

Memorandum

To: Lower Minnesota River West – Comprehensive Watershed Management Partnership Policy Committee
From: Greg Williams, PE, Barr Engineering Co. and Jack Bushman, Sibley County Soil and Water Conservation District
Subject: Governance structure for the Lower Minnesota River West 1W1P Partnership
Date: January 27, 2022
Project: 23721014

The Lower Minnesota River West Comprehensive Watershed Management Partnership (Partnership) is in the process of developing a Comprehensive Watershed Management Plan (Plan) via the One Watershed, One Plan (1W1P) framework. The Partners have signed an agreement to complete the planning process. The Partners must also agree on the governance structure they will use to implement the Plan. The two primary options for 1W1P Plan implementation include:

- Joint Powers Collaboration (JPC)
- Joint Powers Entity (JPE)

Karen Clayton of the Minnesota Counties Intergovernmental Trust (MCIT) presented these options in March 2021. Briefly, these options may be summarized as follows:

Joint Powers Collaboration (JPC)

A JPC does not create a new unit of government. In a JPC the Partners agree to collaborate and deliver a service; they do not need to establish a separate, free-standing entity. The ability to make decisions remains with the governing body of each partner. Establishing a board is not always necessary. If a board or committee is established (e.g., policy committee), it acts solely in an advisory capacity to the forming member boards.

Joint Powers Entity (JPE)

The JPE creates a new unit of government. In a JPE, a separate board is established that operates autonomously from the boards of the 1W1P partner entities. The powers of the JPE vary according to bylaws and may include the authority to receive and distribute funds, hold contracts, own property, and/or hire staff. The JPE may also be held liable by a third party for damages caused by its activities.

Comprehensive watershed management plans developed through the 1W1P framework are implemented by both JPEs and JPCs across the state. The decision to form a JPE or operate under a JPC depends on the

goals of the partners and comfort level of the partners (i.e., trust) to provide autonomy to a separate board to handle decisions related to staff, property, and fiscal management.

The attached MCIT document “The ABCs of JPEs: A Joint Powers Analysis and Worksheet” provides information regarding JPEs versus JPCs and provides example questions that should be asked when considering these governance options. These may include:

- Will the partnership want to hire shared staff or leverage existing partner staff to implement the Plan?
- Is there a need for joint ownership of property?
- What is the preferred method for obtaining and dispersing funds?

We understand that each partner entity that has signed the planning agreement may have unique concerns and preferences regarding establishing a JPE or a JPC. At this stage in Plan development, it is necessary to hear and understand the concerns of each entity so that an acceptable consensus on governance structure is achieved. Ultimately, the board of each partner entity must be comfortable with the governance structure in order to sign the implementation agreement and successfully implement the Plan.

Requested Policy Committee Action:

1. Discuss preferences and concerns regarding JPE and JPC governance options.
2. Seek feedback from respective boards regarding the preference and acceptability of each governance option

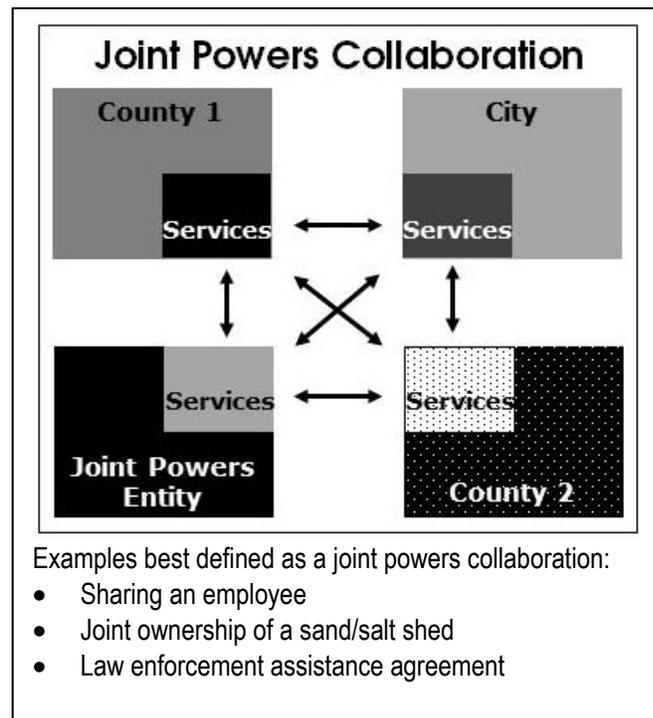
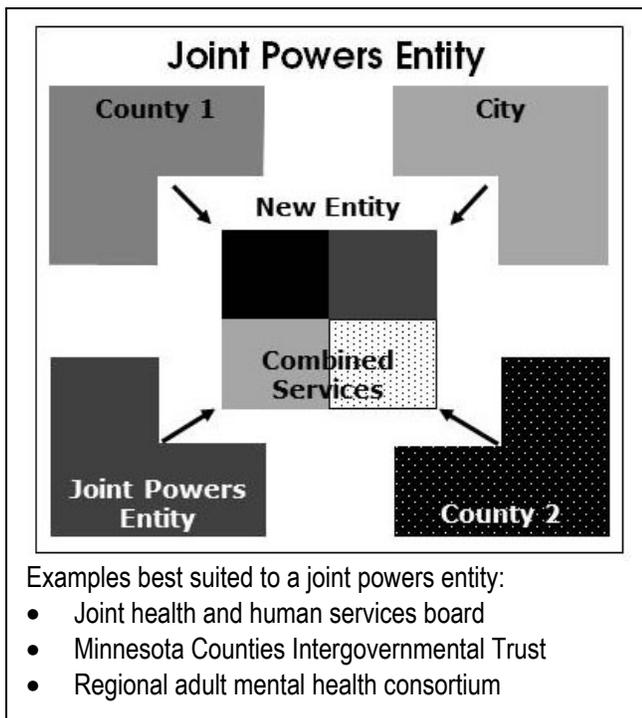


The ABC's of JPEs: A Joint Powers Analysis and Worksheet

Date: December 2018

In response to increasing constituent demands, shrinking resources and state and federal mandates, public entities have increasingly looked to the joint exercise of powers to deliver services efficiently and effectively. Protection is granted to governmental units (as defined by statute) that come together in accordance with Minnesota Statutes, Section 471.59 ("Joint Powers Act"). Specifically, this law provides that regardless of the number of participating governmental units, the joint powers may be treated as one governmental unit for purposes of liability.

Public entities coming together under the Joint Powers Act are required to enter into a joint powers agreement. A joint powers agreement can take different forms depending on the needs of the parties. A single set of liability limits for state tort claims will apply when formed and operating pursuant to the statute. The agreement is the legal document that will outline how governmental units will work together. A joint powers agreement can be used to consolidate and transfer operations to a new entity (joint powers entity (JPE)) or it can resemble a contract where governmental units agree to collaborate and deliver a service (joint powers collaboration (JPC)).



Joint Powers Agreement

When deciding to work with other governmental units, MCIT recommends doing so with a joint powers agreement. The agreement generally establishes either a joint powers entity or a joint powers collaboration.

Joint Powers Entity

A joint powers agreement may establish a separate, free-standing entity that may be subject to liability apart from its constituent members *if*:

- a separate board is established that operates autonomously from the boards of its constituent members
- the joint powers could be held liable to a third party for damages caused by its activities, such as making independent decisions to receive or disburse funds, entering into contracts in the name of the group rather than under the name of a constituent member (e.g., county), employing staff or owning property in the name of the joint powers organization.

Joint Powers Collaboration

When governmental units develop a joint powers agreement in which they document their agreement to collaborate and deliver a service, they do not need to establish a separate, free-standing entity. The ability to make decisions remains with the governing body of each party to the agreement. Establishing a board is not always necessary. If a board or committee is established, it acts solely in an advisory capacity to the forming member boards.

Operation, form and coverage will eventually determine whether the group is forming an entity or engaging in a collaboration. How the joint powers will *operate* determines how the joint powers should *form*, which determines whether *coverage* will be needed.

Joint Powers Questionnaire

When representatives of each governmental unit discuss how they will operate, the following questions should be considered. MCIT recommends that members analyze their responses to the following questions in light of the criteria previously outlined. This list is not all inclusive but provides a basis for the discussion regarding operations.

Questions to Ask	Importance
Coming Together	
Who are the participating members?	Minn. Stat. § 471.59*, Subd. 1 defines the term “governmental units.” Only those “governmental units” defined by statute may enter into a joint powers agreement. Note: Effective Aug. 1, 2010, the definition of “governmental unit” was amended to also include federally recognized Indian tribes and the Minnesota Historical Society.
What are your common goals? <ul style="list-style-type: none"> • Which services or powers will be shared? • How do you plan to carry out or accomplish your goals? 	A JPA under Minn. Stat. § 471.59, Subd. 2 must define the “purpose,” as well as “provide for the method by which the purpose sought shall be accomplished or the manner in which the power shall be exercised.”

<p>Why are you coming together?</p> <ul style="list-style-type: none"> • To share ownership of property or to share operation of a facility? • To share an employee? • To carve out powers and establish a joint powers entity (e.g., regional mental health consortium) • To access funding sources? • To establish common procedures and protocols? • To provide services jointly? • Other reasons? 	<p>In addition to the purpose for the joint exercise of powers, the reason that you come together establishes the basic groundwork for drafting the joint powers agreement.</p> <p>Note: Certain entities are subject to additional regulation under Minn. Stat. § 471.59 including, but not limited to:</p> <ul style="list-style-type: none"> • Subd. 11: Joint powers board established to issue bonds • Subd. 11: Family services collaborative under section 124D.23 or a children’s mental health collaborative under section 124D.23 • Subd. 12: Joint exercise of peace officer or police powers • Subd. 13: Joint powers board for housing
Governance	
<p>Will you need to establish a board or committee?</p> <ul style="list-style-type: none"> • If so, explain duties, board make-up etc. • If a board is established and granted the authority to act autonomously from the boards of the participating governmental units, the joint powers agreement has established a joint powers entity. 	<p>Minn. Stat. § 471.59, Subd. 2. Agreement to State Purpose: “When the agreement provides for use of a joint board, the board shall be representative of the parties to the agreement. ... Irrespective of the number, composition, terms or qualifications of its members, such boards are deemed to comply with statutory or charter provisions for a board for the exercise by any one of the parties of the power which is subject to the agreement.”</p>
<p>Will the board have a name?</p>	<p>Although not specifically mentioned in statute, operating as a named organization may give the appearance that a separate legal entity exists. If a collaboration, ensure grants applications, contracts, etc. are not in the name of the board or collaboration.</p>
<p>Will the board have bonding authority?</p>	<p>Minn. Stat. § 471.59, Subd. 11. Joint Powers Board: “... A joint powers board established under this section may issue obligations and other forms of indebtedness only in accordance with express authority granted by the action of the governing bodies of the governmental units that established the joint board. ...The joint powers board established under this subdivision must be composed solely of members of the governing bodies of the governmental units that established the joint powers board.”</p>
Operations: Contracts	
<p>Will you enter into contracts to accomplish your goals?</p>	<p>Minn. Stat. §471.59, Subd. 3. Disbursement of funds: “... Contracts let and purchases made under the agreement shall conform to the requirements applicable to contracts and purchases of any one of the parties, as specified in the agreement.”</p>
<p>In whose name will contracts be executed and who will have the authority to sign?</p> <ul style="list-style-type: none"> • Fiscal agent? 	<p>The party in whose name a contract is executed and signed is the party that is obligated to carry out the contract.</p> <ul style="list-style-type: none"> • If a contract is executed in the name of the fiscal agent on behalf of the participating governmental units, it is

	<ul style="list-style-type: none"> ○ other requirements, such as wage and benefit administration, unemployment and AWAIR (a workplace accident and injury reduction program). ● A JPE may contract for human resources services: <ul style="list-style-type: none"> ▪ Paychecks must be in the name of the JPE. ▪ Policies and procedures must be in the name of the JPE.
Budget and Finance	
Where will you obtain funding and how will those funds be expended?	Minn. Stat. § 471.59, Subd. 3 Disbursement of funds: "... Strict accountability of all funds and report of all receipts and disbursements shall be provided for."
Joint powers collaboration	Funds are obtained and expended by the participating governmental units.
Joint powers entity	JPE may receive and disburse funds in the name of the JPE. JPE must have segregated bank accounts and its own tax identification number.
How will expenses, revenue and resources be allocated: population, percentage, equal shares, services provided on an in-kind basis?	Although this information is not required by statute, it is recommended that participating members make this determination prior to drafting the agreement. This may save expensive and time-consuming disagreements after the fact.
Fiscal agent?	Although these factors are not specifically required in the statute, determining this in advance is advantageous to the group. The statute does require a strict accountability of funds.
Joint powers collaboration	When a participating governmental unit acts as the fiscal agent and receives and disburses funds on behalf of the collaborating units, it is important to understand the fiscal agent may be the responsible/liable party.
Joint powers entity	The JPE should clearly define the expectations and responsibilities of the fiscal agent: <ul style="list-style-type: none"> ● Which party will serve as fiscal agent? ● For how long? ● Will the fiscal agent change? If so, define circumstances in which a change may be made?
Property	
Will the property or facility be shared, jointly owned or jointly operated?	Although the statute only requires the agreement to address distribution of property upon completion of the joint powers agreement, MCIT recommends determining how the ownership, operation, storage and/or use of property will be handled in advance of developing the joint powers agreement.
Who will own the property?	Liability typically follows ownership. Therefore, participating members should be aware of potential responsibilities.

	If property is owned in the name of the new joint powers organization, establishing a joint powers entity may be necessary.
Where will property be stored/kept?	The party storing or keeping property may have some liability should the property sustain damage.
Which party will provide coverage?	Determining whether coverage will be placed and by whom is important to avoid misunderstandings after the fact.
How will costs be allocated?	<ul style="list-style-type: none"> • Cost of coverage? • Deductibles? • Maintenance and repair?
Legal Advice	
Who will serve as legal counsel? Joint Powers Collaboration Joint Powers Entity	Each participating governmental unit must receive individual legal advice. Identify the JPE's attorney: <ul style="list-style-type: none"> • private counsel • county attorney • city attorney Is there a conflict of interest for the person chosen?
Membership	
Will parties be allowed to join after the fact? <ul style="list-style-type: none"> • If so, define the terms • What are the financial issues? 	Although not required by statute, defining the procedure for adding new parties may prevent rewriting the entire joint powers agreement with all new signatures each time a member is added.
Will parties be allowed to withdraw from the agreement prior to expiration? <ul style="list-style-type: none"> • If so, define the terms • What are the financial issues? 	The statute addresses dissolution, not withdrawal. What happens if one or more parties choose to withdraw from the agreement prior to expiration?
Dissolution	
What happens when the agreement ends?	Minn. Stat. § 471.59, Subd. 4. Termination of Agreement: "Such agreement may be continued for a definite term or until rescinded or terminated in accordance with its terms."
How will you dispose of jointly owned assets or jointly owned property?	Minn. Stat. § 471.59, Subd. 5. Shall provide for distribution of property. "Such agreement shall provide the distribution of property acquired as the result of such joint or cooperative exercise of powers, and the return of any surplus money in proportion to the contributions of the several contracting parties after the purpose of the agreement has been completed."
*For further explanation, see Minnesota Statutes Section 471.59	

Liability

Members must also look at potential liabilities they might face because of their joint powers agreement. Although the protections from liability may be limited by Minnesota Statutes, Section 471.59, anytime members come together under a cooperative arrangement, activities or operations may expose the group to potential liability.

Joint Powers Entity

When forming a joint powers entity, MCIT recommends clearly transferring liability to the new joint powers entity. As such, the JPE should agree to protect, defend and hold the individual participants harmless from potential liability claims. With few exceptions, such a provision is required for MCIT membership.

The following is sample hold harmless and indemnification language that should be modified or tailored to fit each individual situation:

The [name of joint powers entity] agrees to defend, indemnify, and hold [name of individual participating members], its employees and officials harmless from any claims, demands, actions or causes of action, including reasonable attorney's fees and expenses arising out of any act or omission on the part of [name of joint powers entity] in the performance of or with relation to any of the work or services to be performed or furnished by [name of joint powers entity] under the agreement.

Joint Powers Collaboration

Although a joint powers agreement may not establish a separate, free-standing entity that may be subject to independent liability, important liability concerns remain.

Even though liability for damages is capped at the limit for one governmental entity, the statute does not state *which* of the participating entities will be responsible for paying those damages or for defending claims. It also does not state how potential damages should be allocated. If the intent of the joint powers collaboration is to share the cost of a claim, MCIT recommends specifying how those costs will be allocated in the agreement.

Example: The county, city and state jointly share ownership of a highway garage/maintenance facility. The costs involved in building the garage were split between the parties based upon the percentage of the facility that each would occupy. The city occupies only 10 percent of the building, the county occupies 35 percent and the state occupies the majority at 55 percent. The county agreed to maintain the common areas: hallways, restrooms, parking lot, etc.

A member of the public visits the building for a meeting with state staff members. The visitor trips on a bump in the blacktop in the parking lot, falling and breaking his hip.

Which party should be held responsible if there is a determination of negligence? Should it be the state because the visitor was the state's client? Should it be the county because it agreed to maintain the parking lot? Should the city be required to contribute based on its occupancy? If the costs are shared, what percentage should each party contribute?

Participating members of the joint powers collaboration should clearly apportion costs and responsibilities prior to drafting the agreement. MCIT recommends reaching an understanding *before* a claim occurs. Failing

to do so opens the door to bringing all of the participating members into a claim or suit. The potential for disagreements after the fact can be difficult, time consuming and expensive.

Coverage for the Joint Exercise of Powers

Joint Powers Entity

When public entities consolidate and transfer duties to a new joint powers entity pursuant to Minnesota Statutes, Section 471.59, the new entity becomes a separate and distinct legal entity that has all the privileges, obligations and risks of its creating members. Therefore, the operations of the JPE and actions of the board and employees expose the entity to its own potential liability for claims and lawsuits.

A forming member's MCIT coverage is not extended to a joint powers entity. As a separate and distinct legal entity, the joint powers entity must place its own liability coverage to protect the entity, board and when applicable, the entity's employees.

Joint Powers Collaboration

Conversely, separate coverage is not necessary when MCIT members enter into a joint powers collaboration *if* the decision making remains with the individual parties to the agreement.

Frequently Asked Question

Members often ask if their MCIT coverage extends to county commissioners, other elected officials and employees serving on the joint powers board for claims arising out of those activities. Under the definition of "covered party," those individuals serving on other such boards are covered by their MCIT liability coverage, but *only* for their individual actions. The forming member's MCIT coverage does *not* extend to such an individual when a claim is made against a JPE board or as a whole or against an individual's conduct arising from the joint powers entity.

Securing Coverage for a Joint Powers Entity

Members may seek coverage for their joint powers entity with MCIT. Membership in MCIT requires the entity be subject to Minnesota Statutes, Chapter 466. This statute provides certain immunities and defenses to qualified entities in Minnesota. The statute also places a cap on the amount of damages that these entities are required to pay in the event they are found to be liable. Prospective members are encouraged to secure a legal opinion to determine their ability to qualify for the protections of Minnesota Statutes, Chapter 466.

Like all entities requesting membership, the joint powers entity must complete a risk assessment and provide MCIT copies of governing documents, such as its joint powers agreement and bylaws. Using this information, MCIT evaluates eligibility for membership. The cost of coverage for the new JPE depends on its size and operations. The cost of coverage/contribution is based on factors such as number of employees and board members, amount of property owned and the entity's published budget.

With few exceptions, if the joint powers entity would like membership in MCIT, the agreement must include all the Joint Powers Act requirements and transfer liability to the new entity via an appropriate hold harmless and indemnification clause. MCIT recommends specific language stating the entity will comply with the Open Meeting Law, Minnesota Statutes, Chapter 13D.

As a member of MCIT, the joint powers entity is provided the same coverage as all other public entities that participate in the Trust. MCIT's coverage is designed to address exposures unique to public entities. This

includes coverage for Open Meeting Law and data practices violations, employment claims and excessive force claims.

Members should contact their MCIT risk management consultant for information about the types of coverage available to the joint powers entity and the cost for it.

Risk Management Recommendations

Whether the joint powers agreement forms a new entity or a collaboration among the members, the following steps should be taken by the forming parties:

- Form in accordance with the Joint Powers Act: Minn. Stat., § 471.59.
- Develop a clear understanding of the nature and intent of the agreement.
- Clearly communicate the intended operations to legal counsel or the county attorney.
- Form the agreement in accordance with the operations.
- Operate in accordance with the form of the agreement.

Risk Management Recommendations Specifically for JPEs:

- Provide separate coverage for the joint powers entity.
- Transfer liability to the joint powers entity.
- Ensure that the JPE protects, defends and holds the individual participating members harmless from potential liability claims.

Risk Management Recommendations Specifically for JPCs:

- Define how liability will be allocated prior to receiving a potential claim.
- Allocate costs and responsibilities in the joint powers agreement.

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