WARROAD WATERSHED DISTRICT

Rules Guidance Document

Adopted: January 23, 2025

PERMITTING PROCEDURES, FEES AND FINANCIAL ASSURANCES

Guidance to District Rule

The Permitting Procedures, Fees and Financial Assurances District Rule sets forth the basic process for property owners to apply for watershed district permits and for district processing of applications. These procedures are intended to assure that the district's process is fair, thorough, and effective.

A. Policy

The policy statement at section 1 of the rule states that the district's regulatory program is intended to balance two interests. First, the district has an interest, and indeed a statutory mandate - Minnesota Statutes §103D.341 - to reasonably regulate and monitor activities within its boundaries that may affect water resources. Second, it wishes to do so without unnecessary burdens on those who wish to make use of their property responsibly. A district and its staff will keep both of these interests in mind in carrying out its regulatory program.

B. Application Submittal

Key elements of the rule for application submittal, at section 2, are as follows:

- The rule states explicitly that activity subject to district rules may not occur until a permit has been applied for and issued.

- The landowner must sign the application form. The applicant and permittee should always be the party who is indicated in the county land records as the owner of the property on which the activity is to occur. If another party (such as a contractor or intended property buyer) is the district's contact, it should be identified as the agent for the landowner and the district should document its authority to represent the landowner. This insures: (a) that any activity pursuant to a district permit occurs with the knowledge of the landowner and (b) that if compliance action is necessary, the district or the contractor will have access to the property.

- The application must be made on a form supplied by the district. State law (Minnesota Statutes §15.99) stipulates that once an application is submitted, the district must approve or deny the application within a specified time frame or else the permit is deemed granted. Therefore it is important that an application be clearly identified as an application, and not, for example, merely a pre-application inquiry.

- When a landowner submits an application, it operates as a grant of permission for the district to enter the property. Entry typically will be needed for the district to evaluate the permit application and, once a permit is issued, to monitor activity for permit compliance. The watershed law (Minnesota Statutes §103D.335, subdivision 14) already authorizes the district to enter lands "to make surveys and investigations to accomplish the purposes of the watershed district." This appears to give districts adequate legal authority to enter private property, outside of constitutionally protected areas such as those in or adjacent to homesteads. The rule language is consistent with this authority.

- There is a distinction between permit approval and permit issuance. An approved permit may have conditions that must be fulfilled before the permit is issued (while other conditions may apply after a permit is issued to the manner in which the work itself is conducted). The District rule states that a permit extends for one year after permit approval. To state it another way, all activity on the land that is subject to the permit (not including subsequent ongoing maintenance) must be completed within a year. This means that it is the permittee's burden to meet as soon as possible any conditions that must be fulfilled before permit issuance. This prevents the situation where a permit is indefinitely open because the permittee has never met such conditions and the permit has never issued.

C. Permit Renewal and Assignment

However, because it may take time for pre-issuance conditions to be met, and because even without such conditions a project may take more than a year to complete, the District rules include a process for a permit to be renewed. An applicant must request a renewal before the permit has expired. A renewal presents a situation where there is a need for balancing of interests as described earlier. On the one hand, once a district has evaluated an application and determined that proposed work can be done in compliance with the district's rules, a landowner should be able to complete the work without unexpected new costs or barriers. On the other hand, the district does not want land in a disturbed state indefinitely and, as an administrative matter, does not want a permit open indefinitely. Further, because the district's rules may evolve over time to reflect new knowledge and policies, the district has an interest in limiting the extent to which future land disturbance is "grandfathered" under old rules and does not have to meet new standards.

The District permit renewal terms balance these considerations as follows:

- A permit may be extended for an indefinite number of terms, provided the work has been "substantially commenced." However, if the work has not been substantially commenced by the end of the second permit term (two years), it may not be renewed and the landowner will need to make a new application.

- The district may deny or place new conditions on a renewed permit for a "material change in circumstances." This allows the district to ensure that the permit continues to protect water resources if there is new knowledge or information relevant to the work since the permit was approved or last renewed. The term "material" is intended to give some protection the landowner, and means that the district will not change the "rules of the game" unless the change is both significant and relevant.

- Further, on the first renewal, a change in the district rules occurring since permit approval will not count as a "material" change. This insulates a permittee from a change in the rules for a two-year period of time after a permit is approved. If a permittee seeks a second renewal and the district rules have changed in the interim, the district may apply new conditions as needed for the work to conform to the new rules.

- However, once the permittee has made "substantial progress" on the work, a request for permit renewal will not be subject to a rule change occurring since permit approval or the prior

renewal.

Similarly, the District rule allows for a permittee to assign the permit to a third party. It is advised that the permit always "run with the land," so the typical reason for a permit to be assigned is because the property is being conveyed. The general principle that the rule reflects is that permit assignment should not be burdened. However, the rule conditions this principle on the following:

- The assignee, in writing, must assume all permit obligations. This avoids the situation where a permittee is excused from permit obligations and ceases to have authority over the land, but the new landowner disclaims knowledge of the permit responsibilities.

- At the time of permit transfer, the work must comply with the permit. First, it is important to document that the site was in compliance when a permit assignee assumes compliance responsibility. This precludes the assignee's later claim that the site was non-compliant on the earlier permittee's watch, and that the assignee was unaware of or should not be responsible for it. Also, practically speaking, property transfer is an effective moment to require that site condition be corrected, as it will be made a condition of sale.

- If the district holds a financial assurance, it will need a substitute assurance from the permit assignee and will return the existing one to the permittee.

Finally, the District rule allows the district to deny or impose conditions on a permit transfer if it has doubts about the proposed assignee that are relevant to whether the assignee can perform the work in compliance with the permit. This clause probably won't apply very often, but gives the district the ability to exercise its judgment if certain work is sensitive or the proposed assignee has shown itself to be irresponsible in the past. The district will need to decide what is sufficient evidence to support special conditions in this circumstance.

D. Standards Without Need for Permit Process

The District rule, at section 3, creates the authority for a district to issue what are termed "general permits." A general permit can be an efficient mechanism for a district to impose standards on a certain type of activity without requiring everyone performing that activity to navigate the ordinary permit process. Typically this would apply to a class of activity that does not create a large risk of water resource impact and that, because it is simple or straightforward, does not generally require project-specific evaluation and project-specific conditions.

A general permit may allow the district to do three things: (a) apply a set of standard conditions to the defined activity sufficient to provide basic necessary water resource protection (for example, if the activity involves minor land disturbance, the general permit may require basic erosion and sediment control); (b) make a record of where in the watershed the work is occurring, allowing for the work to be monitored as necessary and also giving the district information about cumulative effects; and (c) exercise jurisdiction over the work, in the event a particular case does create a risk of water resource harm.

E. Reconsideration

At section 4, the District rule includes a process for an applicant to ask the board of managers to reconsider a district permit decision. This reconsideration is intended as a requirement before the applicant may appeal the decision to a court under Minnesota Statutes §103D.537.

If an applicant challenges a permit action, the district will always be in the strongest position to defend its decision if there are detailed findings to support a permit denial, or to support conditions included in a permit approval. The United States Supreme Court underscored this point in its decision in *Koontz v St. Johns River Water Management District*, U.S. No. 11-1447; 570 U.S. (2013). The Court held that land-use agencies imposing conditions on the issuance of development permits must have a rational relationship and rough proportionality with the impacts of the proposed development.

Because most permit actions are not contested, it doesn't make sense for every such action to rest on extensive staff or consultant work and detailed findings. The reconsideration process is intended to allow for the district to devote the resources to such efforts only as to those aspects of a permit that are in fact contested. The District rule requires an applicant to give a district fair notice of its objection to the denial or conditions, and ensures that the applicant has a full opportunity to address the board of managers in that regard. The District rule also provides that a district may recover its additional permit review costs incurred in the reconsideration process.

This process must be carefully managed so that the district does not violate Minnesota Statutes §15.99, which as noted places a strict deadline on a district's final permit decision. The District rule states that if the reconsideration process cannot be completed within the section 15.99 time frame, then the applicant is not required to complete the reconsideration step before exercising its appeal right. It is especially important for districts to manage the permit process so that decisions are timely within these deadlines, and adequate time is anticipated for reconsideration of contentious permit conditions.

F. Permit and Inspection Fees

Minnesota Statutes §103D.345, subdivisions 1 and 2, allow a watershed district to (1) require a minimal application fee to cover administrative expenses of receiving and filing permit applications and (2) require inspection fees that cover the actual cost for the district to process and review a permit application and then to monitor compliance with the issued permit. This includes staff and consultant costs (including attorney costs) and related administrative costs. At section 5, the rule basically incorporates the statutory language.

For a watershed district that chooses to exercise this authority, there tend to be two ways of doing so. One is to track actual costs and to bill the applicant or permittee accordingly. The other is to establish a fee schedule that uses enough fee categories (type and scale of work) so that the imposed fees correspond with reasonable accuracy to actual costs incurred by the district. The District rule elects to use the latter method, and further provides that the fee schedule will be set by the board of managers from time to time. It is recommended that the fee schedule be established in this way, and not in the rule itself, so that it can be adjusted on an annual or other regular basis without the need for a formal rulemaking process.

The District rule exempts units of federal, state and local government from the permit fee. This simply restates the exemption found at Minnesota Statutes §103D.345, subdivision 3.

G. Financial Assurance

Section 6 of the District rule incorporates the Minnesota Statutes §103D.345, subdivision 4, authority given to watershed districts to require that a permittee give a bond to ensure its performance under the permit. The District rule uses the term "financial assurance" rather than "bond" to allow a permittee to use other means of assurance including letters of credit and cash escrows. As is recommended for the permit fee, the required amount of financial assurance for a particular type and scale of project would be set in a schedule that could be reviewed and adjusted by the board of managers as needed, without a formal rulemaking.

The rule further sets forth fairly straightforward terms for how the assurance will be used by the district, the enforcement costs that the assurance may be used to fund, and the release and return of unused funds once the work is completed in accordance with the permit terms. The rule explicitly states that if district costs exceed the amount of a financial assurance, the permittee will be responsible to reimburse for those excess costs. The district would have to pursue such a claim by an independent legal action, if necessary.

The rule provides that a financial assurance will not be required if the permittee is a federal, state or local unit of government. The watershed law does not specifically exempt governmental agencies from the district's authority to require a financial assurance. However, the practice of watershed districts generally is not to impose such a requirement. It is reasoned that public permittees, in general, are more reliable in meeting permit requirements and that where a particular permittee is not, it remains accessible and is not going to disappear or go into bankruptcy. Further, the cost of a bond or letter of credit would just be an additional taxpayer cost. Notwithstanding, the rule states that if the public permittee requires a bond of its contractor, the district is to be named a beneficiary. The reasoning here is that this gives protection to the district without measurable added cost.

H. Permit Approval Authority

Finally, section 2 of the District rule states that the board of managers will decide permits, except as may be delegated to the administrator. A district board of managers may be quite comfortable delegating the authority for permit decisions to its administrator, or the authority for simpler permits or those likely to be less controversial. Allowing the administrator to approve certain permits reduces the time and cost for applicants and frees the board of managers agenda for other matters. The delegation would occur by a board resolution that defines the limits of the delegation.

With the reconsideration process at section 4, if a permittee objects to a permit decision of the administrator, it will come before the board for review. A district can include other procedures in its rules, or in the delegation resolution, that would, for example, allow a board member or an interested member of the public other than the applicant to ask that the board consider an application in a given instance.

SURFACE DRAINAGE AND FLOOD MITIGATION

Guidance to District Rule

The Surface Drainage and Flood Mitigation District Rule identifies the changes to surface water flows that will require a permit from the watershed district, and sets forth the standards it will apply in order to determine whether those changes are permitted. A watershed district's consideration of this District Rule in particular will benefit from the district engineer's advice to assure that critical water management concerns in the local watershed are addressed.

A. Policy

The policy statement at section 1 serves several purposes. First, it communicates to property owners why the watershed district is choosing to regulate surface drainage and assists those owners in designing their proposed surface drainage alterations in a way that will be consistent with district goals. Second, when the board of managers must exercise judgment during permitting decisions, it will refer to the policy statement in order to align its decisions with the stated policies. Third, in the event of a legal challenge to a permit decision, the underlying policies of the rule will guide the judge. If the permit decision aligns with those policies, the judge will give greater deference to the board's decision and the district's legal position will be stronger.

The proposed policies reflect the following goals for surface drainage management:

- To preserve capacity in public drainage systems into which lands assessed for those systems discharge. Note that the drainage law (Minnesota Statutes chapter 103E) does not control the volume that may flow from assessed lands into the system or the rate of that flow. However, a watershed district under its regulatory authority (Minnesota Statutes chapter 103D) may regulate both volume and peak flow off of lands into a drainage system to provide drainage benefits equitably to all lands paying into the system.

- To limit the movement of soils into channels and preserve the integrity of channel banks, in order to limit maintenance costs for public ditch systems and limit the transport of sediment, nutrients and other pollutants to downstream receiving waters.

- To protect the structural integrity of public drainage systems from destabilizing hydraulic forces.

- To prevent unassessed lands from draining into public systems, in order to preserve system capacity for those property owners bearing the cost of those systems, and in the interest of equity.

B. Regulation

The regulation section identifies proposed changes to the landscape that require a permit from the watershed district. The separation between those activities that require a permit from those that don't is made with reference to the four policies identified in the preceding section. What this section does is identify those activities that, if not done properly, can cause impacts to public drainage systems and

downstream waters that, as the policies spell out, the watershed district is trying to prevent. The goal is to exercise watershed district oversight of those activities while, to the extent possible, avoiding imposing permitting burdens on other activities that don't pose a substantial risk of impact.

In addition, this section strives to define activities that require permits, and those that don't, as precisely as possible. Ambiguity in knowing what does and does not require a permit is a burden on property owners and can be a source of legal conflict. This doesn't mean that all ambiguity can be eliminated, but where possible it should be minimized.

The District Rule first describes the activities that require a permit, and then carves out from those descriptions certain exemptions. The District Rule sets forth specific descriptions of activities that require a permit. In summary, they include:

- Diking
- Any private drainage work within any right of way of a governmental roadway.
- Installation or alteration of a road or utility crossing beneath or over a legal drainage system.

The following activities that otherwise would meet one of these criteria are exempted from the permit requirement:

- Ordinary maintenance of a private drainage way.
- Install, repair, or replace subsurface tile drainage.
- Emergency work on a non-public drainageway or channel necessary to avoid significant property damage. The District rule requires advance notice to and approval from the watershed district for work in a private drainage way located within a public right of way. Notice to and approval from the proper governmental roadway entity is also necessary. However, it is recognized that certain situations may arise which require immediate action. In these cases, any emergency work performed without proper notice and approval is done at the owner's own risk.
- Ordinary cultivation or other ordinary agricultural activity.
- Adding or maintaining a crossing in a public right of way that is already permitted by a city, county, state or federal entity.

The District Rule contains an explicit reminder that it does not eliminate any other legal requirements or constraints applicable to the proposed work. As regards the drainage code, this means, for example, that a landowner performing work in a public channel may not obstruct flows; that a new outlet into a public system or the connection of unassessed lands is prohibited without drainage authority approval; and that the drainage authority retains all authority under the drainage law to do work within public systems and assess the costs.

The rule also explicitly affirms that it does not displace any private property rights in water flow, or any rights to be protected from such flows. The rule reflects the responsibility of the watershed district to manage surface drainage for the general public benefit. But the district does not act as an arbiter, for example, as between adjacent property owners. So if a property owner excavates a channel or alters his land in a way that affects the flow of water onto adjacent property, he will need a permit from the watershed district, but he also will be responsible to ensure that he is not infringing on the rights of the adjacent owner by increasing, relocating or diverting flows across the neighboring property.

Finally, this section of the District Rule states that a contractor or equipment operator is equally responsible to ensure that there is compliance with the rule. If there is enforcement, this protects a watershed district against claims by a property owner that it wasn't aware of what a contractor was doing, or claims of a contractor that the property owner had assured it that all permits and approvals were in order. It allows a watershed district to look to the property owner, or the party actually doing the work on the land, or both, to restore and remediate the impacts of any unpermitted work. The property owner and the contractor then can sort out responsibility and cost between themselves.

C. Criteria for Surface Drainage Changes

This section applies to all activities subject to permits except for diking, and states the criteria against which a permit application will be evaluated.

The criteria in the District Rule relate back to the policies enumerated in Section 1 of the rule. They are as follows:

- Flows - volume or peak - onto adjacent property may not unreasonably increase.
- Unassessed lands may not be drained into a public system.
- To the extent reasonable, flows resulting from proposed changes must be retained on-site before discharge, or discharged to off-site retention - natural or artificial - in order to mitigate flow changes and limit downstream sediment transport.
- Erosion and sedimentation in drainage systems will be minimized through a number of means, as feasible:
    - An erosion and sediment control plan must be submitted and approved;
    - Channels must be vegetated above low-water mark;
    - Channel banks must be designed with proper slopes;
    - Hydraulic forces must be assessed and provided for in the design;
    - Grass filter strips establishment should be considered wherever channel work is conducted.
- Finally, there is a general requirement that downstream flows or water quality may not be adversely affected.

The last criterion, in particular, is general, which leaves discretion in the hands of the district and therefore can potentially prompt legal dispute. However, risk of impact can be very specific to each situation, and this criterion rests on the need for a watershed district to be able to protect surface drainage systems as necessary in the context of each specific set of circumstances.

Note that the procedural rule includes a step by which an applicant may ask the board of managers to reconsider a permit decision before it is appealed. Where the board denies a permit, or includes certain conditions in the permit, this reconsideration step is the opportunity for the district, through its engineer, to examine the facts carefully and to make - and document - careful findings about potential impacts. This would supply the specificity that the rule criterion lacks and establish the foundation for a final determination by the board of managers.

D. Criteria for Dikes

This section states the criteria against which a permit application for a dike will be evaluated. These criteria, as well, related back to Section 1 and are as follows:

- Flows onto adjacent property may not be diverted to an unreasonable extent.
- Retention may not contribute to an increase in downgradient flood peak, and there must be downstream capacity for any change in the hydrograph of flow.
- The dike structure must be designed so that, without additional stabilizing measures, it will withstand flood conditions without erosion or risk of failure.
- The structure outlet, and basin drawdown pumping capacity, must be sized and designed in accordance with the criteria contained in the Minnesota Hydrology Guide.
- The applicant must submit and follow operational procedures that prohibit drawdown pumping during a flood event until downstream flood peaks have receded.

The District Rule also provides that as a condition of a permit, the property owner must grant the watershed district a perpetual right to install, maintain and operate traps or gates to prevent outflows from the diked area during and after flood events that cause the dike to be overtopped.

It is noted that here, too, there will be a need to assess the specific circumstances and to apply some judgment in applying these criteria in each case. Again, the reconsideration step in the procedural rule allows for the level of analysis that is necessary if the district and an applicant do not reach concurrence on a given proposal.

E. Exhibits

This section lists application submittal requirements. The basic submittal requirements that may be requested are: (a) maps and information to locate the project; (b) topographic, elevation, dimensional and flow data necessary to evaluate the hydrologic, hydraulic and flood impact of a proposed change in the landscape; (c) identification of affected wetlands; and (d) a listing of potentially affected owners.

It is standard to also include a "catch-all" provision by which a watershed district may require any other submittals that it reasonably needs to evaluate a proposed activity for compliance with the rule criteria. This allows the district to keep its mandatory submittals reasonably limited, and to tailor the submittal burden on an applicant to what is needed in order to evaluate the applicant's specific proposal. This presumes that district staff will work with an applicant to identify necessary submittals. If an applicant fails or refuses to supply what the district requests, the district may be unable to properly evaluate an application, and this may be a legal basis to deny the permit.

Minnesota Statutes §15.99 requires a permitting agency, including a watershed district, to act on a permit application within the time specified in the statute. This time starts to run when the district receives the application, unless within 15 business days of receipt, the district advises the applicant that the application is incomplete. In light of this statute, it always is important that a district promptly review an application and determine whether it is complete. This becomes even more important if the district relies on a "catch-all" provision, since an application that otherwise contains required submittals is complete unless and until the district identifies other information that is necessary.

F. Definitions

This section defines certain terms used in the rule. Specifically, it defines "drainage way" as pertaining only to surface drainage systems, which may include tile portions, and establishes the terminology to distinguish between public and private systems. It also: (a) defines drainage system "improvement" as

having the same meaning as under Minnesota Statutes chapter 103E; and (b) defines the 100-year floodplain in a standard fashion. The definition of "floodplain" does not identify the source of precipitation data used to define the 100-year precipitation event, so that adjustments in the data (such as the present shift from NOAA Technical Paper #40 to Atlas 14 data) will not require a formal revision to the rule.

The definitions included here are best incorporated into a single Definitions section applicable to the watershed district's entire body of rules, with due care to ensure they do not have different meanings under other rules. If they do have different meanings, it would be acceptable to have definitions of terms as a section of the surface drainage rule itself, and applicable only to that rule.

ENFORCEMENT

Guidance to District Rule

The Enforcement District rule advises property owners and contractors of the steps the watershed district may take to address a violation or threatened violation of a district rule, permit or other binding district requirement.

1. Manner of Enforcement

This paragraph states the scope of watershed district authority to take enforcement action, and the forms that action may take. Largely, it restates §§103D.545 and 103D.551 of the Minnesota Statutes, the two provisions of the watershed law that provide the foundation for district enforcement. In short, watershed districts may bring action to stop or prevent a violation, to require compliance and action to fix the consequences of a violation, to recover enforcement expenditures, and to charge a violation as a criminal misdemeanor. Notably, apart from a small fine that may be imposed for a misdemeanor, watershed districts to not have the authority to impose or recover a financial penalty.

Note that the paragraph refers not only to a violation of a district rule, permit, or other regulatory requirement, but also to a threatened violation. If a threatened violation does not lead to an actual violation, the district would not be entitled to an order requiring the responsible party to take action. However, if the facts are supportive, the District may issue an order, or obtain a court injunction, to stop the action that threatens violation. The proposed text allows for a district, in consultation with its legal counsel, to determine in any given case the available and preferred remedies.

2. Investigation of Noncompliance

This paragraph advises that the district's authorized representatives, without prior notice to or permission of the property owner, may enter land within the watershed to inspect for compliance with district rules, permits and other regulatory requirements. This restates Minnesota Statutes §103D.335, subdivision 14, which says:

> The managers may enter lands inside or outside the watershed district to make surveys and investigations to accomplish the purposes of the watershed district. The watershed district is liable for actual damages resulting from entry.

The district need not know or even suspect that a violation is occurring, nor is its authority limited to lands on which activity taking place is subject to a district permit. The statute permits entry onto any lands as the district finds appropriate in order to effectively carry out its regulatory function.

Note that the statute gives this authority to "[t]he managers." We believe it is reasonable to read the term "managers" as meaning, more broadly, the district's representatives - managers, staff, contract

personnel - both because the term “managers” is used elsewhere in the watershed law simply to refer to the district as a whole and because, as a matter of common sense and necessity, it is not only the district managers themselves who are in the field performing regulatory inspections and oversight on behalf of the district.

The statutory authority under subdivision 14 to enter private property cannot override the U.S. and Minnesota Constitutions, and therefore is limited by the constraints those documents place on entry. Specifically, except under certain limited circumstances, district representatives cannot enter enclosed structures or outside areas that directly surround a residence and its associated structures (garage, shed, etc.). Also, while the statute authorizes entry without notice to or agreement of the landowner, a district may adopt procedures under which it limits the practice of unannounced entry for reasons such as inspector safety and landowner relations. In implementing its inspection authority, a district should coordinate closely with its legal counsel to establish its inspection procedures and practices.

3. Administrative Compliance Order

Under the watershed law, a district board of managers is given the power to issue orders relating to permits and permit compliance. This authority is implemented in paragraph 4, described further below.

However, a condition that is causing or threatening harm to water resources may need attention immediately, or at least before the board of managers practically can be convened to hear a matter and issue an order. For that reason, it is desirable to be able to exercise the authority to issue a preliminary compliance order at the time a violation is observed.

The preliminary compliance order would identify the apparent violation and impact, and would advise of recommended compliance actions, but would not purport to order that those actions be taken. Instead, it would advise of a compliance hearing by the board of managers and notify that the hearing will occur unless the suggested actions are timely taken. If the responsible party did not agree with preliminary compliance order, it could choose not to take the recommended action, and wait to present its case to the board.

While a watershed district order is legally binding, a district can enforce that order only by going to a state district court judge. To have the strongest legal position in front of the judge, a district is always advised to have an order issued not just by individual managers or staff, but by its board of managers. This means that even if a preliminary compliance order has been issued, the board will want to hold a hearing and issue a superseding order before going to court.

4. Board Hearing

This paragraph provides for a board hearing before a district compliance order (other than a preliminary order) may be issued. Because a district order may impose substantial cost on a property owner or contractor - by delaying work, requiring restoration action or imposing district costs - the law requires that the potential recipient of an order be given notice and an opportunity to appear and present evidence to the board before the board makes findings. The law does not specify how many days’ notice must be given, how notice must be given, or the specific procedures that must be afforded at the

hearing beyond an "opportunity to be heard." District legal counsel should be consulted on these details, and whether they should be included in the rule language or simply followed as district practice.

The paragraph also makes clear that on the basis of a finding of violation, a board of managers may order any remedy "within the District's authority." These remedies include: (a) a directive to cease and desist until an after-the-fact permit is applied for and issued: (b) a requirement that the responsible party bring the activity into compliance and/or take steps to remediate impacts from a violation; and (c) reimbursement of the district for its costs incurred in compliance monitoring and enforcement. As noted previously, a watershed district cannot impose a monetary penalty. Also, of course, the district cannot itself conduct criminal proceedings; it would need to pursue a misdemeanor action in state district court.

Finally, the paragraph makes clear that the board has the authority to consider and issue an order, whether or not there is a preliminary, staff-issued field order. If there is not actual or threatened harm to justify a staff order, then the district may simply notice and hold a board compliance hearing. Typically, this will follow staff efforts to work with a violator to secure compliance, but it can occur whenever the board of managers deems appropriate and need not follow informal or formal staff action.

5. Liability for Enforcement Costs

Paragraph 5 of the District rule states that a property owner or responsible contractor will be responsible for district costs to investigate and respond to a violation of a district rule, permit or other regulatory requirement to the extent that Minnesota Statutes §103D.345, subdivision 2, allows. This statute says that a watershed district may charge an "inspection fee." It then states how the fee may be calculated:

> The inspection fee must be used to cover actual costs related to a field inspection. Inspection costs include investigation of the area affected by the proposed activity, analysis of the proposed activity, services of a consultant, and any required subsequent monitoring of the proposed activity. Costs of monitoring an activity authorized by permit may be charged and collected as necessary after issuance of the permit.

Accordingly, if there has been an inspection, then the cost of the inspection, any analysis related to it, and any subsequent monitoring related to it may be recovered from the property owner or other responsible party. It further says that consultant costs related to the inspection, and to subsequent analysis and monitoring, are recoverable costs as well. This would include engineering and other technical consultants, but also may be read to include fees paid to district legal counsel for assistance in evaluating compliance and carrying out enforcement procedures. To recover these costs, it is important for a district to keep careful records of them.

Enforcement may result in a variety of costs to a district - staff hours, administrative and consultant costs, sampling and analysis costs, manager per diems for special meetings, contract costs for restoration work undertaken by the district, and potentially costs for court proceedings. The proposed rule language does not take a position on the precise extent to which each of these falls within the scope of the statute. Each district should determine its position with the advice of district legal counsel (for example, attorney fees for court proceedings may be excluded from the scope of §103D.345,

subdivision 2, by virtue of separate treatment in §103D.545, subdivision 3). Note also that in the absence of the authority to impose a fine, a watershed district's ability to require that a responsible party reimburse its costs may be a measurable financial incentive for early compliance.

6. Contractor Liability

The watershed law requires that watershed districts adopt and apply rules governing activities that may injure water resources, but it does not anywhere state who is subject to enforcement in the event a rule, or a permit issued under the rules, is not followed. It is good practice to require the property owner of record to be the named permit applicant, so that the authority to perform the proposed work is established and the district always has an official location where the permittee can be located. Further, in the event of noncompliance, it will be necessary for the property owner to be accountable for the violation to ensure that there is legal access to the property for any compliance work that is needed. In this case, it is reasoned that if a contractor has actually performed the work that does not comply, the property owner has a contract relationship with the contractor that will allow the property owner to demand that the contractor address the violation and hold the property owner harmless for costs.

However, there is nothing in the watershed law that prevents a district from also holding directly accountable the contractor that, itself or through its subcontractor, is responsible for the violation. A district may decide that it will have more leverage to gain compliance if both the property owner and the contractor are directly subject to district orders and enforcement proceedings. If the district encounters a situation where the property owner appears to be innocent of the violation, holding the contractor responsible as well allows the district to take enforcement action directly against the contractor with minimum imposition on the property owner.

Paragraph 6 establishes that a contractor also is responsible for a violation if it, or its subcontractor, performed the activity constituting the violation. This section defines the term "responsible contractor" as it is used throughout the rule to denote a contractor that may be subject to enforcement.