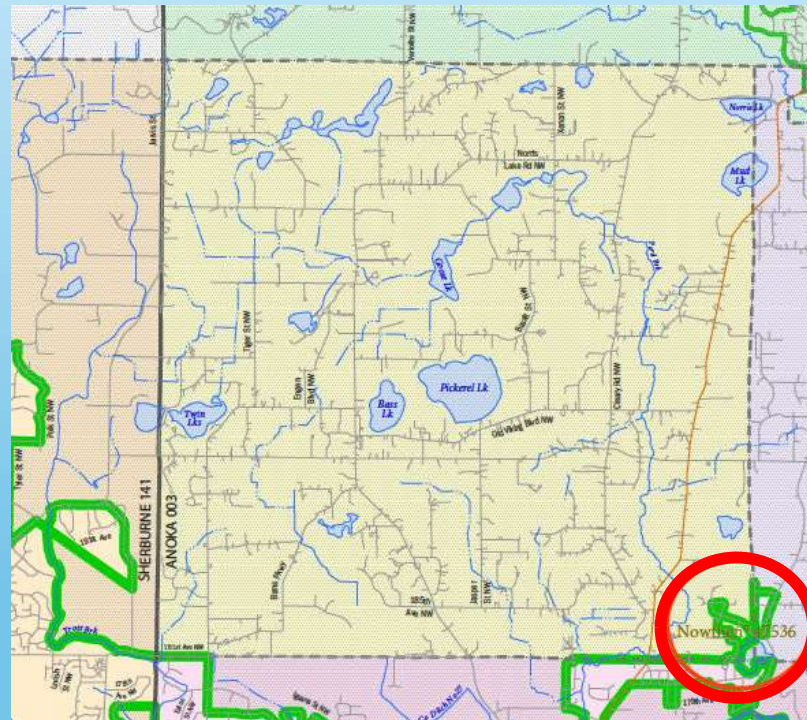
Pop. of 5,000-9,999 and discharging to a special or impaired water

Petition to the PCA Commissioner

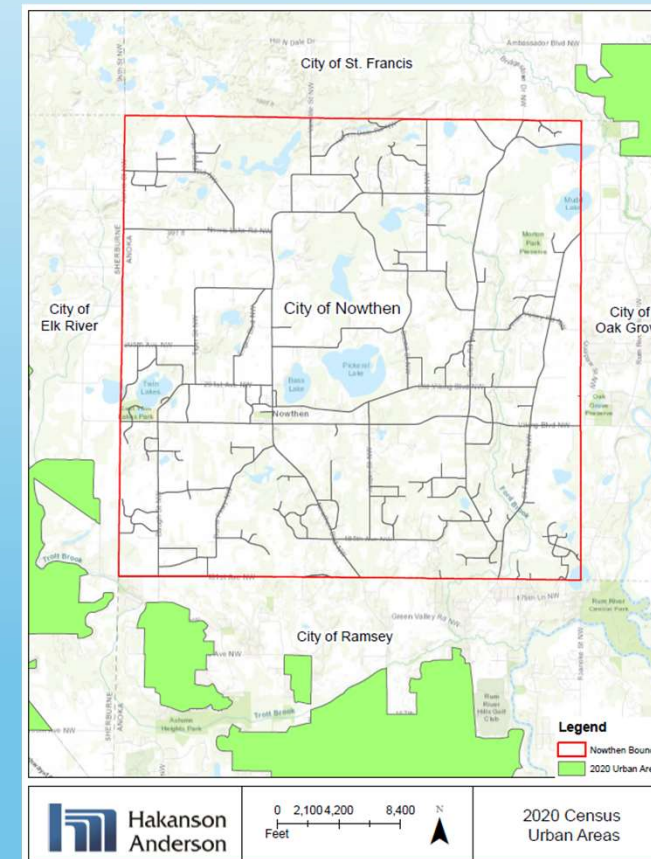
Our state regulator is the Minnesota Pollution Control Agency (PCA).

Each time our MS4 General Permit has been reissued, the list of regulated communities has changed. Until this time, this list has always grown. The PCA is working on a reissuance right now and they wanted to generate the new list of regulated communities before this new permit is issued.

In the 2020 Census, some communities fell outside of an urbanized area. 3 examples



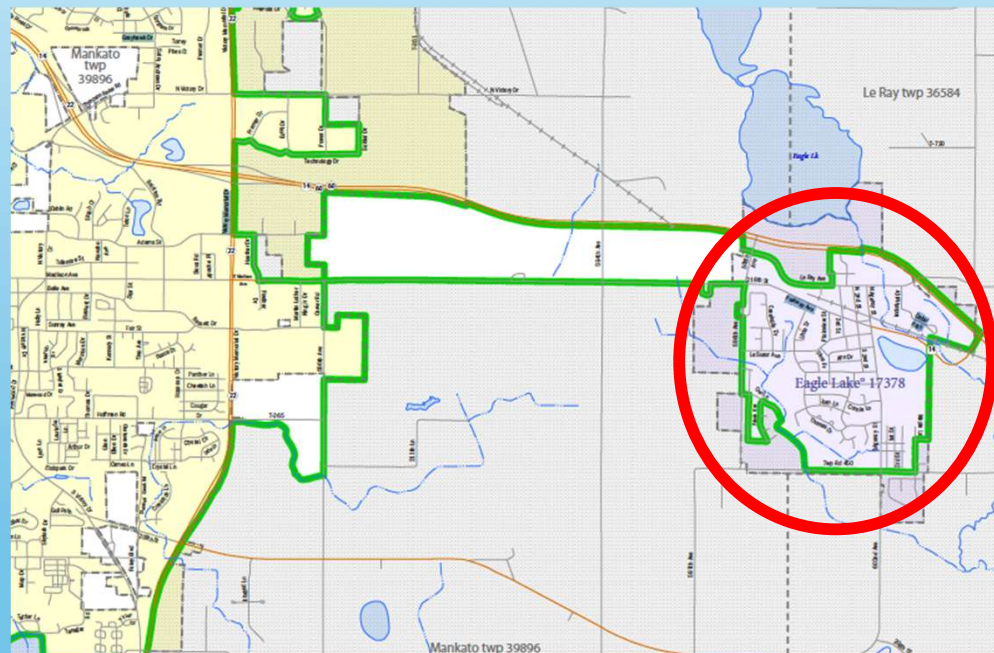
2010 Census



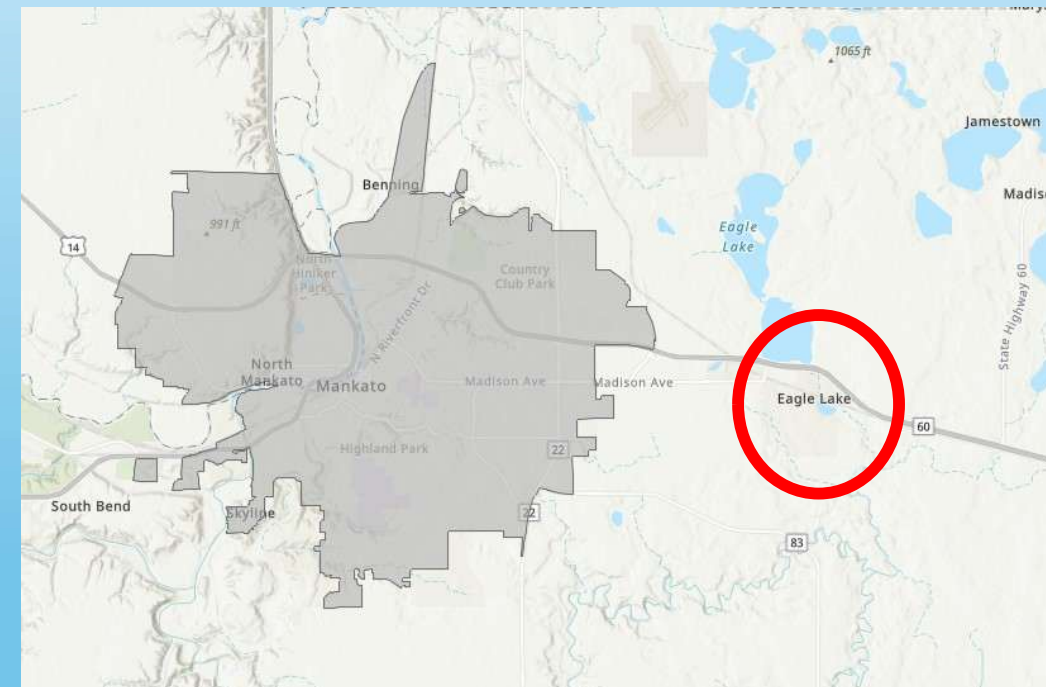
2020 Census

In the 2020 Census, some communities fell outside of an urbanized area. 3 examples

City of Eagle Lake

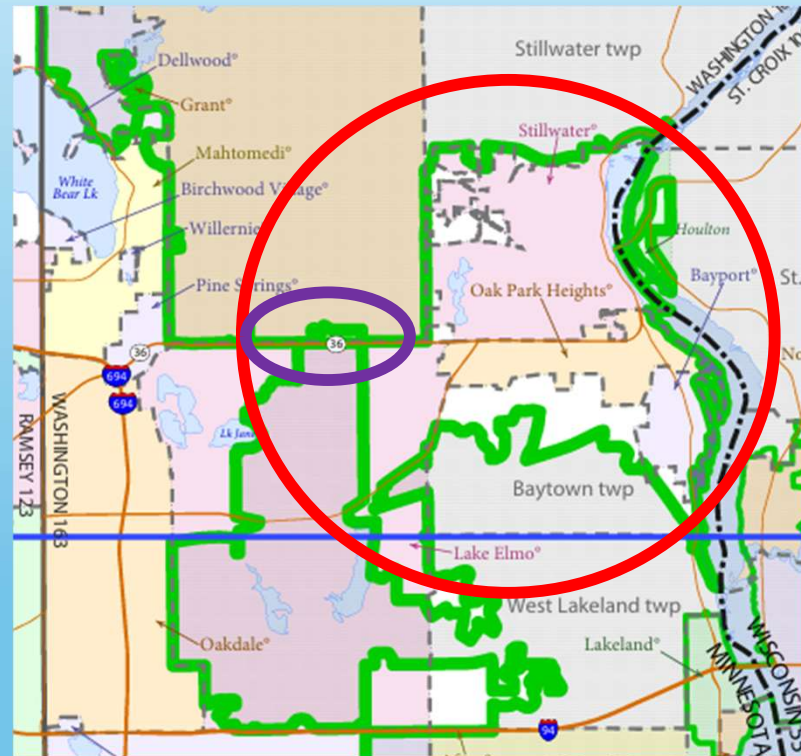


2010 Census

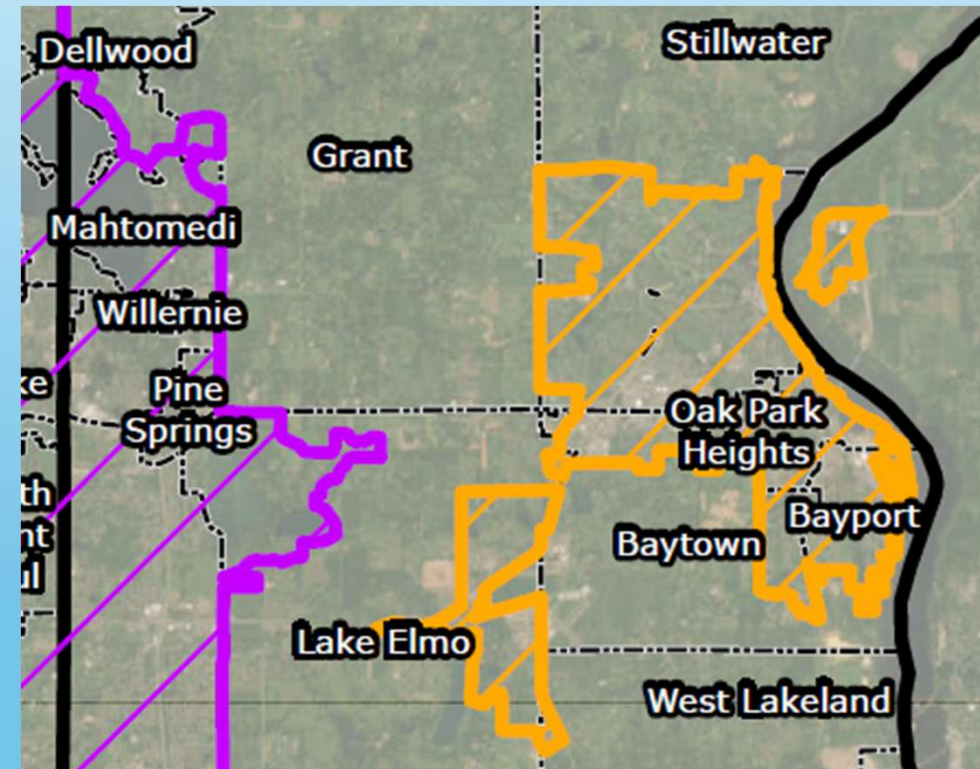


2020 Census

In the 2020 Census, some communities fell outside of an urbanized area. 3 examples



2010 Census



**2020 Census
31,474**

The PCA found 11 MS4-permitted communities, cities and townships, that had fallen outside of an urbanized area in the 2020 Census and did not meet any of the other selection criteria.

They had two sources of guidance to decide what to do.

The first was Code of Federal Rules (CFR) language that had been incorporated, by reference, into the state rules that governed the MN MS4 program.

§ 122.32 As an operator of a small MS4, am I regulated under the NPDES storm water program?

(a) Unless you qualify for a waiver under paragraph (c) of this section, you are regulated if you operate a small MS4, including but not limited to systems operated by federal, State, Tribal, and local governments, including State departments of transportation; and:

(1) Your small MS4 is located in an urban area with a population of 50,000 or more people as determined by the latest Decennial Census by the Bureau of the Census. (If your small MS4 is not located entirely within an urban area with a population of 50,000 or more people, only the portion that is within this urban area is regulated);

Language from the preamble for the 1999 federal rule that established the Phase II MS4 program:

“Based on historical trends, EPA expects that any area determined by the Bureau of the Census to be included within an urbanized area as of the 1990 Census will not later be excluded from the urbanized area as of the 2000 Census. However, it is important to note that even if this situation were to occur, for example, due to a possible change in the Bureau of the Census’ urbanized area definition, a small MS4 that is automatically designated into the NPDES program for storm water under an urbanized area calculation for any given Census year will remain regulated regardless of the results of subsequent urbanized area calculations.”

I have referred to this provision as a “once in, always in” policy.

Many states looked to this rule preamble language as guidance for running their state programs. Thus, unenforceable rule preamble language became the way state programs determined whether communities that fell outside of an urbanized area would remain regulated. It became regulatory policy in many states.

The PCA balanced state rule language (including the problematic CFR language that had been incorporated by reference) with contradictory federal rule preamble language and decided that they should follow their state rule.

The state rule for stormwater permitting (7090) instructed the PCA Commissioner to determine whether a community is required to be regulated. It also provided a petition process for a permittee to request a reevaluation of the Commissioner's designation.

“B. Any person may petition the commissioner to reevaluate the designation of an MS4 for a determination that the MS4 does not meet the criteria in subparts 1 and 2 and does not need a permit. Upon receiving a signed written petition for the reevaluation of a designation, the commissioner shall evaluate the petition and determine if the MS4 no longer meets the requirements for a permit under this part.”

The PCA had developed a form for such petitions. They sent this form and a letter of explanation to the 11 communities that had fallen outside urbanized areas.

Most of the form was very straight-forward. There was one important, general question:

“D. Please include any other relevant information to support your petition in the space below or attach as a separate file. For example, include maps of most recent jurisdictional boundaries, completed orderly annexation agreements, photographs, maps of your MS4 conveyance systems as they relate to Urbanized Area as determined by the most recent Decennial Census, etc.”

MCSC developed template language and instructions for the communities to use to answer this question in a manner that would give the PCA the information it needed. We worked with PCA staff to make sure the language and instructions were sufficient and clear. We distributed it to the affected communities.

In late 2025, the PCA received the petitions, did the reevaluations, and issued permit coverage termination letters.

“RE: Termination of Coverage under the NPDES/SDS General Permit MNR040000 for Municipal Separate Storm Sewer Systems for the City of _____

The MPCA performed an analysis of the data submitted against Minn. R. 7090.1010, subp. 1(A) and concluded the MS4 is not located in an Urbanized Area as determined by the latest (2020) Decennial Census by the Bureau of the Census. Based on these findings, the Commissioner has determined that the city of _____ no longer meets the designation criteria established in Minnesota Rule 7090.1010, Subp. 1(A) and is no longer required to be regulated under the General Stormwater Permit for Small MS4s. Effective on the date of this letter; the city of _____’s coverage under the General Stormwater Permit for Small MS4s is terminated.”

“Please be advised that the following scenarios may change the circumstances for the city of _____ in the future requiring the MPCA to redesignate the city of _____ as a regulated Small MS4.

Results of a future Decennial Census may include Urbanized Area within the jurisdiction of the city,

Results of a future Decennial Census may include a population density exceeding thresholds specified in Minn. R. 7090.1010, Subp. 1.B.(2) or (3),

Any person may petition the MPCA Commissioner in accordance with Minn. R. 7090.1010, Subp. 4.A, based on the designation criteria established in Minn. R. 7090.1010, Subp.2, for a determination that designation is appropriate.”

In December 2022, EPA issued the Federal Rule to change “*urbanized area*” to “*urban area with a population of 50,000 or more people*” in the appropriate sections of the CFR.

On one level, it was a very simple rule change. They set it up as a direct final rulemaking.

In the preamble, though, they included a reiteration of the “once in, always in” language from the 1999 rule. MCSC submitted a negative formal comment on three grounds:

The “once in, always in” policy, first promulgated in the 1999 rule preamble and again in this rule preamble, is contradicted by the existing CFR language that relies on the “latest Decennial Census” as the only determining factor.

Setting regulatory policy in this manner, just in rule preambles, is inappropriate and possibly illegal.

We wanted EPA to provide an explanation and justification for this policy.

MCSC's comment was viewed as an adverse comment, the only adverse comment from anywhere in the country.

EPA's response:

“EPA is treating these comments as adverse to the direct final rule because they raise questions and concerns about the inclusion of excerpted text from the Phase II stormwater rule preamble. Though the commenter raises no concerns about the actual changes to the Phase II regulations, even stating that the “proposed rule provisions are noncontroversial,” EPA’s longstanding practice is to consider comments that are critical of information included in the preamble to a direct final rule as adverse, thus requiring the Agency to withdraw the direct final rule.”

“EPA disagrees with the commenter’s characterization of the proposed rulemaking, and considers the issues raised by the commenter to be outside the scope of this action. EPA declines to take the actions that the commenter recommends to address the issues the commenter raised.”

A number of people, including some of my closest colleagues, have questioned why MCSC and I have chosen to work hard to challenge EPA's rulemaking and pursue the goal of having some communities become unregulated. Here are some of the reasons:

This affects a small number of small communities.

Some of these communities should probably have never been regulated in the first place. They have very limited staff and very little new development or redevelopment. Addressing the requirements of the MS4 permits has been a real challenge and, perhaps, an inappropriate burden on these communities.

MCSC and my work for it seek to help our member communities meet the requirements of the permit and the program in the most cost-effective manner possible – to spend tax-payer dollars most wisely. If we can legally help some communities to be released from the permit, we should do so.

continuation.....

A number of the communities that became unregulated have kept most of their stormwater programs in-place. They continue to keep their local stormwater design standards up-to-date and enforced. They are still doing plan reviews. Some of these communities are also regulated by watershed districts, with permitting requirements more stringent than the MS4 permit.

A regulatory program is not strengthened by arbitrary policies that contradict CFR and/or state rule language and are promulgated using procedures such as relying only on rule preamble language. Just as the permittees are required to comply with the MS4 permit requirements, the regulatory agencies should follow their own rules and appropriate policy promulgation procedures. When they fail to do this, their reputation and respect, especially among the regulated parties, suffers and is diminished. MCSC and I sought to correct EPA's actions to help restore their reputation and respect among the MS4 permittees.

Conclusions and recommended actions

The PCA did the right thing, in the view of MCSC and me. They chose to follow the binding state rule that included CFR language.

In your state, you may want to check to see if any regulated communities fell outside of urban areas with populations of 50,000 or more people in the 2020 Census.

In your state, check to see if the state rule governing the MS4 permitting program incorporates the CFR language that was in the Minnesota state rule.

If these are the case, talk with your regulator. Point out that the affected communities will approach the agency asking which portion of their jurisdictions is regulated under the CFR § 122.32 language.

Good luck!

Comments or Questions, please

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