**MINNEHAHA CREEK WATERSHED DISTRICT**
**GUIDANCE to PROPOSED REVISED RULES**

**December 18, 2023**

## BACKGROUND

Under Minnesota Statutes §103D.341, the Minnehaha Creek Watershed District ("District") has prepared proposed revisions to its permitting rules. On October 26, 2023, the District Board of Managers ("Board") directed that the proposed revisions be distributed for public comment.

The legal authority for the District Rules derives from Minnesota Statutes chapters 103B and 103D. Under Minnesota Statutes §103D.341, subdivision 1, watershed districts must adopt rules "to accomplish the purposes of [the watershed act] and to implement the powers of the managers." Further authority to adopt rules to protect and manage water resources is found in Minnesota Statutes §§ 103B.211 and 103D.335.

The revisions encompass the entirety of the District rules, consisting of the following:

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| 1.0 | Definitions |
| 2.0 | Procedures |
| 3.0 | Erosion and Sediment Control |
| 4.0 | Floodplain Alteration |
| 5.0 | Stormwater Management |
| 6.0 | Waterbody Crossings and Structures |
| 7.0 | Wetland Protection |
| 8.0 | Shoreline and Streambank Stabilization |
| 9.0 | Dredging |
| 10.0 | Illicit Discharge |
| 11.0 | Appropriations |
| 12.0 | Financial Assurances |
| 13.0 | Fees |
| 14.0 | Variances and Exceptions |
| 15.0 | Enforcement |

Before this rulemaking, the District had not performed a thorough review and revision of its rules in over ten years. A principal purpose of the revision is to improve the District's development review and permitting process by bringing more clarity to its rules and review procedures. To that end, the existing rules have been reworded and reorganized with the goal to make them as clear and understandable as possible. In addition, the proposed rules:

(a) pare unneeded application submittals and allow District staff to conform submittal requirements to the particular application; and

(b) introduce "fast-track" and general permits to reduce application burden and speed permitting time for certain activities that pose limited risk to water resources.

A second central purpose of this rulemaking is to bring the District's erosion & sediment control (ESC) and stormwater management rules into conformance with state and federal law. Under the federal Clean Water Act (CWA), implemented at the state level by the Minnesota Pollution Control Agency (MPCA), the District is designated as an owner or operator of a "municipal separate storm sewer system" (MS4), and is required to hold and comply with an MS4 General Permit (GP) issued by the MPCA. The MPCA reissues this GP, designated as GP MNR040000, every five years. The MS4 GP requires that each MS4 owner or operator use its permitting authority to regulate land-disturbing activity in accordance with specific standards and directives set forth in the MS4 GP.

Each of the 29 municipalities within the District's boundaries also is an MS4 owner or operator, subject to the same legal mandates under the MS4 GP. By conforming its standards to the MS4 GP, the District is fulfilling its legal obligation, but also is aligning those standards with the development regulations of its cities. The District believes this alignment will be of great benefit to its cities, which are subject to District permitting for roadwork and other land development, and also to private property owners and developers who must comply with the permitting standards of both the District and the city.

Finally, the revisions propose a number of substantive changes to the District rules based on the District's permitting experience and the input of its Technical Advisory Committee (TAC), composed principally of municipal and other public agency staff and formed under Minnesota Statutes §103D.337. The District's goal for its rules is to locate the balance point where water resource impacts from land development and disturbance, and from work in waters, are minimized but regulated parties are not subject to unnecessary cost or burden. The revisions also seek to clarify existing rule language that has been a point of confusion to regulated parties, and to incorporate into the rules interpretations of rule language that the District has formed, and applied consistently, over time. These proposed changes are intended to bring the District's rules closer to the balance point in specific ways.

**The proposed revised rules, as well as the District's existing rules, may be viewed or obtained at the District offices and accessed through the District website, minnehahacreek.org.** Because most of the rules have been substantially reorganized, redlined versions showing proposed changes to existing rules would be confusing and of limited aid. Instead, the District has produced a side-by-side comparison of each rule to aid in review of changes.

The District is soliciting input from all parties so that the rule revision is reasonable and best-suited to accomplish its water resource management goals without undue regulatory or administrative burden. Comments are most helpful when they are specific and factually detailed as to concerns or potential impacts, and when they include specific suggestions for alternative language or an alternative approach.

Pursuant to Minnesota Statutes §103D.341, the proposed revisions are being issued for public comment for a period of 45 days. The District solicits and welcomes all comments from state and regional resource protection agencies, local governments, regulated parties and all other members of the public. **Please submit written comments by electronic mail to rulerevisions@minnehahacreek.org. Comments must be received by February 1, 2024. In addition, the District Board will hold a public hearing on the proposed rules at its regular meeting called to order at 7:00 p.m., on January 11, 2024, at the District offices, 15320**

**Minnetonka Boulevard, Minnetonka MN**. At that time, any interested member of the public will have the opportunity to address the Board on the proposed changes. The District carefully will consider all comments and make appropriate changes to the proposal before adoption.

This Guidance to Proposed Revised Rules relates the basis for the District's initial judgment that the revisions are both beneficial and reasonable. This document does not cover all details of the proposed revised rules.

## RULEMAKING PROCESS

The present rulemaking process originated in a comprehensive review of the permitting program in 2018 to identify issues as they have arisen over the course of implementing the program. District staff engaged the District's Citizens Advisory Committee (CAC), a 14-member advisory body appointed by the District Board pursuant to Minnesota Statutes §103D.331. Over the course of 10 months, staff worked with the CAC to review and categorize issues, and to develop consensus over a proposed approach to addressing these issues.

In early 2019, District staff presented the results of this process to the Board's Operations and Policy Committee. The categorical issues and solutions outlined through this process served as the basis of a Permitting Alignment Scope of Work, which was authorized by the Board in September 2019. In doing so, the Board endorsed the following goals for the rulemaking:

- Align MCWD's regulatory scope and standards with state agencies for consistency and compliance

- Simplify and streamline rule language, submittals, and processes to enhance clarity and improve customer service

- Improve program efficiency and effectiveness by tailoring regulations and field presence to potential natural resource risk and opportunity

Between 2019 and 2021, staff worked with the District engineer and legal counsel to develop a set of specific policy recommendations to update the existing rule language and standards. In Fall 2021, District staff brought these recommendations to the CAC and the Board for consensus. From Fall 2021 through Fall 2022, staff worked with the engineer and counsel to draft proposed rule text.

Pursuant to Board authorization, staff then engaged the TAC in a structured review of the proposed revisions. From October 2022 to June 2023, the TAC participated in eight in-person meetings, in addition to online surveys and individual meetings. Through these efforts, the District sought to incorporate the perspective and technical expertise of its public partners in their roles as parallel regulatory entities, regulated parties and project partners. The TAC process concluded with written documentation of the matters reviewed, TAC input, and conclusions of District staff as to how the proposed rule would address each matter.

Staff presented the final proposed rules, with supporting material, to the Board's Policy and Planning Committee, and then to the Board itself, where the Board directed that the proposed

rules be published and distributed for formal public comment in accordance with Minnesota Statutes §103D.341, subdivision 2.

**RULE 1.0: DEFINITIONS**

The Definitions rule has been revised so that it will continue to support the substantive rules that follow.

Eight terms are proposed to be deleted, because they no longer would appear in the rules, or not in a way that requires a definition:

- Access corridor
- Linear reconstruction project
- Natural state
- Parcel
- PID
- Redevelopment
- Shoreline
- Wetland buffer zone

The term "Preserve wetland" is to be removed as well, as it will be referenced under the new definition of "Management class."

The following eight terms are newly used in the proposed rules, and would be added to the definitions:

- Common plan of development
- General permit
- No-Rise standard
- No-Rise certificate
- Reconstructed
- Residential appurtenance
- Stabilize

A number of terms would be revised to express their meanings more clearly, without a change in meaning. Several other proposed revisions merit brief note:

- "BMP" (best management practice) is revised to refer what those proficient in the field consider to be a best present means or method.

- "Design storm" now references specific rainfall depths for one-, two-, 10- and 100-year design storms. This would be revised to refer generally to the present NOAA precipitation frequency estimates.

- "Fast Track permit" is given a general definition. Specific Fast Track permits for which the rules provide would be stated now within the specific rules that authorize them.

- "Fill" would be edited to correct what the District considers imprecision in the existing definition.

- "New Principal Residential Structure" is revised to clarify that the definition refers to a single-family residence, and not to a building containing multiple residential units.

- "100-year high water elevation" is revised to set forth the order of preference for the source of the elevation data, namely first municipal modeling and, if that is not available, District, then Federal Emergency Management Agency (FEMA), then applicant modeling.

- "Site" would newly include a definition pertaining to Linear Transportation Projects, delineating the site by longitudinal right-of-way (ROW) and project limits, but also including area outside of ROW that the applicant has designated for project purposes.

**RULE 2.0: PROCEDURES**

The Procedures rule is edited extensively for clarity, with three additions:

- In section 1, District staff would be given the authority to allow an applicant to omit submittals that staff finds to be unnecessary for the particular application.

- Section 1 also clarifies that while the landowner of record must sign the application as an applicant, there may be co-applicants as well. In the application, the co-applicant would state their interest.

- Compliance with a permit, until the work is completed, the site restored and the permit formally closed, must remain the responsibility of the property owner, as the property owner has control of site conditions. The District has observed that with great frequency, property under an open permit is transferred without rigor in transferring the permit. Paragraph 9(b) of the proposed rule would state explicitly that the permittee is responsible to initiate a permit transfer in conjunction with a transfer of property ownership. The text affirms that the named permittee remains responsible for the site condition and permit compliance (along with the transferee) until the permit is transferred, so that it is in the permittee's interest to diligently attend to the transfer.

No other substantive changes are proposed to the rule.

**RULE 3.0: EROSION and SEDIMENT CONTROL**

The District's present Erosion and Sediment Control rule requires a person engaging in land disturbance to prepare and implement an erosion and sediment control (ESC) plan. Subject to certain exemptions, the rule applies to a land disturbance exceeding 5,000 square feet and to the filling, excavating or storing on site of 50 cubic yards or more of soil or other earth materials.

The chief reason for the District to revise this rule is its obligation under its MS4 GP, as described above. In parallel to the MS4 GP, the MPCA implements a separate federal stormwater mandate to limit pollution of surface waters from active construction sites. The MPCA implements this mandate through a second GP, referred to as the Construction Stormwater GP (CSGP) and designated as MNR100001. The CSGP, like the District's rule, requires a property owner to prepare and implement an ESC plan. In addition, however, in the MS4 GP, the MPCA requires that the MS4 permittee regulate land disturbance for ESC by means of standards at least as protective as those in the CSGP. This results in duplication, as a property owner must comply with the CSGP, and also comply with the ESC regulations of local MS4s, including municipalities and watershed districts.

In this rulemaking, then, the District proposes to align its ESC standards with the terms of the CSGP. It is doing this both to meet its legal obligation under the MS4 GP, and to ensure that its regulation of land disturbance aligns with that of the MPCA and the municipality, so that the burden of duplicative regulation on the regulated community, and the potential confusion of duplication, are minimized.

By aligning with the CSGP, and adopting certain of its terms by reference, the District also is able to simplify and shorten its rule.

**Applicability of the Rule**

The basic applicability terms of the rule would not change: a land disturbance of 5,000 square feet or more, or the excavating, filling or stockpiling of 50 cubic yards or more of soil or earth material, would be subject to a permit. The revised rule would specify that only "exposed" stockpiling triggers the rule, so that a stockpile protected from precipitation and runoff by structural means would not do so.

Under the existing rule, most applications proceed by Fast Track permitting that does not require public notice. Under the proposed rule, land disturbance meeting the threshold for the CSGP (one acre or more of land disturbance) no longer would be subject to Fast Track permitting. However, for land disturbance below that threshold, and for excavating, filling or stockpiling that exceeds 50 cubic yards, the rule, at section 5, would provide for a general permit. Under this section, an applicant need only submit a notice of disturbance and a simplified ESC plan. The District reserves the right to direct the application to ordinary permitting if District geographic layers indicate a regulated waterbody or floodplain on the property. Otherwise, the general permit is deemed granted and the applicant may proceed, subject to basic requirement to inspect and maintain practices, and stabilize the site when work is completed.

The District proposes this expedited permitting on the basis of experience finding that small sites don't require the level of application development and review, and of site monitoring, that has been devoted to them under the standard application process. This change will reduce the burden on regulated parties undertaking land disturbance of smaller scope, and allow District staff to align permit oversight resources more closely with level of water resource threat. District staff will continue to inspect sites operating under the general permit, and will retain the authority to require compliance steps where a site is not being properly managed.

The proposed rule would remove the existing rule exception for emergency activity (see existing rule, par. 3(c)).

**ESC Plan Requirements**

The proposed rule, at section 3, lists the contents of the ESC plan that an applicant must submit for land disturbance that doesn't qualify for the general permit. This replaces content requirements at subsection 5(a) of the present rule, as well as several such requirements within subsection 5(b). The District proposes to delete the present requirement that the ESC plan specify six inches of topsoil to be spread and incorporated where topsoil has been removed. District staff and the engineer don't find that this has been an effective requirement.

The existing rule, at section 6, requires submittal of a soils engineering and/or geology report under certain circumstances. The District retains the authority to request additional application submittals that a situation may call for (see proposed rule, par. 3(d)), and so finds that it may dispense with a distinct section referencing these reports.

**Site Inspection and Maintenance**

For land disturbance of an acre or more, the District must apply standards at least as protective as the CSGP. The CSGP standards are extensive, set forth in a number of sections of that document as follows:

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| Section 7 | BMP Selection and Stormwater Management |
| Section 8 | Erosion Prevention Practices |
| Section 9 | Sediment Control Practices |
| Section 10 | Dewatering and Basin Draining |
| Section 11 | Inspection and Maintenance |
| Section 12 | Pollution Prevention Management Measures |
| Section 13 | Permit Termination Conditions |
| Section 14 | Temporary Sediment Basins |
| Paragraph 16.4 | (protection of infiltration systems) |
| Paragraph 17.3 | (protection of filtration systems) |
| Paragraphs 23.7 thru 23.11 | Additional Requirements for Discharges to Special and Impaired Waters |

The District finds that these standards within the CSGP incorporate all of the inspection and maintenance terms in the present District rule, with several exceptions as to details that need not be in the rule. The District could revise and augment its existing inspection and maintenance terms (see existing rule, paragraph 5(b), section 9, paragraph 10(a)) to cover, or be equally protective as, the above CSGP requirements, but believes this would result in a complex rule, and risk confusion and burden for those that must conform to both the CSGP and the District permit (and likely a municipal permit as well). The District finds it appropriate simply to incorporate the above CSGP sections and paragraphs, in order to provide a compliance path for regulated parties that is most efficient and clear. The District understands and expects that most or all of its municipalities have done or will do the same, so that regulated parties will need to comply with a single set of requirements.

**Notifying the District**

Section 6 of the proposed rule indicates five stages throughout the conduct of work subject to permit when the permittee must notify the District so that the District, if it chooses, may inspect the site. These apply to all permittees except those operating under the general permit. This section is carried over from the existing rule without change.

## RULE 4.0: FLOODPLAIN ALTERATION

The District's floodplain rule requires a permit for any land alteration within a floodplain, defined as the land reached by the water elevation of the associated waterbody during the 100-year storm event. The rule requires that there be no net loss of water storage, as a result of fill or other activity, between the ordinary high water and 100-year high water elevations.

The proposed rule would make two limited changes.

First, the present rule provides for a Fast-Track permitting procedure for "six inches or less of organic material to be incorporated into existing soil in preparation for sodding or seeding." As noted above, the Fast Track procedure foregoes public notice and may reduce submittal requirements. Under the proposed rule, "ordinary landscaping purposes of soil for cultivation; or for soil amendment, or topsoil or sod addition" is excepted completely from the permit requirement. The District has not encountered an instance in which the working of soil for landscaping purposes has presented a measurable impact on floodplain flood storage, and further expects that many ordinary landscaping activities, commercial and residential, nominally subject to a permit under the existing rule proceed without a District permit or any awareness that a permit is required. The District finds that a permit requirement for such ordinary, insignificant activities is neither effective nor useful for flood management.

Second, in several places in the existing rule, an applicant must demonstrate that proposed fill will not "aggravate high water conditions" (par. 3(a)), "cause an increase in the 100-year flood elevation" (par. 3(b), or "cause high water or aggravate flooding on other properties" or "unduly restrict flood flows" (par. 3(c)). The District proposes to revise each of these to require simply that the No-Rise Standard is met. The No-Rise Standard is an engineering determination, pursuant to MnDNR procedures and methodology, that the activity will not result in an increase in the 100-year high water elevation. The intent is to use a consistent standard in the rule, and to align with standards that the MnDNR applies in its public waters programs and that are used in federal floodplain management.

## RULE 5.0: STORMWATER MANAGEMENT

In this rulemaking, the District's Stormwater Management rule is proposed to be substantially revised. The chief driver of the revisions is the District's obligations under its MS4 GP, as described in the introduction above. The GP mandates that each permittee enforce permitting regulations for permanent management of stormwater runoff associated with land development involving the creation of new hard surface and/or the reconstruction of existing hard surface that, together, amount to an acre or more. The GP prescribes minimum standards and, in order to meet these standards, the District must significantly revise its own rules.

This state law mandate coincides well with the underlying rulemaking goal of making the District rules less complex and more understandable, where there are opportunities to do that. The District's present rule imposes standards to capture and treat stormwater, and to prevent increases in the rate of runoff leaving the site during storm events. The standards applicable to a given development plan are determined on the basis of parameters including whether the project is new development or redevelopment, the size of the site, the proportion of the site that is disturbed, and the resulting increase or decrease of hard surface. The mandate of the MS4 GP is more simple and, as a result, the proposed revised rule is more simple as well.

Other sections of the proposed rule are more concise as well, with the result that the proposed rule would be measurably shorter than the present rule. The District also introduces a number of clarifications and revisions of more focused import, to address issues that have arisen over the time that the present rule has been in effect.

**Rule Applicability**

As a preliminary note, the existing rule distinguishes between "Development" and "Redevelopment," where the latter consists of land-disturbing activity on a tract that already contains a building or hard surface. The District considered the distinction worthwhile to account for the constraints that existing development on a site might pose, and to allow for the rule to address the question of when a redevelopment should retrofit treatment for existing hard surface. The MS4 GP standards don't differentiate between development and redevelopment, and so the proposed rule collapses these two categories into the single term "Development." The rule continues to regulate creation or reconstruction of hard surface of less than an acre, but the District has concluded there isn't a substantial benefit to differentiating in this category so as to justify the added complexity.

The proposed rule also modifies the existing "common or related ownership" clause in section 2 of the present rule. Here, stormwater management requirements are determined with respect to the aggregate of development on adjacent sites under common or related ownership occurring since 2005. To conform to the MS4 GP, the proposed rule would substitute the "Common Plan of Development" clause used in that document, which decides requirements by looking to development that constitutes "one proposed plan for a contiguous area where multiple separate and distinct land-disturbing activities may be taking place at different times, on different schedules, but under one proposed plan." The rule also would retain an element based solely on capturing cumulative development over time, but instead of dating this back to 2005, would specify that it applies to development on the site over the prior 10 years. The intent remains to ensure that sequential instances of more limited development over time don't result in cumulative hard surface runoff that is not being managed.

Also, to conform to MS4 GP standards, certain exceptions at section 2 of the present rule must be modified (see the proposed rule at par. 2(b)):

- The existing exemption for construction of a single-family residence on a lot of record will apply only to the extent the construction does not exceed an acre of hard surface. Except for the occasional residence with a very long driveway, the District expects this narrowing of the exemption to be of little consequence.

- The present rule also exempts redevelopment that reduces site hard surface by 10 percent or more. Again, the exemption will not apply if the redevelopment nevertheless involves an acre or more of new or reconstructed hard surface.

- The existing rule exempts from the rule Linear Transportation Projects, new or involving reconstruction, that don't increase hard surface by at least 10,000 square feet. Under the revised rule, such projects that don't increase hard surface by that amount, but that involve substantial reconstruction so that new and reconstructed hard surface together exceed an acre, will be subject to the rule. If the MS4 GP standard of an acre of new and reconstructed hard surface is not reached, the proposed rule would continue to exempt those Linear Transportation Projects where hard surface will not increase by 10,000 square feet or more.

Finally, the proposed rule includes two clarifications with respect to the rule's applicability:

- The permit trigger of grading or changing land contours does not apply to agricultural activity (par. 2(a)(3)).

- Where the rule is triggered by grading or changing of land contours, or by subdivision without development (existing rule, par. 2; proposed rule, pars. 2(a)(2) and (3)), the proposed activity is not subject to water quality volume control requirements, and the required stormwater management plan need only be conceptual (par. 2(c)).

**Water Quality Volume Standard**

The water quality (WQ) volume standard is the principal means by which surface waters are protected from increased pollution due to runoff from hard surface development. The standard requires that runoff be captured, that it be abstracted from the landscape where possible, by infiltration into soil or other means, and where that is not possible, that it be treated to remove phosphorus and sediments. The MS4 GP focuses its mandate on the WQ volume standard, and so the most substantial changes proposed to this rule concern this standard. This subsection concerns the volume standard itself; the subsection that follows concerns the sequencing requirements before an applicant may forego an abstraction method in favor of a non-abstraction method of treating WQ volume, and the criteria for when infiltration is prohibited.

The proposed rule would condense and adjust Tables 2 through 5 of the present rule, and re-present them in the proposed rule as Tables 1 and 2. Table 1 applies to development other than Linear Transportation Projects; Table 2 applies to Linear Transportation Projects. The tables implement the following MS4 GP standards (again, applicable when new plus reconstructed hard surface sum to an acre or more):

- For Development, treat one inch of runoff from all new and reconstructed hard surface.

- For Linear Transportation Projects, treat one inch of runoff from all new hard surface, or one-half inch of runoff from all new and reconstructed hard surface, whichever is greater.

For the following actions that do result in an acre or more of new or reconstructed hard surface, and therefore are required to meet MS4 GP standards, this will result in a new WQ volume treatment obligation which, again, the District is legally required to impose:

- New development that results in hard surface on less than 20 percent of a site, which is exempt from WQ treatment under the present rule.

- Redevelopment that results in a net decrease in site hard surface, which presently is exempt from the rule (if the net reduction exceeds 10 percent) or requires only an on-site best management practice (BMP) (if the net reduction is less than 10 percent).

- A Linear Transportation Project that increases hard surface by less than 10,000 square feet, which is exempt under the present rule.

For certain actions that don't result in an acre of new or reconstructed hard surface, and for which the District therefore has discretion as to the standard it applies, there also would be a new WQ treatment obligation:

- New development on a site smaller than an acre presently is exempt. Under the new rule, an on-site BMP will be required, except for construction of a single-family residence on a lot of record, which will remain exempt.

- New development, on a site an acre or larger, that creates hard surface on 20 percent of the site or less presently is exempt. Under the new rule, treatment of WQ volume for new hard surface would be required.

As to these five categories, it should be noted that for those that presently are exempt, this exemption applies to the requirements of the Stormwater Management rule as a whole. The exemption removal means that these categories would be required not just to meet specified WQ volume requirements, they also would be subject to other rule standards such as rate control, BMP incorporation, avoiding water level impacts on downstream lakes and wetlands, and providing for adequate vertical separation of structures from stormwater feature elevations.

The District has reviewed the burden this would create for these categories on the basis of considerations such as site constraints, and has concluded that this set of increased responsibilities is not unreasonable. The District also finds there is benefit, in the form of simplicity, in applying a more uniform set of standards and avoiding multiple distinctions among project characteristics. In a particular instance of new development on a small site, meeting rate control requirements could present a challenge. In those unusual cases, the District would consider a variance request. Interested parties, on the basis of their own experience, are invited to raise any concerns as to the proposed framework.

Finally, the District notes that while the WQ volume treatment standard is the means to address water quality in runoff, the existing rule, at paragraphs 3(a)(1), 3(a)(2) and 3(c)(2), imposes certain phosphorus control requirements directly. The proposed rule, at paragraph 3(c), would consolidate these by simply stating that any WQ volume treatment method other than

abstraction must achieve the level of phosphorus removal required by application of the abstraction standard.

**Infiltration Sequencing**

The sequencing of the method of WQ volume treatment in the MS4 GP is prescriptive. Treatment must be provided by infiltration or another abstraction method, to the extent feasible and/or cost-effective. An applicant asserting that the full standard cannot feasibly or cost-effectively be met by abstraction must submit an analysis to support this. If the District accepts the analysis, that part of the WQ volume standard not met by abstraction may be met by filtration, a sedimentation basin, or another method of removing phosphorus and sediments from the runoff.

The exception to this sequencing requirement is where infiltration is prohibited. The MS4 GP lists nine circumstances in which this is the case, involving inadequate soils or geology; insufficient separation from groundwater level; drinking water sensitivity; and actual or potential contamination in, or of, soil or groundwater.

The proposed rule adopts these sequencing standards and infiltration criteria, essentially verbatim. One notable difference between the District's sequencing in the present rule, and the MS4 GP sequencing in the proposed rule, concerns the designation of filtration as a treatment method. Under the present rule, the District has denominated filtration as an abstraction method, which an applicant may use without demonstrating that infiltration is infeasible or inappropriate. Under the new rule, filtration would not be considered abstraction, and could be used to meet WQ volume treatment requirements only pursuant to the indicated abstraction analysis demonstrating that opportunities for abstraction had been exhausted.

Finally, the District proposes to delete several methods from its table of abstraction practices (Appendix A to the Stormwater Management rule). These methods – tree preservation, planting of new trees, and pervious area enhancement – are not recognized as abstraction methods under the MS4 GP. The District finds this will have little impact, as applicants have proposed these methods very rarely.

**Rate Control Standard**

The present rule requires that aggregate peak runoff from the site not increase, due to the development activity, for the one-, 10- and 100-year precipitation events. It further provides that where there is more than one point of discharge from the site, there may be an increase in runoff at a particular discharge point, provided there is no increase in aggregate, and provided also that the increase at the particular discharge point does not cause a local impact.
The proposed rule adds one clarification to this standard: where any portion of the site's hard surface runoff is being treated in an off-site facility, that discharge is not considered in measuring whether the aggregate standard is met. It is expected that the rate of this discharge may be elevated as it has not yet been treated. However, the discharge still must be managed so that any rate exceedance doesn't create a local impact.

The only change proposed to the rate control standard is that in examining whether peak runoff rate will increase for the three events, the one-year event is to be replaced by the one- or two-

year event. The majority of the District's municipalities and flood management partners use the two-year event. The purpose of the adjustment is to provide flexibility to applicants so that they need not perform multiple calculations to meet the requirements of the District and the municipality.

As noted above, new development that results in hard surface on less than 20 percent of the site area would be subject to the rate control standard, where presently it is not. The District doesn't foresee a technical challenge or related compliance burden for this category of land disturbance to meet the standard. The standard also newly would apply to certain redevelopment that produces a net reduction in hard surface. Because the amount of hard surface is being reduced, it is almost certain that peak runoff rate from the site would decrease as well.

**Vertical Separation of Structure Openings from Elevations of Surface Waters**

The present rule requires that two feet of vertical separation be maintained between the 100-year high water elevation of a waterbody or stormwater management facility and the low opening of any structure. The proposed rule retains this standard. The rule would add the following: "unless the structure opening is hydraulically disconnected from the waterbody or practice." This clause is to recognize that an intervening earth form, natural or constructed, may exceed the elevation of the structure opening and therefore cause the simple comparison of opening and water surface elevations to misrepresent flood risk. This clause would not authorize the use of artificial barriers as a means to avoid proper structure elevation.

**Impact on Downstream Waterbodies**

This section of the rule prohibits impact on the elevation of a downgradient lake or wetland from site development, and its alteration of runoff patterns, in excess of stated allowable increases. The only change proposed here is, the same as for the rate control examination noted above, to examine conformance to the standard not for the one-year precipitation event, but for either the one- or the two-year event. Again, this is for the purpose of applicant flexibility.

**Using Off-Site Stormwater Management Practice**

Existing section 7 describes how an applicant may make use of an off-site stormwater management facility to meet the WQ volume and phosphorus treatment standard, the rate control standard, or both. The proposed rule, at section 8, maintains the substantive terms of this section, but clarifies it in three respects.

First, the present section title is "Regional Stormwater Management," and the section references off-site treatment through the vehicle of a "regional or subwatershed plan." The section provides for such a plan, typically prepared by a municipality or other road authority to provide for a series of future projects. But it isn't limited to such cases, and may apply to the desire of a private developer to direct the runoff from a single development site to an off-site public or private facility. Accordingly, the section would be retitled to "Location of Volume and Rate Control Practices" to capture its more general intent.

Second, paragraph 8(a) would specify that an off-site facility used for compliance must be located downgradient of the land disturbance, but upgradient of any public water. This is so that the facility receives the runoff being generated by the new or reconstructed hard surface, and so that the runoff is in fact treated before it may cause an impact on a public water. The term "public water" is defined at Minnesota Statutes §103G.005, and does not include all surface waters. Therefore, this standard would allow unmanaged runoff to flow through some such waters before it is treated. There is an element of practicality involved in defining this constraint, and the rule further requires the applicant to demonstrate that there will be no local impact upgradient of treatment. The District is comfortable that this will allow for care to be taken in appropriate cases.

Third, at paragraph 8(c), the proposed rule would expand on what the applicant must show to use an off-site facility:

- The facility has the capacity to treat the runoff in question;
- If the applicant doesn't own the facility, it has permission to use the necessary capacity;
- The facility is subject to a maintenance obligation that the District has the power to enforce; and
- The facility's maintenance status conforms to its maintenance obligation.

**Stormwater Facility Maintenance**

A private applicant must establish its legal obligation to maintain a stormwater management facility in perpetuity by executing a maintenance declaration and filing it with the county land office for recording on the property title. A public applicant may simply execute a maintenance agreement with the District. With some frequency, a municipality arranges with a private applicant to assume maintenance responsibility of the stormwater facilities receiving runoff from the privately owned site. In practice, the District structures this in one of two ways:

- The municipality may be a signatory to the declaration.

- The municipality may enter into a maintenance agreement with the District, while by separate legal means acceptable to the District, such as a dedicated or conveyed easement, establishing its right to enter the property to perform the maintenance.

The District's practice has been to allow the municipality and applicant to select one of these approaches. The proposed rule, at paragraph 10(c), would incorporate this arrangement, for guidance and clarity.

**RULE 6.0: WATERBODY CROSSINGS and STRUCTURES**

This rule requires a permit to place a roadway, boardwalk or utility crossing, or other similar or associated structure, across or beneath a waterbody, or in any way that disturbs the waterbody below the top of the waterbody's bank.

The proposed rule would introduce procedural elements to reduce permitting time and burden for public authorities to replace elements of water conveyance systems, and for the directional drilling of utility crossings beneath waterbodies.

First, the proposed rule adds a Fast-Track permitting mechanism for a public entity replacing "a culvert or other hydraulic control with a structure of substantially equal hydraulic and, as applicable, navigational capacity." Public works departments within the District, in the ordinary course of permitting and in TAC meetings associated with the rulemaking, have expressed the view that the District's permit requirement creates delays in the process of replacing stormwater infrastructure, including in cases where there is a certain urgency in order to avoid flood risk or for other reasons.

The District has evaluated the option, requested by some public partners, to allow such work by general permit or other method that doesn't require review and affirmative approval by District staff. The District has concluded that a measure of review is appropriate. For one, structures available for delivery, or otherwise for use, often will not be able to replicate the existing structure in dimension or material, and the proposal will involve some increase in the hydraulic capacity of the structure that the District will want to evaluate. For another, a variation in alignment or elevation may have a non-trivial effect on localized water elevation in the receiving waterbody, on forces directed at the bank and bed, or on other elements of waterbody integrity. Protecting the function and integrity of these regional resources is at the core of the District's responsibility. In addition, the District maintains hydraulic and hydrologic models that are increasingly important to flood management within the broader watershed. It is important that the District have reliable access to up-to-date data as to sizing and other features of stormwater infrastructure in order to maintain model currency.

Therefore, the District proposes to incorporate, not a general permit, but a Fast-Track process for infrastructure replacements, set forth at section 6 of the proposed rule. The applicant will need to submit the information required by the rule so that the District can confirm that the replacement will not alter capacity in a significant way. The rule would exempt such applications from the "minimal impact" element of the application, which requires examining alternatives to the proposed action.. Also, public notice will not be required. The District expects that omitting these two application requirements will decrease the amount of time required to obtain a permit under this rule.

Second, the existing rule requires pilot, entrance and exit holes for directional drilling beneath a waterbody to observe a setback from the waterbody of at least 100 feet. The purpose of this provision is to protect the stability and vegetative cover of the waterbody edge by keeping the boring and associated work limits at a distance. Over time, the District has considered and issued a number of variances for utility companies that could not meet that setback due to existing structures, existing utility alignments, local requirements to maintain utilities within right-of-way, and similar reasons. In general, these variance proceedings imposed an unnecessary cost on applicant and District resources, as in each case delineation of construction limits and a sound ESC plan, diligently implemented, were sufficient to address any concern from a reduced setback. The District believes that District staff are able to ensure such measures without the need for the Board to hear the matter as a variance request. The proposed rule, at paragraph 3(g), would allow District staff to accept a reduced setback on finding that the

applicant's plan includes adequate ESC and other measures to protect against risk of damage to the bank or sediment release into the waterbody.

In conjunction with this change, the rule also recognizes that the requirement to drill at least three feet below the bed of the waterbody may be indeterminate in cases such as wetlands for which the bed elevation may not be clearly ascertainable. The rule would give District staff the authority, in such cases, to specify the necessary maximum elevation of the bored utility.

Otherwise, the proposed rule reflects the District's intent to write its rules more concisely and in more direct and clear language. Several specific clarifications in the rule are as follows:

At paragraph 3(d), the requirement to preserve wildlife passage along the waterbody is condensed. The need for measures to preserve such passage has arisen infrequently, and where it has, the District and the applicant have worked readily together for a sound design. The District believes that the shorter language of the proposed rule is adequate to ensure that, where designed passage is necessary, the applicant fulfills its responsibility to provide it.

Paragraph 3(e) provides an important clarification as to the scope of the District's analysis for installation or replacement of a stormwater conveyance outlet structure. The rule states that such a structure must be designed so that it "does not promote erosion or scour, or otherwise affect bed or bank stability, or water quality, within the waterbody." The question has arisen on multiple occasions whether under this analysis, the District examines the pollutant loads that are delivered through the outlet structure into the receiving waterbody. The proposed rule clarifies that this is not a part of the analysis.

The purpose of this rule is to protect the physical integrity and existing capacity of the receiving waterbody. The intent of the rule is to ensure that the placing of a physical structure within or beneath the waterbody profile will not risk or impair the existing ability of the waterbody to convey water or afford navigation. Where the rule requires design that does not affect water quality, the reference is to improper direction of flow, alteration of existing channel flows, inadequate energy dissipation or other features that would introduce instability to the waterbody bank or bed. Similarly, the District does not evaluate flow rate or volume from the outlet, except as it may pose a risk to the waterbody bed or banks.

In short, what flows out of the outlet is a matter of upstream conditions of land use and infrastructure design. Pursuant to its statutory purposes and powers, the District has a keen interest, and a role in engaging with its public partners, in these matters, but it is an interest and a role best pursued through planning, project partnering and coordination, and not on the occasion where an outlet structure requires replacement.

Paragraph 3(f) requires an applicant to present an analysis to demonstrate that the proposed intrusion on the waterbody is the "minimal impact" alternative to achieve the specific need. The term "minimal impact" refers to all impacts on the water resource encompassed by the descriptions of beneficial public use contained in the watershed law. The existing rule lists certain potential alternatives that an applicant is expected to consider. The proposed rule removes obtaining additional easement rights from this list, but emphasizes an attention to design by adding rerouting to avoid a crossing, minimizing the number of crossings and avoiding encroachment on the waterbody for non-water dependent purposes.

Paragraph 4(b) provides that riprap included in a design for energy dissipation is not subject to the rule if it conforms to specified MnDOT standard plates and incorporates controls against erosion and sedimentation. This exception means that when riprap conforming to the MnDOT plates is a part of a design submitted for a permit under this rule, the criteria under the rule (preserving hydraulic and navigational capacity, preserving wildlife passage, "minimal impact" analysis) will not be applied to the riprap element of the design. If riprap is added to an existing outlet for energy dissipation purposes, and conforms to the MnDOT plates, a permit is not required.

## RULE 7.0: WETLAND PROTECTION

The District's wetland protection rule concerns three aspects of wetland management:

- The District's implementation of the Minnesota Wetland Conservation Act (WCA). Under WCA, either the District or the municipality is designated as the local government unit (LGU) responsible to implement the statute and state wetland rules (Minn. Rules 8420). Presently the District acts as the WCA LGU in the majority of its municipalities. WCA regulates draining of wetlands, filling within wetlands, and excavation within certain wetland types.

- The District's regulation of excavation within wetlands that is not regulated by WCA. WCA allows local units of government to regulate wetlands disturbance more extensively than WCA. Minn. Rules 8420.0233. As a long-standing policy matter, the District has chosen to use this authority to regulate excavation within all wetland types.

- The requirement to establish and maintain undisturbed vegetation adjacent to wetland, to buffer the wetland against impacts from construction activity, replacement of vegetation with hard surface, and stormwater runoff; to preserve the habitat function of the wetland and its upland edge; and to protect the structural integrity of the wetland edge.

The proposed revision to this rule would adjust the rules in a number of ways to reflect the District's experience in implementing the rule, and to improve the rule's clarity by explicitly incorporating a number of interpretive practices that the District has applied consistently across time with respect to certain terms of the rule that are not fully unambiguous. None of these is a fundamental change to the rule or how the District applies it, but each may be of interest, and is noted here. One of these adjustments concerns wetland impact replacement. The great majority concern the vegetated buffer requirements: their applicability, determining buffer width, monumenting the buffer edge, and how they are to be maintained. Finally, the requirement to prepare and submit a wetland delineation in support of an application would be modified to reduce applicant burden.

### Wetland Replacement Location Sequencing

When activity within a wetland requires replacement of wetland function under WCA, the replacement wetland must have a certain hydrologic proximity to the impact. It must be replaced within the same "minor watershed" (Minnesota comprises about 5,600 minor

watersheds). If that is not feasible, it may be replaced within the "watershed" (of which there are 81 in Minnesota). If banked wetland credits are to be used, the banked credits must originate within the same "Bank Service Area," defined on a hydrologic basis.

For some time, the District has exercised its authority under Minnesota Rules 8420.0233 to impose stricter replacement requirements in order to protect the integrity of the hydrologic systems within the watershed. The District rule has required replacement on site, if possible. If that is not possible, the applicant must replace within the same District subwatershed. (As described in the District's watershed management plan, the District watershed is divided into 11 subwatersheds.) If replacement is not available within the subwatershed, the applicant must explore replacement within the District. Only if there is no opportunity for this may the applicant then replace within the "watershed" as defined in the preceding paragraph.

The District proposes to revise replacement location sequencing requirements in one respect. While the rule would retain the existing District-specific location sequencing, the initial priority for on-site replacement would be eliminated.

When the District adopted the existing location sequencing requirements, a priority was placed on on-site replacement, according to the notion that the best approach was to seek no net impact to the affected wetland. Since, thinking has decisively shifted in favor of fulfilling replacement by contributing to larger-scale wetland restoration and preservation, as restoration is more reliable and the restored or preserved wetland is better protected against impact and more sustainable.

As a minor matter, the proposed rule also would eliminate the language of existing paragraph 3(b) referencing an applicant's option to meet replacement requirements by means of banked credits purchased from the District. As noted, the District does not own any such credits, and has no present plan to enter into the business of wetland credit banking.

**Applicability of Wetland Buffer Requirements**

The proposed rule would create an exemption from the wetland buffer requirement for actions on public land that otherwise would trigger the buffer. The exemption would apply when the area to which the buffer would apply "is subject to an equivalent conservation restriction," or where the buffer would conflict with "a water-dependent recreational or educational public purpose served by the affected area." The former would apply, for instance, on land dedicated to the public in development and subject to a conservation easement or conservation declaration that protects the buffer to an extent equivalent to that provided by the buffer maintenance declaration that the District requires under the rule. The latter would apply when the purpose of the public landholding and management is water dependent, and requires public facilities to be located adjacent to the water where buffer otherwise would be located under the rule. An example would be a boardwalk or viewing platform, or a canoe launch.

The District finds this exception necessary to properly balance competing public interests in wetland preservation and access to wetlands for recreation or education. The risk to the wetland is limited in this case by the fact that the public land owner or manager ordinarily will share the District's commitment to protecting the resource and, in cooperation with the District, will design the encroaching facilities with care to that end. The rule would specify that the

District would have the authority to impose reasonable conditions to ensure that the wetland resource is not compromised by the absence of a vegetated buffer.

The proposed rule would, in addition, make two small adjustments to the existing language.

- The existing rule requires a buffer for "[a]ny activity for which a permit is required" under the wetland rule. This is ambiguous, as the wetland "permit" may refer to any of a number of decisions that the WCA LGU makes that don't concern an action causing wetland impact (for example, a wetland boundary determination or an exemption determination). The proposed rule, at paragraph 4(a)(1), would revise this so that the vegetated buffer is required in conjunction with an approval "for a wetland impact that requires replacement."

- The District proposes to delete existing rule text, at paragraph 5(a), that the District will apply the buffer requirement to the reconstruction of an existing residential structure in accordance with the protections afforded a zoning nonconformity under law. Under the proposed rule, reconstruction of a residence would trigger the buffer requirement only if it increases impervious surface (see paragraph 4(a)(3)). In this case, it would be outside the realm of nonconformity law, which protects reconstruction without expansion. Therefore, the text regarding nonconformity law no longer applies.

**Buffer Area and Width**

The proposed rule would adjust or clarify the terms concerning buffer width in the following ways:

- In determining buffer width, the present rule, at paragraph 6(a), requires in some cases that an analysis be performed to assess the sensitivity of the wetland to a change in stormwater flow into the wetland. The District has never operationalized this requirement by adopting a methodology for this analysis. Further, if the buffer requirement is triggered by land alteration upgradient of the wetland, the applicant will be subject to the District's stormwater management rule (Rule 5.0), so that a change to the pattern of runoff into the wetland will be managed. Therefore, the District finds no basis to retain the requirement of a sensitivity analysis.

- At paragraph 6(d), the proposed rule addresses the circumstance of existing hard surface or an existing structure within the buffer area. The rule would state that a structure or surface need not be removed if it is in "sound and functional condition"; under this standard, the District would retain the judgment to require removal, if the structure or surface were a remnant, or otherwise served no functional purpose and retained no economic value. Where a structure or surface is retained, the rule would require that the buffer width displaced by the structure or surface be established upgradient.

- The existing rule, at paragraph 6(c), allows the landowner to maintain within a buffer a path or trail no more than four feet in width, for access to the wetland. The proposed rule, at paragraph 6(d), would add that the path or trail minimize the loss of buffer area, and be designed to not "concentrate or accelerate" runoff to the wetland. Where there

is a measurable slope to the wetland, this requires may require, for instance, avoiding a straight path directly down the slope gradient.

- The proposed rule, at paragraph 5(b), would clarify that an applicant is not required to acquire property in order to provide for the full required buffer width, but need only establish the buffer to the existing property line.

Finally, the rule, at paragraph 5(d), would introduce a clause allowing for a shortfall in total buffer area, if the District finds that buffer design and an enhanced management plan will provide for buffer function at least equivalent to that which the full buffer area would have provided. Presently, such a proposal would require the District Board to approve a variance. The proposed rule would allow this determination to be made by District staff. The buffer still would need to meet minimum width requirements. The applicant would need to demonstrate equivalency with respect to all functions served by the buffer, including but not limited to water quality, flow mitigation, wetland edge protection and habitat.

**Buffer Monumentation**

The present rule, at paragraph 5(d), requires the upland-buffer boundary to be demarcated. The proposed rule would adjust the terms governing buffer monuments in several minor ways:

- The requirement for a monument at least every 100 feet would be changed to 200 feet. This accords with the practice of other public regulatory bodies and appears adequate.

- The buffer declaration will be required to state that if land containing a buffer is subdivided, additional monuments must be installed to ensure that the minimum rule standard of a monument at each lot line is retained (see paragraph 4(c)).

- Under the present rule, at the applicant's request, the District will supply buffer monuments. The District will continue to supply monuments at cost, but the text is proposed to be removed from the rule as it is not related to applicable standards, but is rather a service offered by the District.

- The present rule, at paragraph 7(b), allows a public property owner or a homeowner's association (HOA) to enter into a maintenance agreement with the District, in lieu of physical boundary monuments. The District has not found an HOA to be a reliable means to protect the buffer edge from encroachment by homeowners, and so, at paragraph 4(c) of the proposed rule, is withdrawing this option for HOAs.

**Buffer Maintenance**

The buffer is established, by filing the buffer declaration with the county (or, for a public entity, executing the maintenance agreement) before the permit is issued or land disturbance begins. The existing rule, at paragraph 7(c), states requirements for restoring buffer soils and establishing buffer vegetation after the area has been disturbed during construction.

The proposed rule incorporates a preference to not disturb the buffer area in the first place. Paragraph 6(e) requires that buffer area be fenced against encroachment by construction

activity, “unless the applicant demonstrates that it is necessary to work within the buffer.” The District believes that most buffer encroachment during construction activity is avoidable, and that a physical demarcation will avoid unnecessary impact to buffer soils and vegetation without impeding construction.

The proposed rule, at paragraph 6(c)(3), also would increase flexibility for road right-of-way maintenance. After consultation with road authority representatives, this paragraph allows mowing and brush-cutting within a buffer located in right-of-way for public safety and to allow for drainageways to be inspected, and allows application of fertilizer and soil conditioning in consideration of the stress that the location places on vegetation. Much of this authority already resides in what will be paragraph 6(c)(2), but is being clarified for the benefit of road authorities.

**Requirement to Prepare and Submit Wetland Delineation**

The existing rule requires that a “[c]omplete delineation report” be submitted with an application under the rule. A delineation is prepared by a qualified professional and may involve time and a measurable expense.

An application under WCA will be subject to submittal requirements set forth in WCA rules, Minn. Rules 8420. District staff is not authorized to depart from these requirements. The proposed rule, however, at paragraph 7(b), would provide that for applications not subject to WCA, or where WCA does not require a full delineation, District staff may exempt the applicant, entirely or partially, from the delineation requirement, where the full delineation is not needed for the District to review and decide the application.

For an example as to the first case, the buffer requirement is triggered by land disturbance subject to the District’s stormwater management rule (Rule 5.0), but only as to that part of the wetland that is downgradient from the disturbance. To determine the buffer width and boundary, it is necessary to locate the wetland edge, but only as to that part of the wetland to which the buffer will be applied. As to the second case, WCA does not mandate a delineation as a part of an exemption or a no-loss determination. In many cases, the wetland boundary will be irrelevant to deciding the application. In these cases, the applicant will not need to incur the cost or time to obtain a full delineation.

## RULE 8.0: SHORELINE and STREAMBANK IMPROVEMENTS

The Shoreline and Streambank Improvement rule requires a permit to construct or install materials on the bank of a lake or stream, either to stabilize the bank or for an amenity or other beneficial purpose. The rule does not apply to docking structures or boathouses, which typically are regulated by the municipality or lake association.

The proposed rule is a substantial revision, but principally for the purpose of making the rule more clear. The rule is reorganized, shortened and rendered in more straightforward language. In the interest of simplicity and flexibility, certain detailed specifications of the existing rule are proposed to be removed, in favor of reliance on best practices and the judgment of District staff.

**Rule Applicability**

With respect to the rule's applicability, proposed paragraph 2(b)(3) would exempt riprap placed at a culvert or outfall for energy dissipation from the permit requirement, and specific standards, of the rule, if it conforms to the indicated MnDOT standard plates and incorporates ESC measures. The MnDOT standard plates reflect best practice for the purpose and therefore are acceptable alternative specifications. Exempting riprap placement for this purpose allows road and public works authorities to maintain existing riprap installations and address scour issues promptly.

Paragraph 4(e) advises that conforming riprap is not considered fill subject to the Floodplain Rule (Rule 4.0). It advises, further, that any improvement under the rule that meets the technical specifications of paragraph 4 is excluded from the definition of floodplain fill so as to be exempt from the Floodplain Rule.

In addition, the proposed rule improves clarity as to the rule's application, in two respects:

- At paragraph 2(a), the rule explains that a disturbance of "the bank" of a waterbasin or watercourse, which triggers the permit requirement, means a disturbance below the ordinary high water level.

- At paragraph 2(b), the rule retains the existing exemption for maintenance of an existing improvement without addition of new material, but adds that the bed or bank may not be disturbed.

**Erosion Intensity Calculation**

The primary focus of the rule is to limit the use of hard armoring or other structural stabilization to what is necessary in light of the wave and hydraulic forces to which the bank is subject. This is achieved through an erosion intensity analysis (EIA) that determines whether bank stabilization may be achieved through structural means, whether a bioengineering practice should be used instead, or whether forces are small enough that a biological practice (vegetative stabilization) alone is sufficient.

Under the existing rule, the applicant must perform an EIA for any application, apart from an application to maintain an existing improvement (paragraph 2(b)). Because the EIA requires obtaining and using numerical figures characterizing the shoreline or streambank environment, and because it involves mathematical calculations, it has with some regularity complicated the permit submittal and review process. The District therefore has considered further when it is or is not necessary and, at paragraph 3(a) of the proposed rule, has expanded the cases where it is not required to include: (a) where a biological practice is proposed; and (b) where the permit is sought to maintain or reinstate, without extension, a bioengineering or structural practice that has not degraded to a natural condition.

For streambank stabilization, the EIA must include calculations of both shear stress on the bank, and bankful stream velocity (see the existing rule at paragraph 4(a)). Whichever of these calculations yields the higher erosion intensity will determine what stabilization method may be

used. However, the rule fails to set forth its standards for the erosion intensity that corresponds to the velocity calculated. The proposed rule, at paragraph 5(a), includes these standards.

**Design Specifications**

The proposed rule clarifies or adjusts a number of specific design terms:

- The present rule prohibits a streambank encroachment that reduces channel cross-section or increases upstream flood stage, unless the applicant can demonstrate that the encroachment "doesn't exacerbate high water conditions." (See par. 6.a(5).) The standard to demonstrate this exception is not fixed, and with increasing concern to prevent small but cumulative flood risk impacts, the District finds the exception to be unnecessary and unwarranted, and proposes to remove it.

- The proposed rule would delete obsolete standards for plantings in biological or bioengineering practices (see existing rule, par. 6(b)) and, at paragraph 4(b), replace them with a general standard to install and establish native plantings according to best practices.

- The proposed rule would delete reference to MnDOT specifications for granular and geotextile filters beneath riprap (see existing rule, par. 6(c)(4)) in favor of allowing the applicant to propose a sufficient design.

- The existing rule, at paragraph 8(a), requires sand or gravel installed as a sand blanket to be "clean" before it is spread. The rule defines "clean" as containing no toxins or heavy metals, and no weed or animal life infestations. The proposed rule, at paragraph 7(b)(1), redefines this criterion in a more concise and general way, for clarity.

- The volume of material that may be placed below the ordinary high-water level for a boat ramp would increase from 50 to 80 cubic yards (see proposed rule, par. 8(b)) to align with Minnesota Department of Natural Resources best practices.

**Application Submittal: Photographs**

The present rule, at paragraph 7(b), simply requires "Photographs of the project site, showing existing conditions." The requirement to submit photographs allows the District in many cases to process an application without the delay of an on-site inspection, and helps to document the pre-existing condition and dimensions of the shoreline or streambank. Often the photographs that are submitted are inadequate for these purposes. The proposed rule, at paragraph 5(b), specifies at greater length the required orientations of the photographs, and what they are to depict.

**RULE 9.0: DREDGING**

The most substantive element of the proposed revision to the dredging rule is the introduction of procedures to expedite permitting for two forms of dredging: (a) dredging by a public agency to remove accumulated sediment at a stormwater conveyance outfall, presently afforded a

"Fast-Track" procedure, would be subject to a general permit; and (b) navigational dredging of an existing channel, with proper documentation, would be subject to Fast-Track permitting.

The Fast-Track procedure presently is used in the District rules for certain simple activities that present small risk of water resource impact. Principally, a Fast Track procedure omits public notice, and therefore reduces permit review time by about two weeks. Often, as well, application submittal requirements are reduced.

As noted above under the Erosion & Sediment Control (Rule 3.0) discussion, the general permit procedure simply requires the applicant to submit a notice and certain basic information to the District, and to receive confirmation of receipt. At that time, the proposed activity is deemed authorized by District permit, subject to a set of standard conditions stated in the rule or associated guidance.

Section 7 describes the general permit for removing accumulated sediments. The general permit is limited to public applicants responsible to maintain public stormwater conveyances that outlet into public waters. The applicant must submit the location of dredging, and state how it will determine the dredging depth so that native bed material is not removed. When the District has confirmed receipt, the permit is deemed to be in place. The work is subject to four conditions: only non-native sediment may be removed; the bed of the waterbody may not be materially altered; silt curtain must be used; and any disturbance to the surrounding land or vegetation must be repaired.

This abbreviated procedure recognizes that public agencies are under public mandate to maintain stormwater conveyance systems, and is based on the District's judgment that public agencies are reliable partners and have a cost incentive not to remove more material than necessary. Further, by practice, dredging depth often is determined by the machine operator's discerning the sediment/bed interface so that, in the District's present judgment, the burden to determine and map bed elevation as an element of the application isn't warranted. The limited submittals are to allow the District to track where and when sediment dredging is occurring, and how public entities are determining dredging depth and amount. Also, this information will help the District identify conveyances that are transporting large sediment loads from upgradient areas.

Section 8 describes the new Fast Track procedure for maintenance dredging of a navigational channel or access. Dredging rights are somewhat complicated from a legal point of view but, in general, an existing public or private navigational channel or access may be maintained to previously approved dimensions. Where the applicant can submit dredging plans previously approved by the District, then this, accompanied by an erosion control and site restoration plan, may enable the applicant to receive a permit without additional submittals or the delay associated with a public notice period. Importantly, because prior plans may be ambiguous and because the extent of the dredging right depends on considerations that can shift over time, District staff, in its judgment, may defer an application to the normal permitting process and may require additional information or an opportunity for public notice.

Other than introducing these two procedures, the proposed revisions reorganize and shorten the text for understandability and add several clarifications, as follows:

- Paragraph 2(a) notes explicitly that a Dredging permit is not required for utility work that already is reviewed and permitted under the Waterbody Crossings and Structures Rule (Rule 6.0).

- Paragraph 2(b) adds a specific note alerting applicants of DNR General Permit No. 2001-6009. This general permit, reviewed and renewed every five years by the Minnesota Department of Natural Resources (MnDNR), enables a person to avoid a lengthy, separate MnDNR permitting process for dredging that has received a District permit. A person operating under the MnDNR GP must do so in conformance with a number of conditions stated in that document.

- Paragraph 3(a) concerns text that allows dredging to maintain an existing navigational channel to "the original or originally permitted extent of dredging." The proposed rule would revise this to an extent "the District previously has approved." The existing wording is overbroad and can be read to entitle channel dredging to dimensions established before such activity was subject to public review. Such a proposal is not in itself a legal entitlement, and is subject to review under present conditions. The District has intended and applied this clause to concern maintenance of a channel where it previously has reviewed and endorsed the dimensions of dredging.

- Under the existing and proposed rules, navigational dredging in Lake Minnetonka is subject to standards set by the MnDNR, the Lake Minnetonka Conservation District, and the District in a 1993 joint policy statement (see existing rule at paragraph 3(c), proposed rule at paragraph 2(c). At paragraph 4(c)(1), for the convenience of applicants, the proposed rule incorporates numerical standards from the joint statement directly into the rule. At paragraph 4(c)(2), the proposed rule incorporates the dredging depth standard that the District applies to dredging in other waterbodies, which is the standard applied by the MnDNR (see Minn. Rules6115.0201, subp. 4.A).

**RULE 10.0: ILLICIT DISCHARGE**

The District's MS4 GP requires that the District adopt and enforce a rule that prohibits non-stormwater discharges into the District's MS4s. The District's existing Illicit Discharge rule was adopted in 2013 to fulfill this obligation.

The proposed rule would substantially simplify and shorten the existing rule. The District believes that the existing rule was developed from a model rule prepared by the U.S. Environmental Protection Agency (EPA) with a scope in excess of the focus of the illicit discharge mandate under the MS4 GP. The rule prohibits discharges of pollutants not just to the District's MS4s, but broadly to waterbodies within the District, imposes a general requirement on all commercial and industrial properties to take steps to protect against accidental discharges of pollutants, and puts into place an extensive set of District facility inspection and enforcement authorities. The District has encountered very little illicit discharge activity and has not found the present, broad rule to be useful in focusing on the risks that the MS4 GP intends to address. The District finds, as well, that the District's general framework of enforcement tools, as referenced in the Enforcement rule (Rule 15.0) and its supporting policies, applies properly to illicit discharges and that there isn't a need for an independent set of enforcement tools and procedures in the Illicit Discharge rule itself.

Accordingly, the District proposes to condense the rule measurably. The proposed rule carefully categorizes direct and indirect connections to its MS4s, as well as interior and exterior connections, and sets forth a simple set of prohibitions and procedures for District approval of connections:

- A direct, interior connection to an MS4 is prohibited unless it is constructed so that it conducts only stormwater or a non-stormwater discharge that is on a limited list of permitted non-stormwater discharges identified by the U.S. EPA and the MPCA. The property owner or operator must review each existing and future connection for conformance to this requirement.

- A direct, exterior connection may be maintained with District approval, and in accordance with any District-imposed conditions to prevent non-stormwater from entering the connection.

- An indirect connection may be maintained, but the District, after hearing, may require the property owner or operator to modify the structure or institute practices to prevent the discharge of non-stormwater into the MS4.

The rule also imposes response and notification obligations on the owner or operator, in the event of an illicit discharge.

In addition, the District proposes to narrow the geographic scope of the rule. The MS4 GP, strictly speaking, applies only within those areas of the District that drains to the District's MS4s. The District's MS4s consist of eight public drainage systems for which the District is the drainage authority pursuant to Minnesota Statutes chapter 103E. These systems include parts of Six Mile Creek and Painter Creek in the western part of the watershed, and six constructed systems somewhat distributed throughout the watershed. These systems and their drainage areas are shown in Addendum A to the Illicit Discharge rule.

For the Erosion & Sediment Control and Stormwater Management rules (Rules 3.0 and 5.0, above) mandated under the MS4 GP, the District is not limiting MS4 GP-required standards to the MS4 drainage areas, as the standards are appropriate and it would be very confusing to apply different sets of standards across the watershed. However, the District finds that it is sound to apply the Illicit Discharge rule only within its actual MS4 drainage areas. Unlike for the other two rules, there is not a strong impetus for the District to regulate for illicit discharges outside of the MS4 GP mandate. Further, the most recent reissuance of the MS4 GP has imposed a substantial set of obligations on MS4 GP permittees to proactively inventory and inspect potential sources of illicit discharges on an annual basis. This requires entry into and inspection of commercial and industrial processes for which watershed districts typically do not have expertise or training and, in a highly developed setting such as much of the District encompasses, would draw substantial resources away from the District's core programs and core mission. The District considers its municipalities to be more well-equipped to perform these activities and does not find it necessary to seek to duplicate their programs within the same territory.

## RULE 11.0: APPROPRIATIONS

As mandated by statute, the District requires a permit for certain appropriations from waterbodies that are of a quantity below that which is regulated by the MnDNR.

The existing rule excuses a person from obtaining an individual permit if certain information is submitted to the District and the appropriation conforms to certain conditions stated in the rule. This is, in concept, a general permit provision, however it isn't so identified.

The proposed rule would clarify that an applicant that meets these requirements is operating under a general permit. In doing so, the rule establishes the District's authority to oversee appropriations subject to the rule and, as the rule provides, to restrict an appropriation if conditions require.

Otherwise, the proposed rule is limited to revising existing rule text for clarity.

## RULE 12.0: FINANCIAL ASSURANCES

Edits are proposed to the Financial Assurances rule to improve clarity. One substantive modification is proposed. On the applicant's notice to the District of project completion, the District has 45 days to inspect and confirm completion under the permit, or else the financial assurance will be deemed released. The proposed rule, at paragraph 4(a), adds a sentence stating that the District, in writing to the applicant, may extend the inspection period until seasonal conditions allow for the inspection. There are no other proposed changes.

## RULE 13.0: FEES

The Fees rule is edited for clarity. No substantive changes are proposed.

## RULE 14.0: VARIANCES and EXCEPTIONS

The District proposes to change the variance standard in its rule from the "undue hardship" standard to the "practical difficulty" standard. The former is the traditional standard, and requires the applicant to demonstrate that requiring compliance with a provision of the applicable rule or ordinance would cause an "undue hardship." In recent years, by action of the Minnesota legislature, the variance standard for land use authorities (municipalities and counties) has been changed to the "practical difficulty" standard that, as it suggests, requires the applicant to show only a "practical difficulty." Unlike for land use authorities, state statutes do not prescribe the standard that a watershed district must apply in deciding a variance. However, the District finds it appropriate to adjust its standard for consistency with its municipalities.

In each case, the District Board would review certain enumerated criteria and exercise a fair measure of judgment. The principal difference between the two standards is that under the undue hardship standard, a variance may not be based on "economic hardship" or merely "serve as a convenience" to the applicant. Under the practical difficulty standard, an applicant need simply show that as the result of an unusual feature of the applicant's property, the

applicable provision would burden the applicant, and that it would not be unreasonable to excuse the applicant from full compliance.

The proposed rule also seeks to reword one of the criteria to be more directly understandable. The present criterion is whether the variance "[would] not impair or be contrary to the intent of [the District] rules." The proposed rule, more concretely, looks to:

- The extent to which the applicant seeks to diverge from the rule;
- The extent to which the divergence would cause impact to water resources; and
- Whether the variance would shift a burden to a neighboring property or to the broader public.

The proposed rule also would clarify an element of the exception standard. Separately from the variance, the existing rule allows the Board to grant an "exception" from a specific rule provision if the applicant proposes an alternative approach that the Board finds would achieve a greater degree of water resource protection. Under this standard, applicants regularly have proposed alternative actions that aim to achieve additional water resource protections, but that are distinct from the particular resource, or impact of concern, that the rule provision in question aims to address. The rule would state that the alternative approach must achieve an outcome "of the type that the Board intends the standard, specification or method [from which the applicant seeks exemption] to achieve." This is to ensure that the District does not trade the well-being of one resource off against another.

Finally, the rule would be clarified in three ways:

- Section 1 would emphasize that a variance or exception applicant must complete the District application form for that purpose.

- Section 4 would note that the Board may place conditions on a variance or exception. It may be these conditions that allow the Board to find that the criteria for the variance or exception have been met.

- Section 5 would clarify that when the District renews, transfers or terminates a permit, this has the same effect on any associated variance or exception.

**RULE 15.0: ENFORCEMENT**

The Enforcement rule is edited for clarity. In section 3, it is proposed that a compliance order issued by the District Administrator will be effective for up to 20 days. The intent is that within the 20-day period, if the permittee has not addressed the non-compliance, the District Board will convene a compliance hearing and issue an order superseding the Administrator's order. No other changes are proposed.