

RILEY PURGATORY BLUFF CREEK WATERSHED DISTRICT

FINAL STATEMENT OF NEED AND REASONABLENESS

Riley Purgatory Bluff Creek Watershed District Rules November 5, 2014

This statement of need and reasonableness presents background on, technical support for and an explanation of new rules adopted November 5, 2014, by the Riley Purgatory Bluff Creek Watershed District:

- Rule A: Procedural Requirements
- Rule B: Floodplain Management and Drainage Alterations
- Rule C: Erosion and Sediment Control
- Rule D: Wetland and Creek Buffers
- Rule E: Dredging and Sediment Removal
- Rule F: Shoreline and Streambank Stabilization
- Rule G: Waterbody Crossings and Structures
- Rule H: Appropriation of Public Surface Waters
- Rule I: Appropriation of Groundwater
- Rule J: Stormwater Management
- Rule K: Variances and Exceptions
- Rule L: Permit Fees
- Rule M: Financial Assurances

These rules will provide the backbone of the District's regulatory program, the reestablishment of which after a period of dormancy is discussed below. The rules apply to land- and water resource-disturbing activities as delineated in detail in each substantive rule (B through J).

Planning Background

In 2007 the District suspended its regulatory program, relying instead on a streamlined and simplified regulatory system that left watershed cities with sole responsibility to regulate to protect water resources. The updated Riley Purgatory Bluff Creek Watershed District management plan completed in 2011 included a commitment by the District to an advisory role only on regulatory matters.

By late 2012, though, the District determined that impending land use changes, development and redevelopment warranted a renewed watershed regulatory program. City representatives also expressed interest and support for the District's role to augment municipal regulation. As discussed in more detail below, a watershed district regulatory framework is necessary to ensure a consistent level of resource protection across the watershed, as required by the Metropolitan Surface Water Management Act (Minnesota Statutes chapter 103B). Accordingly, in early 2013, the Board of Managers initiated the process of formally amending the District's plan and articulating the District's approach to a regulatory program, including roles and key policies. The plan amendment also described the outreach and stakeholder involvement process the District would employ to update its rules, and explained how the District would implement its regulatory program in collaboration with watershed cities. State agencies submitted favorable comments to the proposed plan amendment, and no comments were received from municipalities or either of the two counties the District lies within.

In October 2013 the Board of Water and Soil Resources determined that the outline for reactivation of the District's regulatory program constituted a minor amendment to the watershed plan, and the amendment was adopted by the board of managers at its regular meeting in December 2013.

Authority

While most of the comments on the draft rules focused on the substantive requirements proposed, others questioned the District's authority to adopt and implement rules at all. At the same time, the Hennepin County Attorney reported to the county board that state law provides clear authority for the District regulatory program.¹

Under state law, watershed districts in the metro area are charged with responsibility for establishing water resource-management policy, standards and goals, then working with other local governmental agencies – cities, most notably – to give effect to the policies, set the standards and achieve the goals watershed-wide. The District not only has the authority to adopt rules but an obligation to do so under Minnesota Statutes section 103D.341. Watershed district rules represent one of the primary ways a board of managers implements the purposes of the state watershed law. In the Twin Cities metropolitan area, rules are also specified by the Metropolitan Surface Water

¹ Report of Dan Rogan to Hennepin County Board of Commissioners, July 29, 2014.

Management Act, chapter 103B, and implementing rules as a critical and necessary component of districts' implementation of their watershed plan.² The law recognizes, though, that watershed organizations implement their plans in conjunction with cities exercising primary land-use jurisdiction. To harmonize these authorities and jurisdictions, the law provides for a framework whereby cities and watershed organizations jointly develop and implement water-resource protection and improvement strategies and tactics.

First, chapter 103B provides that watershed management organizations in the Twin Cities must develop comprehensive watershed-wide water-resource management plans.³ By rule, the state requires that watershed plans' implementation program include regulatory controls to protect wetlands, prevent erosion and sedimentation, protect shoreline and floodplains, and mitigate the deleterious effects of certain land uses on water resources.⁴ Watershed organizations also must set stormwater-management design performance standards to protect water resources from degradation.⁵ Cities in the watershed are required, in turn, to update their local water management plans and associated local controls to conform to and implement the watershed plan.⁶ The law recognizes the primacy and effectiveness of cities' land-use authority, and states a clear path for cities to take the lead in implementing a regulatory program to achieve the water-resource protections specified by the

² Minn. R. 8401.0100, subs. 2, 3. (Draft revisions to the state rules applicable to watershed plans and local governmental units surface water management plans were released for comment September 30, 2014, for review and comment. The revisions do not affect the District's rule-adoption and regulatory-program processes. The draft revisions are available at: <http://www.bwsr.state.mn.us/planning/metro/index.html>.)

³ Minn. Stat. § 103B.231.

⁴ Minn. R. 8410.0100, subp. 2A-E.

⁵ *Id.* subp. 3.

⁶ Minn. Stat. § 103B.235. The draft revisions to the water-management planning rules recognize the relationship between the regulatory programs of watershed organizations and cities and the need for the watershed organization to establish an implementation structure, stating that a watershed plan "must specifically describe how the organization's controls will be implemented in coordination with local official controls. The plan must clearly distinguish between the responsibilities of the organization and the affected local government units relative to controls established according to this subpart." Draft revisions, p. 15.

watershed organization plan. But the law also explicitly provides for cities to opt to have watershed management organizations regulate to this end.⁷

The process whereby a city must update its local surface water plan and official controls is also triggered when a watershed organization *amends* its plan, as the District did to reinstate its regulatory program.⁸ Thus, as soon as the District's plan amendment was approved, it triggered the need for the cities to update their plans and, from there, official controls. Watershed cities recognize this process in their surface water management plans. Eden Prairie's plan, for example, states:

The [Riley Purgatory Bluff Creek Watershed] District is undertaking a Management Plan revision in 2008, which may include revisions to the District's programs, rules, and standards. The City will review that proposed plan and rule revisions and make any required changes to programs and local controls, including an update of this [plan] if necessary.⁹

Watershed districts and cities have customarily opted to collaborate on the development of standards and criteria in rules to implement the watershed plan, then determining which entity will implement that standards and criteria of the rules. This process was described in the District's minor plan amendment. Rather than imposing regulatory specifics in the plan, though, the amendment laid out a stakeholder involvement process whereby the District would work with watershed cities' staff and

⁷ Minn. Stat. §§ 103D.335, subd. 23; 103B.211, subd. 1, providing metro watershed organizations with authority to regulate the use and development of land in the watershed when one or more of the following conditions exists:

- (i) the local government unit exercising planning and zoning authority over the land ... does not have a local water management plan approved and adopted in accordance with the requirements of section 103B.235 or has not adopted the implementation program described in the plan;
- (ii) an application to the local government unit for a permit for the use and development of land requires an amendment to or variance from the adopted local water management plan or implementation program of the local unit; or
- (iii) the local government unit has authorized the organization to require permits for the use and development of land.

⁸ Minn. Stat. § 103B.235, subd. 1(a).

⁹ City of Eden Prairie, Minnesota, *Local Water Management Plan* (December 2008), sec. 6.2.2. *See also* Minn. Stat. § 103B.235, subd. 3 (requiring cities to submit their local water management plans to watershed management organizations for approval).

representatives from state agencies to develop a comprehensive and balanced set of permitting applicability thresholds, criteria and requirements to protect water resources. A representative from the District's Citizens Advisory Committee also consistently participated.

On adoption, the rules become effective throughout the watershed as of the effective date set by the managers. A watershed city may elect to amend its local water management plan and adopt implementing ordinances, and upon the District's approval of the city's plan amendment and implementing ordinances, the city will assume sole regulatory authority in place of the District for some or all rule areas. The recommended delineations of authority will be articulated in a memorandum of understanding for presentation to the city council and Board of Managers for approval.

Development of the Rules

Stakeholder Engagement

The development of the rules relied on the District's strong relationships with water-resources and engineering staffs at the watershed cities. To best ensure that the District rules integrated most effectively and productively with city ordinances, the District framed the rule drafting through three key steps:

First, the District utilized the Nine Mile Creek Watershed District rules as the basis for its drafts. The two adjoining watersheds share four cities, and NMCWD effectively worked with city representatives in developing rules adopted in 2008.

Second, District staff prepared a detailed comparison of the policies and water resource goals established by its plan with the relevant ordinances of the larger cities in the Riley Purgatory Bluff Creek watershed: Bloomington, Eden Prairie, Minnetonka and Chanhassen. (The other cities in the watershed are Deephaven, Shorewood and Chaska, each of which shares jurisdiction over a relatively small portion of the watershed.) The comparison provided the District with a strong understanding of the existing local regulatory system, the gaps that could be addressed and the harmonization of standards that could be achieved by the District's rules.

Third, the District convened its Technical Advisory Committee to provide insights and guidance. In addition to representatives from state regulatory agencies and the Metropolitan Council, municipal public works, water-resources and planning staff served on the TAC. A representative of the District's Citizens Advisory Committee also participated. The TAC met monthly from April through December 2013, and again in June 2014 after the public-comment period on the rules. Through the meetings, the

details of each rule were discussed, and TAC members' input resulted in productive changes and refinements to the draft rules. (Individuals participating in one or more TAC meetings are listed in Table 1.) The TAC members' dedication of their time and insights to the rulemaking process was invaluable.

In addition, the District engaged its Citizens Advisory Committee in the process. Beyond the participation of a liaison from the CAC on the TAC, District staff reviewed the draft rules with the CAC as a body on several occasions, and the CAC reviewed and provided comment on the final draft rules and this SONAR prior the Board of Managers' authorizing their release for review and comment.

Draft Rules

The District issued proposed rules aimed at water-resources protection and flood-damage prevention on February 21, 2014. The District conducted an extensive outreach and peer-review process to help in the development of the proposed rules. And in conjunction with the publication of the draft rules, the District issued a statement of need and reasonableness (SONAR) explaining the function of the rules, detailing the watershed purposes supported by the rules and describing steps the District took in developing them.¹⁰ As described in the February 21 SONAR, the District relied on its own research and valuable input from its technical advisory committee and its citizens advisory committee in developing the draft rules.

The District distributed the proposed rules for review and comment in accordance with state law¹¹ and made the draft rules available on the District website. In addition to the statutorily required public hearing on the draft rules (held March 19, 2014), the District held public informational meetings on the draft rules on March 3 and March 18, 2014. District received verbal comments from all parties expressing an interest in speaking at the public hearing, and staff discussed the operation of and policy drivers for the rules at the informational meetings. The District left the comment period open until April 7, 2014 – a total of 45 days, as required by state law. District staff also met informally with interested individual property owners, city representatives and others.

The District received a substantial number of comments – mostly from individual property owners and representatives of cities and state agencies. Many of the

¹⁰ All materials related to the District's rulemaking process can be found at <http://rpbcd.org/permits>.

¹¹ Minn. Stat. § 103D.341.

comments from individual property owners raised similar issues. Likewise, many of the comments from city representatives touched on similar themes and concerns. In light of the common threads in the comments, the District developed a research–review paper supporting the rules’ required lake, stream and wetland buffers and a supplemental SONAR to address common issues and concerns.¹² District legal counsel also produced a memorandum providing a detailed review of the legal authority for the District’s rules in response to comments on the point. Finally, the District produced a matrix containing each individual comment received during the statutory comment period and also responded to comments with changes to the proposed rules.

After the statutory review and comment period concluded and the rules were revised to respond to comments, more than 100 people – most of them watershed residents – turned out for the Board of Managers’ review of the rules on July 2 and a followup discussion on July 28. Attendees’ comments and subsequent letters and newspaper commentaries made it clear that watershed property owners were both concerned and misinformed about the scope and requirements of the rules. The outpouring focused on two elements of the rules that had been identified as points of difficulty in the initial (statutory) round of comments:

1. The requirement that lakeshore properties provide a buffer adjacent to the shoreline when a significant upgradient land–disturbing project was undertaken; and
2. The imposition of stormwater–management requirements on existing single–family home properties in proximity to water resources.

Given the significant expressions of uncertainty and concern about the rules, the managers delayed adoption so the District could convene an open house and additional public forum for questions, answers and comments, which took place in late August 2014. The District subsequently engaged the City of Eden Prairie in response to questions city council members had on the rules. Then, after several more responsive adjustments to the rules, the managers finalized and adopted the rules on November 5, 2014.

The Board of Managers engaged in the extended public–engagement process not in an attempt to make sure everyone in the watershed embraced the reinstatement of its regulatory program. But rather because the managers wished to demonstrate the

¹² The paper and Supplemental SONAR remain available (as a single document) at the District’s permitting web page: <http://rpbcd.org/permits/>.

District's commitment to ensuring that the rules are imposed with appropriate respect and consideration for property owners' interest in continuing to utilize their properties in their accustomed manner, at the same time that the District fulfilled its obligation to protect and improve the health of water resources and protect against flooding in the watershed.

The Rules – Comments & Responses, Guidance and Explanations

The remainder of this SONAR summarizes a few frequently made comments on the rules and explains how the District revised the rules in response. (The text of all comments received during the statutory comment period is available from the District web site: www.rpbcwd.org/permits.) From there, the SONAR provides background and insights into the operation of each rule.

Overarching Comments and the District's Responses

RULE APPLICABILITY TO SINGLE-FAMILY PROPERTIES

The applicability of the draft District rules to single-family properties was a topic of numerous comments. Homeowners expressed concern most consistently about the provision in the initial draft rules that required establishment of a buffer along lakeshore and provisions that required stormwater-management facilities when a property owner undertakes substantial land-disturbing work. Among other comments, homeowners (and city staff) worried that compliance costs would be outsized, with property owners having to hire an engineer to help design plans for otherwise fairly simple projects.

After much discussion with watershed stakeholders and drafting several revisions to the buffer provisions in an effort to assuage concerns, the Board of Managers elected to eliminate lakeshore buffers altogether – not just on single-family home properties – from the rules. The District will instead focus on developing partnerships with and providing cost-share support to owners of lakeshore property – single-family and otherwise – in the hope of demonstrating the benefits and attractiveness of buffers and building support in the community. The District also will consistently seek opportunities to incorporate lakeshore buffer into its water-quality improvement construction projects. Meanwhile, the buffer requirements on creeks and wetlands continue to apply to single-family home properties, but the District has provided a simple and minimal buffer requirement (*see* paragraph D-3.1d) and simplified the required submittals for projects on such properties (*see* paragraph D-7.2a).

The District has revised the stormwater rule so that owners of a single-family property undertaking a significant construction project need not meet specific stormwater-management performance criteria, but rather need only to install or implement a stormwater best management practice. The required exhibits are substantially less extensive than are required for other projects as well. (See section J3.4.)

Further, the Erosion and Sediment Control Rule provides the most basic and fundamental protections of water resources, and will apply most broadly in land-disturbing work in the watershed. The rule includes simplified exhibit requirements for projects on single-family home properties (see paragraphs C4.2b and c) and a shallower soil-ripping requirement (see C3.2d)

Finally, the District realizes single-family property owners may need particular assistance with the permitting process. For any applicant seeking assistance, initiating contact with District staff well in advance of the start date for work subject to the rules is strongly encouraged. But single-family property owners may particularly benefit from such informational no-cost meetings with staff or the engineer.

CONSISTENCY OF RULES ACROSS WATERSHEDS

Several commenters observed that the District's proposed rules are not consistent in all particulars with other watershed districts' rules and contended that such consistency, on its own, is beneficial. The City of Eden Prairie, in particular, suggested that a number of rule provisions be revised to be consistent with Nine Mile Creek Watershed District regulations.

The District recognizes the benefit of regulatory consistency across watersheds. But each city's and county's regulatory programs are tailored to address the unique social and economic features of the locality. Watershed rules, with their focus on protecting unique local natural resources and countermending particular flooding and pollution threats, also cannot be cookie-cutter, and the District has carefully drafted its rules to address the distinctive features and particular challenges in the Riley Purgatory Bluff Creek watershed.

Because of the geographic proximity to and several shared cities in the Nine Mile Creek watershed, the District utilized the NMCWD's rules as a template for the reinitialization of its regulatory program, and the overall structure and a number of specific provisions of the District rules remain consistent with the NMCWD terms. But the unique topographical features and unique soil conditions of the Riley Purgatory Bluff Creek watersheds require particular protections - the buffers required on creeks and

impervious setback from creeks, for two examples. In addition, groundwater sustainability has become a critical concern in the Twin Cities, and the District has determined that its regulatory program has an important data-gathering role to play in the effort – in collaboration with other agencies – to understand the unique dynamics of groundwater and to help ensure the continued health and availability of the resource. The result is that the District rules include a groundwater-appropriation rule that the NMCWD rules do not.

The obligation to construct a best-management practice triggered by a land-disturbing project on certain existing single-family home properties in the final District rule mirrors neither the NMCWD rules, which require full compliance with stormwater-management criteria, nor the District's other neighbor to the north, the Minnehaha Creek Watershed District, whose rules exempt single-family properties from stormwater requirements. In this regard, the District rules differ because the District responded to comments from watershed property owners – a driver that Eden Prairie staff ultimately agreed was important.

The District's originally proposed rules included differences from the NMCWD rules related to unique topographical and hydrological features of the watershed. The final rules include some changes that bring them into closer alignment with the NMCWD rules, but also include new differences to respond to specific concerns of watershed properties that were raised by commenters. Both drivers for differences underscore the importance of adapting and responding to all manner of unique circumstances of a particular jurisdiction, while harmonizing wherever possible with neighboring organizations' rules for the sake of minimizing the burden of compliance on regulated parties wherever possible

Other comments the District received on specific sections and provisions of certain rules and the District's response (including changes made to the rules) are discussed as in the rule-by-rule review that follows.

Rule-by-Rule Review – Substantive Rules

The balance of this final statement of need and reasonableness provides background, guidance and explanation of the rationale supporting each of the substantive draft rules (B-J), with information on key definitions incorporated into the discussion of the rules to which they pertain. The final section provides guidance on the administrative structure provided in rules A and K-M. While this document attempts to be fully explanatory, it is important for all interested parties to analyze the actual text of the

rules to gain a complete understanding of the District’s proposed regulatory provisions.

The rules have been drafted and refined first and foremost to implement the water resource–protection policies in the District watershed plan. For user–friendliness, each of the substantive rules is structured similarly. Applicable policies from the District’s watershed plan are restated in the first section of each rule, followed by sections addressing, in order, policies, the scope of the regulatory requirement (“regulation”), the specific requirements on work governed by the rule (“criteria”), then exhibit requirements, followed by miscellaneous sections particular to individual rules (e.g., exceptions).

DEFINITIONS

The importance and operation of the definitions included in the rules are explained below in the context of the rules to which they pertain. Several of the definitions were modified in response to comments.

RULE B – FLOODPLAIN MANAGEMENT AND DRAINAGE ALTERATIONS

The District floodplain requirements hew closely to those of other watershed organizations in requiring the preservation of flood storage, even as the watershed continues to experience significant development. Also like other organizations managing water resources and flood risks, the District proposes to use flood elevations calculated using the latest National Weather Service rainfall data, which at this time is the Atlas 14 report finalized in 2013. (The District is presently updating its floodplain models to incorporate Atlas 14 data; the process should be complete in 2015.) The District will provide applicants with any flood–elevation information it has for purposes of project design. (The District has models for all three creeks and most of the major lakes in the watershed.) But an applicant will need to calculate the flood elevation for other, smaller courses and basins, including stormwater facilities it constructs to comply with District requirements. (Such calculations will need to incorporate the most recent National Weather Service rainfall data.)

The types of activities triggering the permit requirement (section 2) are straightforward. The rule requires compensation, in advance, for *any* fill in the 100–year floodplain, precluding minor encroachments over time leading to an increase in the potential for flood damage (subsection 3.2).

The proposed rule is consistent with municipal regulations in requiring the low floor of structures to be a minimum of two feet above the 100-year flood elevation. (Requirements for low-floor elevations of structures adjacent to stormwater facilities are provided by section 3.3 of Rule J – Stormwater Management, discussed below.)

Importantly, the floodplain rule prohibits, in subsection 3.4, the placement of structures or surface paving within 100 feet of the centerline of Riley, Purgatory or Bluff Creek or another watercourse in the watershed. Several commenters stated that the 100-foot space adjacent to a creek in which no impervious surface may be constructed or reconstructed is too wide.

This is a standard articulated by the District in the 1970s¹³ and included in the Floodplain Regulation established by the District's 1996 Water Management Plan. The District engineer's review of the topographic characteristics of the watershed and floodplains supports reinstating the impervious setback in the District's rules. Development, structures and impervious surfaces in the floodplain alter the dynamics of flood flows and reduce the infiltration and water-storage capacity of the floodplain. Surface paving and other impervious surface in the floodplain can increase flow rates, which change the timing of flows and increase the potential for erosion. Also, structures in the floodplain can impede flood flows and increase adjacent and upstream water levels. Structures also have the potential to become dislodged or collapse during flood events, which can lead to flow restrictions and other damage. A 100-foot structure setback limits the potential for structures to be located in floodplain areas. The Board of Managers has elected to seek to help ensure the safety of downstream and upstream properties and resources by retaining the 100-foot setback. Paving and structures within the setback zone will be permitted only when associated with bridges, culverts or trails less than 10 feet wide, which are excepted from the operation of subsection 3.4. (Bridges, culverts and other crossings are regulated by Rule G.)

As explained elsewhere in this SONAR, implementation of the standards and criteria in the District's final rules will be determined in discussions between the District and the cities in the watershed. But section 5 of the Floodplain Management and Drainage Alterations Rule provides a readymade carve-out that defers regulation to the relevant

¹³ See Section F, Review Criteria, Riley-Purgatory Creek Watershed District Prescribed Overall Plan, 1973, p. 61.

city under certain conditions for floodplain impacts that are entirely within the city's jurisdiction – i.e., when the basin in question is entirely within the city's borders.

RULE C – EROSION AND SEDIMENT CONTROL

Best management practices and techniques for erosion and sedimentation control are well established and understood by the development and construction communities. The watershed cities have substantial experience in regulating erosion and sediment control through years of grading and development permit review, and the District rule reflects the broadly shared understanding of how erosion and sediment can be effectively controlled. There were few comments on the draft rule.

Another consequence of the uniformity of erosion and sediment control policy and practice is that it is an area in which the District and watershed cities are likely to agree that city ordinances and permitting programs protect water resources as well as or better than the District regulatory program. Under such circumstances, the entities can agree that the city will exercise sole regulatory authority, rather than having both regulate to that effect.

Even where the District exercises authority to issue erosion and sediment control permits, it will continue to collaborate with city staff on inspection of permitted sites and deployment of enforcement mechanisms as necessary.

Applicability – regulatory scope

The threshold for erosion-control permits is broad and simply stated: disturbance of 50 cubic yards or more of earth or 5,000 square feet or more of surface vegetation. The regulation section was clarified before finalizing by making it clear that “placement, alteration or removal” of earth (not just excavation) triggers the rule. Single-family home property development and redevelopment projects are subject to the rule. The rule's broad applicability is important given the potential for residential development and redevelopment in watershed generally, and especially in areas with steep slopes and erodible soils in close proximity to creeks and small watercourses. Cumulatively, these developments and redevelopments, if unmanaged, could significantly increase sediment and pollutant loading to water resources. Further, compliance with the rule is not onerous: Contractors of all sizes should be familiar with standard erosion and sediment control practices, which do not require significant expenditure or experience to implement for small sites. For those that may not be, relevant information is readily available. Finally, the rule's exhibit requirements include

a couple of specific modifications designed to make it unnecessary to engage an engineer for compliance purposes for a single-family home project.¹⁴

Criteria

The District's erosion and sediment control criteria should look familiar to experienced developers and construction professionals. The MPCA guidance referenced in subsection 3.1b is well established as authoritative on the topic. The statewide nature of the guidance facilitates familiarity and streamlined compliance.

The District's criteria in 3.1 through 3.3 are well in line with industry and regulatory standards. The District's goal with the criterion in 3.2c, including soil ripping to 18 inches deep (8 inches for single-family home properties), is to ensure that vegetated surfaces are fully pervious and capable of the maximum possible infiltration of runoff, in keeping with policy 1.7.

The criteria for timing of site stabilization in 3.2d have been modified to be consistent with the current state construction-stormwater-management requirements.

RULE D – WETLAND AND CREEK BUFFERS

The District's buffer rule enhances federal and state wetlands protections, which will continue to be implemented by the U.S Army Corps of Engineers (for wetlands qualifying as waters of the United States), the Department of Natural Resources (for public waters wetlands) and watershed cities and transportation authorities acting as Local Government Unit administering the Wetland Conservation Act (for all other wetlands). (The District rules rely on and do not supplement the state and federal wetlands-protection regime. The District will consider taking on WCA administration if asked by a watershed city, but does not intend to seek WCA LGU status.¹⁵) The buffer rule also will play a critical part in the District's efforts to stabilize and protect steep slopes around creeks and improve watershed lakes' recreational and aesthetic functions.

¹⁴ Oblique maps, available from the Hennepin County property information website, may be submitted in lieu of topographic maps for single-family home site projects, and single-family project applicants are not required to submit tabulation of the relevant construction implementation schedule. See sections 4.2b and c.

¹⁵ Each watershed city presently acts as WCA LGU within its jurisdiction, and the Minnesota Department of Transportation is the LGU for its transportation corridors.

The District has carefully weighed the interests of property owners and the contributions water resources in developing and finalizing the buffer provisions. The District finds that the protection provided by buffers is necessary for long-term protection of resources that contribute immeasurably to sustaining property values. The District relied on significant research conducted and extensive findings by its engineer, Barr Engineering, showing the value of buffers for protection of water resources and the lack of other options for treating stormwater runoff from properties surrounding lakes in the watershed.¹⁶ The District's research – compiled from years of analysis of stormwater runoff to lakes and other water resources in the watershed – showed a general lack of treatment of runoff from properties adjacent and in close proximity to lakes, while runoff from most other property in the watershed receives treatment by wetlands or constructed stormwater ponds.

The strong case for the multiple benefits of buffers notwithstanding, the District removed the provisions from the draft rule requiring buffers on lakes in response to lake associations', numerous property owners' and other stakeholders' statements of opposition. The District will instead focus on supporting – financially and otherwise – the efforts of property owners who are interested in demonstrating the utility, benefits and beauty of naturalized buffers, and its own efforts to find opportunities to incorporate buffers into its water-quality improvement construction projects.

Relevant to the requirements to establish creek and wetland buffers that remain in the rules, the burden on property owners is leavened by the particulars of the rule, which:

- Do not require a buffer to be established when proposed work triggers only the District Erosion and Sediment Control Rule (i.e., work that does not create significant new impervious surface and presents only short-term potential water resources impacts) (section 2);
- Allow, on non-residential properties, for reduction in the width of the buffer required when slope and soil conditions reduce the risk of degradation of water resources (paragraph 3.1 b);
- Reduce the extent of the buffer required and include simplified buffer-width calculation provisions for existing, already legally established single-family property (paragraph 3.1 d);

¹⁶ See Sobiech et al, "Technical Memorandum: Report on Lake, Wetland and Stream Buffers," June 19, 2014.

- Require buffer only to the extent of available right-of-way for linear projects for which a District permit is required (paragraph 3.1g; *see also* discussion of changes to the applicability of the buffer and stormwater rules to linear projects in the explanation of the Stormwater Management Rule below); and
- Allow appurtenant infrastructure in buffers in public parks and allow a pervious path through a buffer to provide access to protected water resources on all properties (3.2e).

Applicability – regulatory scope

The rule requires a property owner to establish buffer on a creek or wetland only when a permit is required under Rule B – Floodplain Management and Drainage Alterations; Rule E – Dredging and Sediment Removal; Rule F – Shoreline and Streambank Stabilization; Rule G – Waterbody Crossings and Structures; or Rule J – Stormwater Management, except that installation of a sand blanket under Rule F does not trigger the buffer rule.

Buffer is required only on a regulated feature (wetland or stream, as defined in the definitions) that is either disturbed by the proposed activities or downgradient – and therefore at risk of degradation – from the proposed land-disturbing activities (subsection 3.1). That is, the requirement is carefully drafted to apply only when proposed work will directly affect a resource or will increase or alter flow of stormwater and associated contaminants to the resource.

Buffer is required only on property owned by the applicant for a permit.

The High-Risk Erosion Areas map, which governs application of the rule requirements to small, non-public watercourses (*see* paragraph 3.1a.vii), has been developed through diligent analysis by the District engineer of watershed topography to identify those areas particularly susceptible to catastrophic erosion events and chronic degradation from gully-forming runoff. In response to comments, the District added a definition of High-Risk Erosion Areas to the rules that helps explain why buffers are required on such features, which are characterized by easily eroded, very sandy soils and steep slopes. The definition also will guide the refinement of the map, the current operative version of which will be maintained on the District web site (www.rpbcd.org). (While the map itself was originally incorporated into the rules as a term thereof, two realities drove the decision to remove the map from the rules so that it could be updated as needed: 1, the interest of the District engineer in utilizing data submitted by property owners to ensure that the map is as accurate as possible; and 2.

the discovery, during the development of the map, of discrepancies in the legal description of the boundaries of the watershed that will need to be corrected.)

A printed High-Risk Erosion Areas map itself is included with the rules for illustrative and general guidance purposes. The GIS-interface functionality of the map is available only via the District web site (or from the District engineer) because of the high-resolution maps necessary to determine whether a property is within or adjacent to a High-Risk Erosion Area.

The provisions of the rule applicable to existing single-family home properties apply only when the proposed project is construction or reconstruction of a home and/or appurtenant structures and impervious surfaces (e.g., deck, garage, driveway, shed, patio, swimming pool). Reconstruction on a single-family home property that does not involve an increase in the impervious-surface footprint, does not trigger the Stormwater Management Rule, and therefore does not trigger buffer requirements. The “existing home” provisions apply only to lots legally established as of the date of adoption of the rules (November 5, 2014), and without regard to the name the applicable city applies to the zoning designation – as long as single-family residential is a permitted use in the zone. The provisions apply whether the lot has previously been developed or not – i.e., when either a new home is being built on an old lot, or an old home is being torn down so a new one can be constructed. The provisions do not apply to newly subdivided lots or when a property or properties are being reconfigured for development or redevelopment: The District reasons that in subdividing a property into multiple plats, a developer can provide for the standard buffer widths provided in the rule – especially given that lake buffers are not required in the final rule. Some commenters asked that the District define “existing single-family home” property, but the District elected to explain the applicability of the provisions here instead of binding itself to a complicated and rigid definition in the rules.

Criteria

The required buffer widths derived through application of the criteria in subsection 3.1 were set by the Board of Managers after a review of buffer widths required on wetlands by ordinance in Chanhassen, Minnetonka, Bloomington and Eden Prairie, and by other watershed organizations (Carver County Watershed Management Organization in particular), as well as the research on buffer function and effectiveness conducted by the District engineer. From there, the District reduced the required widths in response to comments received to the figures in the final rule.

The width-calculation provision for existing single-family homes is exceedingly simple: Base buffer is always 20 feet, and buffer averaging as provided in paragraph 3.1e is allowed.

Section 6 of the rule was revised – again, in response to comments asserting the buffer rule as proposed was onerous – to provide that buffer and stabilization techniques may overlap on the landscape. Installation of a shoreline or streambank improvement triggers the District buffer requirement, though the fact that the rule has been revised to eliminate buffers on lakes means that this trigger will only require the actual implementation of buffers when a property borders or is within the applicable buffer width of a stream or wetland. Further, the buffer width is added to the streambank (on a creek) or shoreline (on a wetland) improvement width only to the degree that the applicable buffer width exceeds the width of the improvement. That is, if the stabilization improvement is 20 feet deep and the project is taking place on an existing single-family home property (for which the buffer width is 20 feet), no actual buffer would be required. The engineer determined, in supporting the change, that shoreline and streambank stabilization techniques provide many of the same resource-protection benefits that buffer provides.

Vegetation in Buffers and Maintenance

Commenters observed that the ordinances of cities in the watershed may conflict with the District’s initially proposed buffer provisions, which allowed turf grass to serve as buffer and allowed property owners to continue to mow turf grass. The District explored several different options for modifying the buffer establishment and maintenance requirements, ultimately deciding to ensure harmony with city shoreland requirements by requiring that all buffer area be established and maintained with native plants. Section 3.2 of the rule continues to allow management of buffer – including cutting – to ensure buffer health and mowing for public safety purposes.

The District also added several structures to the list of allowable impervious surfaces in buffer areas in response to Eden Prairie staff notes (*see* paragraph 3.2d(i)). And boardwalks through a buffer are allowed under the final rule – a response to commenters’ observation that some property owners in the watershed have such severe shoreline slopes that anything other than a boardwalk is infeasible.

RULE E – DREDGING AND SEDIMENT REMOVAL

The District’s Dredging and Sediment Removal Rule responds to the statutory direction in Minnesota Statutes section 103D.201 to regulate the beds, banks and shores of water bodies for preservation and beneficial public use. District regulation of the

excavation of materials is meant to help preserve the natural character of public waters, the natural appearance of shoreline areas, and recreational, wildlife and fisheries resources. Regulation is also important because the littoral zone (where sunlight penetrates and sediment typically is deposited) is the most biologically productive and ecologically sensitive area of a water body. There were very few comments relevant to Rule E and no substantive changes were made to the rule that was issued in draft form.

Operation of the rule

The rule requires a permit from the District for removal of more than a *de minimus* amount of sediment from a public water body; that is, the rule does not apply to removal of accumulated sediment from, say, a stormwater pond. The “regulation” section also specifies the limited set of purposes for which the District will permit removal of sediment, reflecting the District’s general predisposition against the reconfiguration and enlarging of water resources, the natural resources value of which the public has an interest in conserving. The 1-cubic yard *de minimus* provision and the Fast-Track public-project permitting in section 5 reflect the District’s understanding that public entities often conduct minor routine maintenance activities in public waterbodies and do so in keeping with the policies, purposes and criteria stated in the rule. The District does not wish to unduly burden these efforts.

No permit is needed from the District under its rules applicable to work in public waters if the project proponent obtains a permit from DNR, though the District buffer requirement, if any, could still apply (*see* paragraph 2.2) and other District rules may apply (as would be determined according to their terms).

The criteria in section 3 of the rule follow from and implement the policies and purposes stated in the first two sections. An underlying premise is that the original or native bed and banks of a waterbody can be ascertained to establish an extent to which dredging can occur. Generally, the onus is on the applicant to demonstrate that 1. the proposed dredging or sediment removal is necessary, and 2. that the project will not alter the cross section of and will preserve the natural characteristics of the subject waterbody. Not all criteria will apply to every project, and applicability is addressed as necessary in each criterion (e.g., paragraph 3.1a applies only to a project proposed for navigational purposes).

RULE F – SHORELINE AND STREAMBANK STABILIZATION

Watershed districts have as one of their purposes the regulation of “improvements by riparian property owners of the beds, banks, and shores of lakes, streams and

wetlands for preservation and beneficial public use.”¹⁷ In partial fulfillment of that purpose, the Shoreline and Streambank Stabilization Rule is designed to ensure that the stability of shorelines and streambanks is preserved. (Note that while the rule, for brevity’s sake, sometime refers simply to “shoreline,” the term is defined for purposes of the rules to encompass both shorelines at and waterward of the ordinary high water level set by DNR (on lakes and wetlands) and the area at and waterward from the top of the streambank (on watercourses). Where distinction is necessary – as in paragraph 3.4 – the term “streambank” is specifically used.)

Applicability

Like the dredging rule, the shoreline rule applies to public waters. But stabilization of the banks of small streams that are not public waters is also regulated. Again, the topography and soil conditions of the watershed – especially in the high-risk erosion areas identified in the High-Risk Erosion Areas map – require that the District include such small streams within the scope of the permit requirement. District historical and analytical information indicates that sediment from such small watercourses contributes significantly to pollutant loading in the watershed.

The District also removed the specific exclusion from the rule for planting of vegetation not intended to provide deep soil structure stability in response to comments. While the District does not purport or wish to regulate gardening, efforts to stabilize a shoreline or streambank do need to comply with Rule F, and planting of short-rooted vegetation will not meet the criteria of the rule.

The operative section of the rule was revised in response to comments, clarifying that maintenance of an existing stabilization does not require a permit from the District. That is, if a property owner has a 60 foot length of shoreline that is stabilized with 12 feet of riprap, removal and replacement of riprap in the same dimensions does not require a permit from the District. But replacement of 12 feet of riprap with 20 feet of riprap does.

Again, no permit from the District is needed under Rule F if a DNR permit is obtained.

Criteria

The rule requires that an applicant show a need to prevent erosion or repair erosion damage to obtain a District permit (paragraph 3.1). The provision means the District

¹⁷ Minn. Stat. § 103D.201, subd. 2(11).

will not permit purely cosmetic or decorative shoreline or streambank installations, as explicitly stated with regard to riprap in paragraph 3.6. Further along these lines, the rule allows the applicant to hard armor a shoreline or streambank only if necessary to prevent destabilization. The sequencing criteria in subsection 3.2 were reconfigured for the final rule to clarify that applicants first analyze bioengineering options (stabilization using natural materials), then a mixture of bioengineering and hard armoring, before opting to stabilize a shoreline or streambank with, e.g., riprap. In other words, the applicant must provide information showing that erosive forces are such that hard armoring is necessary. The rule does not require an applicant to install and “try” biological stabilization, then move to riprap only if the plants fail; the stabilization method used is dictated by analysis of the erosive forces at work on the property. For single-family property owners especially, early coordination with the District engineer on calculation of sheer stress and/or erosion intensity per subsection 3.2 will be helpful and informative.

A slight revision to 3.3g in the rule clarifies that a shoreline needs to comply with the 3:1 slope criterion only if the shoreline or streambank is altered in a manner that triggers the requirements of Rule F. Existing, steeper but stable shorelines – of which there are a number in the watershed – need not be altered; the rule requirements apply only if the shoreline is in need of stabilization or reinforcement to protect against destabilizing erosion.

The rule allows retaining walls only in public improvement projects where they provide the best-possible means to maintain the stability of a shoreline or streambank and thereby protect the water resource (see subsection 3.4).

At the suggestion of several members of the TAC, installation of a sand blanket on a shoreline requires a permit under the rule. Sand blanket installation is subject exclusively to the specific criteria in subsection 3.5 and the submission requirements in subsection 4.5.

During the comment period, lakeshore property owners and associations expressed concern that under the criteria in subsection 3.5, the District will not issue more than two permits for placement of sand blankets on property that is not a public beach. Department of Natural Resources rules allow placement of sand blankets on an individual lakeshore property twice without obtaining an individual DNR permit. The District rule adds only a temporal element to that restriction. The District understands that sand is generally an innocuous material, but it can be sullied with trash, debris and phosphorus-bearing plant material. A need for multiple replacements of a beach sand

blanket within a short timeframe is indication that the erosion forces (e.g., waves) affecting the shoreline are such that any material deposited on the shoreline will continue to be washed into the adjacent waterbody – along with the attendant pollutants. For these reasons – and a desire to maintain consistency with DNR regulations – the District will retain the restriction on sand blanket applications to once in four years and twice overall at the same location. The District also did not alter the exemption in this subsection for public beaches, wishing to retain the clear designation of beaches subject to the exemption.

RULE G – WATERBODY CROSSINGS AND STRUCTURES

The District’s proposed Waterbody Crossings and Structures rule generally applies to non-public waterbodies as well as public waters, reflecting the District’s interest in comprehensively regulating projects that have significant potential to affect hydraulics, floodplain storage and water quality in the watershed. But with regard to the placement of a structures, the rule applies only to work in a non-public waters, leaving regulation of structures (e.g., docks) in public waters exclusively to DNR’s extensive expertise and regulatory experience in the arena. Again, no permit under the rule is required for work for which a DNR permit has been issued (subsection 2.1). And in response to comments from TAC members, the rule places an affirmative requirement on permittees to maintain and repair waterbody crossings constructed under a permit from the District (i.e., new crossings, not existing ones) (section 5). But the rule only requires a permit from the District when a waterbody crossing is to be upgraded or expanded (“improved”) or altogether replaced (section 2).

Like the shoreline stabilization rule, all work subject to the crossings rule can only be permitted on a demonstration of need (paragraph 3.1 b).

The District crossings provisions exceed DNR criteria by requiring that existing wildlife traffic be accounted for (paragraph 3.2d), requiring that a crossing be designed for minimal impact on water resources (3.2e), and permitting no increase in flood stage (paragraph 3.2a), in concert with the policy of no net loss of flood storage capacity stated in the floodplain rule.

RULE H – APPROPRIATION OF PUBLIC SURFACE WATERS

Rule H is the first of two water appropriations rules proposed by the District and pertains to pumping from surface waters (wetlands, lakes, creeks). The rule fulfills the requirement in Minnesota Statutes section 103B.211, subdivision 4, that the District

regulate small appropriations from surface waters,¹⁸ and the regulatory thresholds established in the rule comport directly with the statutory requirement, except that the District has elected to apply its rule to the entire watershed rather than just to Hennepin County as required in the statute.

In response to comments about the burden of compliance with the rule, the District scaled back the final rule to remove the required submission of a proposed pumping schedule to obtain a surface-water pumping permit. Also, property owners subject to rule require only a narrative report of how the pumped surface water was used and conserved instead of the monthly pumped volume totals that were required by the draft rule.

Note that permits issued under the rule are continuing, and do not expire as long as the permittee complies with the criteria in section 3 (see subsection 3.3).

RULE I – APPROPRIATION OF GROUNDWATER

While the District’s regulation of surface water appropriations is mandated by statute, its rule for small appropriations of groundwater represents a commitment by the District to contribute to ensuring the sustainability of groundwater resources. Watershed district regulation of groundwater appropriations is supported by state statute.¹⁹

As with the surface water appropriations rule, the District responded to concerns expressed about the burden of compliance with the draft rule provisions by removing the required submission of a proposed pumping schedule and proposed means of monitoring pumping volumes. Also like the final surface water rule, property owners subject to groundwater rule are required only submit annually a narrative report of how the pumped groundwater was used and conserved to retain the permit issued under the rule indefinitely. (No renewal is necessary as long as terms of the permit are complied with; subsection 3.3.)

¹⁸ See Minn. Stat. § 103G.271, and Minn. R. 6115.0670 (establishing a permitting regime administered by the Department of Natural Resources for appropriations of public waters in amounts greater than 10,000 gallons per day or 1 million gallons per year).

¹⁹ Among the reasons for the formation of a watershed district is “to provide for the protection of groundwater and regulate its use to preserve it for beneficial purposes.” Minn. Stat. § 103D.201, subd. 2(14).

The requirement that an applicant have a contingency plan or agreement with the District is simple. No specific content is required; rather, the District wants to see that the applicant has considered and planned for using alternatives to groundwater pumping.

RULE J – STORMWATER MANAGEMENT

The District’s final stormwater rule is modeled on that of its neighbor, the Nine Mile Creek Watershed District, with several key differences:

- The policies reflect the District’s own considered statements of the issues to be addressed by stormwater regulation and the purposes established in its 2013 plan amendment reinstating the regulatory program.
- The criteria in section 3 reflect consideration of the statewide Minimal Impact Development Standards (MIDS) and other recent analysis in setting a volume–control standard of 1.1 inches of runoff (paragraph 3.1b).
- The Riley Purgatory Bluff Creek Watershed District rule requires more robust management of runoff from linear projects to ensure protection of water resources (subsection 2.4).
- The rule makes explicit the District’s ability to require ongoing performance monitoring and revision and reimplementation of the stormwater management plan for a site to ensure the effectiveness of innovative or unproven best management practices (subsection 2.6).
- An alternative management scheme for volume control is proposed for property where infiltration of runoff is either impossible or countermanded by site–specific conditions, instead of a volume–banking system (subsection 3.2).
- Criteria for providing a landlocked basin with an outlet are provided (paragraph 3.3c).

These highlights of the rule also represent the ways in which the proposed regulatory scheme combines the best established practices with innovations in the science of stormwater management to implement a regulatory program that is capable of improving water quality.

Definitions

A number of the entries in the Definitions section of the rules influence the scope of applicability of Rule J:

- “Abstraction” is defined simply and broadly, describing the performance characteristic that is critical to a permit applicant’s demonstration of compliance with the rule: onsite retention of runoff. This exemplifies the performance-based approach utilized throughout the District rules; providing an applicant with the flexibility to comply in the most efficient and cost-effective manner possible and consistent with the proposed use of land. Individual applicants will need to provide documentation and analysis supporting the capacity of their proposed systems to meet District standards – in this case, the retention of 1.1 inches of stormwater runoff from impervious areas on the subject property (Definitions; cross-reference paragraph 3.1 b).
- “Existing conditions”: Note that for purposes of application of the District rate control standard in 3.1a, the “existing conditions” definition includes the impervious condition of a property that has been cleared of buildings and structures some time prior to the submission of an application to the District, but on which no intervening use has been established. This language ensures that property owners are not penalized for clearing buildings and leaving property in a pervious state between developments or uses.
- “Linear project” and “rehabilitation” both contribute significantly to determining how the District criteria in section 3 apply to road and other transportation-corridor projects. (See Definitions, paragraph 2.2c and subsection 2.4, and note that the definition of “reconstruction” discussed below does not apply to linear projects, for which the standard sense of “reconstruction” – as “constructing again” – applies.) In response to comments on the draft rules, the District revised the definition of “linear project” to include – rather than exclude, as in the initial draft definition – projects for which right-of-way must be acquired (Definitions). Road authorities argued that additional property is most often acquired in circumstances related to improving safety – not an expansion of right-of-way for which an entirely new transit corridor is established. As such, even linear projects for which additional right-of-way will be acquired will be constrained by a lack of land available for stormwater facilities and/or buffer.
- “Impervious surface” is defined in commonsense and, again, performance terms, leaving determination as to whether a particular surface is in fact impervious (or not) to be demonstrated by an applicant and determined by the District engineer in a particular case.
- “Reconstruction”: As used in the context of land-disturbing projects other than road/linear projects, the definition of “reconstruction” is critical to delineating

the scope of applicability of the stormwater rule to projects on existing single-family home properties, as is discussed in some detail in the following section.

The District considered adding to this array of stormwater-centric terms, in response to comments from watershed property owners, a definition of “existing single-family home property,” but for reasons explained above the section explaining the Buffer Rule, opted not to. The same reasoning reviewed there applies to the Stormwater Management Rule.

Applicability – regulatory scope

The basic regulatory thresholds in the rule parallel those in Rule C – Erosion and Sediment Control, except that the stormwater rule also applies to the subdivision of property (paragraph 2.1c). The subdivision provision is premised on the notion that such land-use planning and implementation will include construction, and that this step in the development process is best suited to and best accommodates stormwater-management planning. (Subsequent construction, as long as the District permit remains valid, does not require further District stormwater permitting; paragraph 2.2b.)

The stormwater rule does not apply to construction or reconstruction on an existing single-family home property, except when such work presents a particular risk to water resources because stormwater from them drains to or is within the 100-year floodplain of a water resource (paragraph 2.2a). Certainly properties further away could be tributary and present the same risks even though they lack an overland connection to a waterbody. But the District reasons that such properties will be tied into constructed stormwater-management systems that provide treatment.

Further, the Stormwater Management Rule requirements apply to existing single-family home properties proposed construction or reconstruction will increase the impervious-surface footprint on the property. Therefore, a project that involves the teardown of a home or other structure on the property and reconstruction of another structure on the same footprint, does not trigger District stormwater-management requirement. So if a home burns down and a new home is constructed on the same foundation, District stormwater-management requirements do not apply. The “existing home” provisions apply only to lots platted and recorded as of the date of adoption of the rules (November 5, 2014), and without regard to the name the applicable city applies to the zoning designation – as long as single-family residential is a permitted use in the zone.

The District comprehends the uncertainties associated with dispersed, small best management practices on isolated properties in the watershed and the challenges associated with oversight of design, construction and maintenance. The District will need to develop and implement specific outreach efforts to address the associated challenges, but reasons that the education benefits support the additional resources that need to be devoted to regulating projects at the single-family property level.

While the District retained the 5,000 square foot threshold in the rules for linear projects to provide stormwater management and revised the threshold to apply to new and/or fully reconstructed impervious surface (as opposed to the original new or additional), a flexible compliance structure has been incorporated into section 3 of the rule for linear projects that is very closely modeled on the state MIDS. The 5,000 square foot threshold was selected and retained as consistent with rule provisions for new development and redevelopment, and in recognition of the fact any impervious increase, even relatively small, may contribute to degradation of water resources, ultimately requiring expenditure of public funds for cleanup.

Subsection 2.3 sets the application of the criteria in section 3 for redevelopment projects, limiting the applicability of the rule's stormwater management criteria when less than 50 percent of the impervious surface of a property is disturbed to balance the District's interest in encouraging reuse of already developed property with the need to update stormwater management systems.

The District and TAC gave careful consideration to the application of the stormwater permit criteria to linear transportation projects (*see* subsection 2.4). The linear provisions represent the District's balance of its interest in ensuring protection of water resources with the reality that transportation corridors offer limited space in which to construct stormwater treatment. Subsection 2.4 also recognizes that mill-and-overlay and other maintenance projects do not add impervious surface and do not increase runoff problems.

Criteria

The District developed the criteria in section 3 of the rule through analysis of current best practices in watershed rules throughout the metro area, the Minimal Impact Design Standards and watershed cities' ordinances. The 1.1-inch base abstraction

standard is consistent with MIDS,²⁰ and slightly more stringent than the 1-inch standard in the Minnesota Pollution Control Agency's new National Pollutant Discharge Elimination System general permit for construction.²¹ Also consistent with the NPDES structure is the District's dual sets of criteria: one for sites at which infiltration and other abstraction practices can readily be implemented, the other for so-called restricted sites, where poor soils, contamination or high groundwater make infiltration more challenging or inadvisable.

For the final rule, the District has reduced the stormwater-treatment water-quality standard from annual removal of 75 percent of the annual phosphorus load from a property to 60 percent in response to concerns from Eden Prairie city staff about the challenge of achieving the higher criterion (*see* paragraph J3.3.c). The District reasons that at most sites, compliance with the 1.1-inch abstraction standard will mean stormwater-management systems will, by design, achieve at or close to the 75 percent water-quality standard anyway. And given that the 75 percent removal rate is very difficult if not impossible to achieve without some form of abstraction, restricted sites were not likely to be able to achieve the 75 percent standard.

The draft rules issued in February 2014 did not have specific criteria for linear projects, and road authority commenters observed that the stormwater management requirements would unworkably burden road reconstruction projects or render such projects infeasible. The District added regulatory provisions specific to linear projects in response to the comments (in subsection 3.2 in the final rule). The criteria require compliance with rate control and water quality for all projects subject to the rule, but include two compliance tiers for abstraction, which apply in accordance with the amount of new or fully reconstructed impervious surface (using the total of the two for purposes of determining which abstraction criterion applies). "Fully reconstructed," in this context, refers to road areas that have been disturbed down to native or underlying soils; work such that the surface work does not qualify as "rehabilitation," as defined for purposes of the rules.

The District has revised the stormwater management criteria for all restricted sites (linear and otherwise; *see* subsection 3.3). They provide a compliance structure for

²⁰ See <http://www.pca.state.mn.us/index.php/water/water-types-and-programs/stormwater/stormwater-minimal-impact-design-standards-mids.html> (last visited October 26, 2014).

²¹ See <http://www.pca.state.mn.us/index.php/view-document.html?gid=18984> (pp. 12-13) (last visited October 26, 2014).

projects that are planned for properties with conditions that preclude compliance with the abstraction standard in paragraph 3.1a. These revisions principally reflect and incorporate a simplified version of the MIDS flexible treatment options, which underwent an extensive review process by the MIDS working group. The criteria in 3.3 are sequential, so if abstraction to the standards in paragraphs 3.3a and 3.3b cannot be achieved, an applicant has the option of providing off-site treatment to the letter of the rule's water-quality and abstraction criteria; rate control must be met onsite under any circumstances.

In keeping with the discussion above of the rules' applicability to existing single-family home sites, the criterion in subsection 3.4 (added in the final rules) is very straightforward and easy to comply with. As opposed to the initial draft rule's requirement that single-family home projects subject to the rule meet the generally applicable criteria in section 3.1, under the final rule such project need only provide a best-management practice in conformity with guidance issued by the state. The purpose of the provision is to ensure that proponents of projects on single-family properties from which stormwater runs off untreated come to understand the importance of and contribute to mitigation of impacts of stormwater runoff to water resources. But generally homeowners should not have to hire an engineer to design a facility that complies with the rule. And District staff will devote particular attention to ensuring that homeowners subject to the requirement receive whatever assistance they need.

Subsection 3.5 has been added to Rule J Stormwater Management to specifically recognize that property owners can calculate the stormwater-management capacity expected to be provided by buffers required by Rule D, and credit such capacity toward compliance with the stormwater-management criteria in section 3. (Note that this provision is available to all property owners applying for a District permit, not just owners of single-family home property.) The criterion is optional; it does not require the creation of buffer on any site, but simply recognizes that buffer has some stormwater-management capacity.

The low-floor criterion in subsection 3.6 closely comports with cities' requirements, and the District expects it to impose no additional burden on property owners. In addition to requiring that new structures be built in conformity with the standard, the rule requires construction of or changes to stormwater management facilities may not bring adjacent properties into violation of the freeboard criterion. While it is not within its purview or intent to regulate the allocation of liabilities between adjacent property

owners, the District has no intention of affirmatively permitting projects that will create this potential hazard.

The specific regulation of low-floor elevations of structures adjacent to stormwater facilities such as catch basins, rain gardens and detention ponds is designed to prevent flooding damage and seepage (paragraph 3.6a). Appendix J1 will allow permit applicants to set the location of the stormwater facility to the structure, water table elevation and soil conditions to ensure the appropriate distance and elevation of a structure relative to such facilities.

Maintenance

The maintenance provision in the final rule is straightforward and virtually identical to similar provisions in watershed rules throughout the metropolitan area. Like those rules, the District requires that a private property record maintenance obligations on the deed, while public projects can comply by entering an agreement with the district. (A public entity generally cannot record a maintenance obligation against property it owns.)

Exhibits

The District's stormwater management plan exhibit requirements are standard and straightforward. The option in paragraph 4.3j for the District engineer to require submission of an environmental site assessment allows the engineer to recommend approval of infiltration practices on sites with past-use history that raises concerns about contamination. Where contamination that could be mobilized by increased infiltration of runoff is present, infiltration will not be permitted.

For projects on existing single-family properties (i.e., projects for which compliance can be achieved simply by constructing or implementing a best-management practice), required drawings and exhibits will be only as necessary to demonstrate that the BMP is designed and will be built in compliance with industry best practices.

Program Administration Rules

RULE A – PROCEDURAL REQUIREMENTS

The procedural requirements in Rule A facilitate compliance with the District's substantive rules.

The recommendation in subsection 2.1 to project developers to avail themselves of consultation with District staff early in the development process allows future applicants to consider ways to minimize impervious surface, fully integrate infiltration features and route runoff to such features, and identify other potential project components that provide stormwater management benefits, all of which of course supports compliance with the District rules. Early review, comment and discussion can save significant resources that might otherwise have to be expended to bring a completed design into compliance with District permitting requirements – especially those for stormwater management.

The draft rules included a provision as section 2.3 requiring at least preliminary city approval before the watershed takes final action on a permit ensures that the District expends resources on analyzing a proposed project only after it is reasonably likely that it comports with local land-use controls – municipal codes and regulations – when applicable. It was important to city commenters on the rules that projects be allowed to proceed through both city-review processes and the District’s permitting program more or less simultaneous, and the final rule accommodates that parallel progress. This provision has been removed from the final rules to avoid any confusion about the ability of project reviews to occur in parallel and the practical fact that the District and watershed cities work together effectively enough to avoid the risk of mispending resources on a project unlikely to proceed through the city approval process.

The rule’s conditional approval provision, section 3, will allow certain submittal requirements or necessary design finalization to be fulfilled after the Board of Managers approves an application. As such, conditional approval will be granted only when relatively ministerial, administrative or minor compliance matters remain to be completed. Financial assurances, for example, very frequently will be secured and provided only after conditional permit approval. The key to the efficacy of such a provision is that the permit itself will not be issued – and work subject to the permit may not commence – until the designated conditions are satisfied.

An important aspect of sections 3 and 5 is that permitted projects that will remain under way longer than the original permit period (one year by default) must file for renewal prior to the expiration of the permit. Permittees failing to do so must reapply for a permit and pay applicable fees (i.e., as if applying for the first time). Permit renewal prior to expiration will require only a nominal fee. Also, only one renewal will be allowed when permitted activities have not been substantially commenced. Permittees taking more than two terms to get started will need to submit a new application and associated materials (including the permit fee) and may be subject to

new regulatory requirements. Use of the term “substantially commenced” in the rule means the Board of Managers will consider the level, nature and intensity of activities that are under way at a particular project site to support permit renewal. The provisions strike and maintain a balance between allowing permit holders to continue work on a project without apprehension of being subject to changes in the District regulatory requirements and preventing permit holders from obtaining essentially prospective approval of projects to avoid applicability of updates to the District regulatory program. The provisions are drafted to comport with established law on permittees’ vested rights in completing their projects.

Permittees taking more than a single term to complete work still will need to maintain compliance with District financial assurance requirements.

The Board of Managers retains the option of varying from the standard one-year permit term for a particular project in individual cases as the circumstances warrant (section 5).

Finally, section 4 of the rule is specifically included to respond to the 2013 United States Supreme Court decision in *Koontz v St. Johns River Water Management District*.²² It allows the District to reconsider, at the applicant’s request, a condition on approval of a permit or the grounds for denial of a permit. The applicant will need to reimburse the District for the cost of the additional analysis necessary for this review. The reconsideration step does not alter an applicant’s opportunity to appeal a District decision on a permit application in accordance with watershed law to the Board of Water and Soil Resources or to a state district court.

RULE K – VARIANCES AND EXCEPTIONS

The District’s draft variance provision is straightforward and very much in line with recently revised statutory municipal and county variance criteria in section 1. The rule incorporates the *practical difficulties* standard that has been codified in state law applicable to cities and counties. Under this standard, to receive a variance an applicant must show practical difficulties in complying with a District rule requirement or requirements. The criteria in the rule facilitate the Board of Managers’ determination as to whether the practical difficulties standard has been met. In short, if what an applicant wants to do with the subject property is reasonable and the

²² 133 S. Ct. 2586 (2013).

variance will not undermine the purpose and spirit of the District rules, a variance can be granted.

Given the primacy of the District's natural resources management mandate, the exception provision in section 2 is consistent with similar provisions utilized by other watershed districts and allows for the creativity of applicants wrestling with difficult or particularly advantageous site conditions. Application of the exception provision is limited to circumstances where substantial and varied measures are being undertaken to address not just the rule provision at issue, but the improvement of water resources broadly.

RULE L – PERMIT FEES

The District intends the fee requirement to reimburse its administrative, inspection and enforcement expenses as provided for by statute (Minn. Stat. § 103D.345, subd. 2).

Fee amounts will be set by Board resolution annually, and a schedule of applicable fees will be maintained on the District's web site, as well as at the District offices. The District intends to implement and maintain a simple fee structure, with only as much variation and detail as is necessary to ensure that actual costs of administration and enforcement are collected, and that fees collected do not exceed costs of the program.

RULE M – FINANCIAL ASSURANCES

Like permit fees, financial assurance amounts will be set annually by board resolution and published via the District's web site. The rule establishes structure under which financial assurances can be required at the outset of permitting and released upon completion of work.

Per section 4, the District will require that an applicant demonstrate, by means acceptable to the District engineer, that stormwater facilities are functioning before the financial assurance will be released.

The District will work in harmony with the watershed cities to ensure appropriate coordination of financial assurances requirements. Where the District shares regulatory responsibility with a city or cities – such as for erosion and sediment control – adequate financial assurances may be held jointly.

Table 1 – Technical Advisory Committee participants

Name	Affiliation
Liz Stout	City of Minnetonka
Laurie Susla	RPBCWD Citizens Advisory Committee
Melissa Jenny	U.S. Army Corps of Engineers
Terry Jeffery	City of Chanhassen
Jennie Skancke	Department of Natural Resources
Jack Gleason	Department of Natural Resources
Kris Langlie	RPBCWD Citizens Advisory Committee
John Ekola	Hennepin County
Mike Wanous	Carver County Soil & Water Conservation District
Bob Bean	Bolton & Menck (City of Deephaven)
Joe Mulcahy	Metropolitan Council
Leslie Stovring	City of Eden Prairie
Paul Hornby	WSB Engineering Inc. (City of Shorewood)
Rod Rue	City of Eden Prairie
Mary Krause	City of Eden Prairie
Barb Loida	Minnesota Department of Transportation
Brad Wozney	Board of Water and Soil Resources
Steve Segar	City of Bloomington