RCWD
RICE CREEK WATERSHED DISTRICT

July 16, 2024

Re: Rice Creek Watershed District Rule Revision

- Definitions (Rule A)
- Procedural Requirements (Rule B)
- Stormwater Management (Rule C)
- Erosion and Sediment Control Plans (Rule D)
- Floodplain Alteration (Rule E)
- Wetland Alteration (Rule F)
- Regional Conveyance Systems (Rule G)
- Public Drainage Systems (Rule I)
- Enforcement (Rule K)
- Variances (Rule L)

To Distribution List (Attached):

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

The proposed rule revisions encompass a number of changes to the rules listed above. Some are substantive changes prompted by the District's experience in administering the current rules. There are also a number of technical adjustments to application submittals and rule criteria, brought forward principally by the District's permit review team based on experience in administration. Finally, there are changes that don't change the rules, but address ambiguities or simplify.

The District is the operator of a "Municipal Separate Storm Sewer System" (MS4) under the Clean Water Act stormwater program, and must conform to the terms of an MS4 General Permit (GP) administered by the Minnesota Pollution Control Agency (MPCA). The GP requires the District to regulate stormwater impacts of land disturbance in accordance with certain terms and standards. Among the proposed substantive changes are revisions to the Stormwater Management rule to conform to the directives of the GP. The municipalities within the District, with limited exception, also are MS4s obligated to regulate land disturbance according to the MS4 GP. By conforming to GP standards, the District is aligning its stormwater rule closely with the stormwater ordinances of its cities, reducing complexity and cost for regulated parties.

**The proposed changes, in redline, are included with this letter and otherwise available for review at the District offices or accessed through the District website, www.ricecreek.org.** The District is soliciting input from all interested 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 that may be suitable for all parties subject to regulation.

**Please submit written comments by mail or electronic mail to the attention of Patrick Hughes, Regulatory Manager. Comments must be received by September 20, 2024. In addition, the District Board of Managers will hold a public hearing on the proposed rule at its regular meeting called to order at 9 a.m., on September 11, 2024, in Council Chambers, Shoreview City Hall, 4600 Victoria Street North, Shoreview MN**.

The following is a brief review of the substantive changes proposed, and the rationale for each.

**1. Definitions (Rule A)**

The District proposes to add definitions for four terms:

- Common Plan of Development
- Outlet Control Structure
- Single Family Residential Construction
- Volume Control Practice

These four definitions all would be added to implement changes to the Stormwater Management rule, and are discussed under section 3, below.

**2. Procedural Requirements (Rule B)**

There are no proposed substantive changes to procedures. Section C.13 of the Stormwater Management rule (concerning area/phased development permits) is proposed for deletion. Therefore, a reference in section B.6 to section C.13 would be removed.

**3. Stormwater Management (Rule C)**

*Aligning with MS4 GP Standards: "Common Plan of Development"*

The rule, at section C.2, contains a clause to protect against cumulative impacts from development activities that fall under regulatory thresholds because they are pursued independently of each other or phased. The clause, which the District refers to as the "connected action" clause, applies the rule's thresholds:

cumulative of all impervious surface created or reconstructed through multiple phases or connected actions of a single complete project, as defined by the District, on a single parcel or contiguous parcels of land under common ownership, development or use.

The MS4 GP employs a similar concept, termed "Common Plan of Development." The District proposes to substitute "Common Plan of Development" for the "connected action" clause. The proposed rule incorporates the term, as defined in the MS4 GP, into the Definitions rule. The MPCA has issued written guidance in applying the term – see **https://www.pca.state.mn.us/sites/default/files/wq-strm2-22.pdf**. The District intends to apply the Common Plan of Development clause in accordance with MPCA guidance, as the MPCA may expand or adjust it over time. The District does not foresee a great difference in application of the two approaches.

*Aligning with MS4 GP Standards: Water Quality Volume Practices*

Both the District stormwater rule and the MS4 GP mandate stormwater phosphorus control and volume management by specifying a minimum "water quality volume" that stormwater management practices must be designed to accommodate. See District rule C.6(c), MS4 GP 20.6/20.7. Both mandate that stormwater be managed by a "volume control practice" – i.e., by infiltrating or reusing it - unless site conditions (clay soils, high groundwater, soil contamination, etc.) counsel that stormwater not be introduced into the soil matrix. There are slight differences in how this preference is stated that the proposed rule would remove.

The District rule, at paragraph C.6(d)(2), states that to the extent infiltration on the project site is feasible, then a volume control practice must be the chosen method of stormwater management, whether the practice is placed on the project site or elsewhere. To the extent a volume control practice is not feasible, another method of stormwater management such as biofiltration, filtration or retention must supply the remaining required water quality volume. A project that is not a "Public Linear Project," (PLP, defined as "a project involving a roadway, sidewalk, trail or utility not part of an industrial, commercial, institutional or residential development") must meet the water quality volume standard. The rule requires the same for PLPs, except that recognizing right-of-way constraints, it requires a PLP to manage stormwater associated with reconstructed hard surface only to the extent it is feasible to do so within the project site, or relevant right-of-way. See C.6(e).

The MS4 is a bit broader, in that it requires a PLP permittee to provide water quality volume, for both new and reconstructed hard surface, only to the extent that a volume control practice can do so on site. The permittee must make a reasonable attempt to acquire additional right-of-way or adjacent land. See MS4 GP, 20.7. But it need not employ practices other than volume control practices, and need not meet the water quality volume standard beyond what it can achieve on site. The proposal would adjust the District rule to conform to the MS4 GP standard.

*Aligning with MS4 GP Standards: Treatment Location*

The District stormwater rule allows off-site treatment of stormwater according to a "Resource of Concern" framework. The rule identifies 54 lakes within the District as principal receiving waters or "Resources of Concern" (ROCs). A permittee may provide for stormwater from project hard surface to be managed on the project site, or else downgradient from the project site, but above the first downgradient ROC. If there are not opportunities to meet the water quality volume standard within this defined area, then the outstanding water quality volume requirement may be met by locating a practice upgradient from the project site, subject to a calculation showing that the amount of total phosphorus kept out of the ROC will at least equal the amount that an on-site practice would have captured. See C.6(d). Underlying this framework affording leeway to off-site, and specifically regional, treatment is the District's observation that such treatment often is more cost-efficient, and that a regional facility is conducive to municipal, or otherwise more-reliable, maintenance.

In contrast, the MS4 GP requires PLP permittees to treat stormwater on-site, and does not require treatment beyond what can be achieved on-site. For non-PLP permittees, the MS4 GP requires treatment on-site except as a permittee shows that doing so is not "cost-effective." MS4 GP 20.8, 20.10.

The proposed rule would adopt the MS4 GP framework. With respect to projects that are not PLPs, the District believes that this framework still will allow for use of regional or other off-site treatment: when an off-site facility would provide for more cost-efficient treatment or maintenance, this would satisfy the "cost-effective" MS4 GP criterion. The rule will require that the applicant document the more favorable cost profile of the off-site proposal.

The MS4 GP also specifies a sequencing for off-site treatment. First, stormwater must be managed upgradient of the next "receiving water," and next, within the DNR "catchment area." MS4 GP 20.11. The District proposes to retain its ROC-based location sequencing. The District developed the ROC framework thoughtfully on the basis of its watershed hydrology. The two frameworks appear equivalent and the District does not see a water resource advantage in disrupting its approach.

*Aligning with MS4 GP Standards: Roof Treatment*

Subsection C.6(f) allows for stormwater from residential roofs, decks and other non-driving surfaces that can't reasonably be routed to a stormwater practice to be considered as treated, if the runoff is directed to green space meeting specified criteria. Because the MS4 GP requires all runoff to be captured and treated, the proposed rule would clarify that this subsection simply recognizes that runoff handled per the criteria is being infiltrated. The rule would authorize the District to require, as a permit condition, a covenant recorded on the title protecting the green space, if the District finds there to be a risk that the green space might be converted to hard surface in the future.

*Special Rule Provisions for Public Permittees*

Constraints under which units of government operate in acquiring and owning land may warrant different approaches to applying District rules. Two examples arise from the District's recent experience in applying the stormwater rule to government projects.

First, the District manages portions of the watershed under wetland plans developed under the Minnesota Wetland Conservation Act (Minn. Stat §103G.2243) and approved by the state. To support these plans, the District's wetland and stormwater rules provide that when land is subdivided, the landowner must file instruments on the property title to protect the wetland and establish a permanent vegetated buffer adjacent to it. See C.10(d). When a city or other unit of government is negotiating with a private landowner for a fee or easement interest in unimproved land, in order to site a portion of road right-of-way, a linear utility or another location-constrained public improvement, the landowner's obligation to place these permanent encumbrances on the retained portion of the tract may dissuade the landowner from cooperating. This may force condemnation proceedings, and otherwise result in unnecessary public cost, delay and potential acrimony.

In addition, in this instance, subdivision isn't prompted by any present landowner intent to develop the retained property, and so the threat to the wetland resource is low. If and when the landowner should take steps to develop the retained land, the buffer and easement protections then would be required by the rule and put into place.

Accordingly, the District, in a new subsection C.12(e), proposes to exempt the retained land from the required encumbrances when the subdivision is for the benefit of a public project by a public permittee.

Second, a standard condition of a permit under the stormwater rule requires the landowner, for the benefit of the District as drainage authority, to convey to the District a maintenance easement over any public drainage system (PDS) that crosses the property. C.10(b). The right of maintenance access already exists, by virtue of the physical presence of the PDS and of legal doctrines resting on the District's statutory obligation to maintain the PDS. The rule requires the easement less to convey the right of maintenance, and more to document this right clearly on the property title to avoid future misunderstanding or conflict between the District and the landowner, or between the landowner and a successor in title.

In many cases, there are limitations or complications in burdening public land with an easement of the sort required. Further, the benefit of documenting the District's right to maintain the PDS is less than for a private landowner, both because a public owner rarely will seek to obstruct PDS maintenance, and because public land ownership tends to be more stable over time. For these reasons, the District, by modifying subsection C.10(c), proposes to exempt public landowners from the PDS easement requirement.

<u>Technical Adjustments</u>

The proposed rule would refine certain technical provisions of the stormwater rule.

- The rule would modify subsection C.5(f) to adjust the criterion for when a landowner may create an outlet for a landlocked basin. The rule now requires the basin outlet to be above the water elevation resulting from back-to-back 100-year precipitation events. The proposal would require only that the outlet be above the critical duration flood event (typically either the 100-year rainfall event, or the 10-day snowmelt event). If a critical duration flood event is exceeded, flow from the outlet of a previously landlocked basin likely will have little downgradient impact, as the volume discharged from the basin will be only a small part of overall runoff volume downstream.

- The rule would add in the Definitions section a formal definition of "Outlet Control Structure," in particular that it is a permanent, rigid structure, and that riprap on an earthen berm is not such a structure. The rule then would add to the technical specifications of the stormwater rule (subsections C.9(a), .9(c) and .9(d)) that the design of an infiltration, biofiltration, filtration or retention practice must include such a structure. An earthen weir, whether armored with riprap or otherwise, has a higher risk of erosion from daily flows and is challenging to build with the necessary precision as to its elevation. A rigid structure as defined is one that is stable, and able to be constructed or installed to a precisely specified elevation.

- At subsection C.9(g), the stormwater rule requires that the low floor and low entry elevations of new structures be a certain height above the 100-year flood and emergency overflow elevations of an adjacent natural waterbody, stormwater basin or rain garden. With some regularity, the District board of managers is asked to consider a variance for the construction or reconstruction of a garage, shed or similar non-habitable structure that is constrained by site conditions and existing structures to meet this standard. The board ordinarily grants a variance in these cases, on the reasoning that the applicant, as the structure owner, bears the flood damage risk, and on the condition that a notation of non-conformance to the District rule is filed on the deed for the benefit of a future purchaser of the property. The District proposes to incorporate this framework into the rule, allowing District staff to judge the impracticality of meeting the standard, so that homeowners need not incur the expense and delay of seeking a variance from the board. The District also notes that its municipalities, as building code officials and flood insurance program participants, have primary authority for flood protection in construction and independently may apply the vertical separation requirements they think warranted. In applying this to structures "not intended for habitation," the District would rely on the municipality's definition of habitability.

<u>Clarifying and Simplifying</u>

The following revisions are proposed in order to clarify and simplify the rule. The clarifications, generally, will simply allow the rule to reflect, explicitly, the District's practice in implementing the relevant provision.

- Subsection C.2(c) states that a PLP requires a permit "when one acre or more of impervious surface will be created or reconstructed." This is ambiguous, as it could be read to mean that a permit is required only when either an acre or more of hard surface will be created, or an acre

or more will be reconstructed. The proposal revises the rule to be clear that a permit is required when the sum of new and reconstructed hard surface will exceed an acre. This is the threshold specified by the MS4 GP, the intent of the rule, and how the District has applied it.

- Subsection C.5(a), concerning the use of a regional stormwater management facility, would be clarified in two respects: (a) for any use of a regional facility, the applicant must document that the practice is subject to a maintenance commitment by the owner to the District; and (b) the applicant need not demonstrate a right to use the practice's "remaining" water quality volume, but only that amount of water quality volume that the applicant requires to meet the rule standard. Also, the rule would be revised to eliminate the applicant's obligation to show that the practice is in a maintained condition. The District has observed that when the practice is owned by a third-party, this can be difficult or infeasible. If a practice is not in a maintained condition, the District will pursue maintenance directly with the owner of the practice.

- Table C-1, implementing subsection C.6(c), states total phosphorus removal factors for alternative water quality volume practices. The District intends to remove "stormwater wetlands" from the table. A stormwater wetland generally is impractical and rarely is proposed as a practice. Removing stormwater wetlands from the table still allows an applicant to use this practice if the application supports sizing and a proposed pollutant removal efficiency.

- At subsection C.9(b), to simplify and for clarity, the District would consolidate the listing of external technical standards for stormwater reuse into a District guidance document.

- The District proposes to add, at subsection C.9(e), that the design of an underground stormwater management facility must include an inspection/access port. In practice, the District requires such a port, and this would give better notice to applicants. Ordinarily a port is shown on the manufacturer's typical detail drawing, but on occasion the port is excluded from the design engineer's plan and in the final construction. The port is important, used primarily for inspection and for suction hose access to remove sediment. Incorporating a port into the design is a minor element of the permittee's stormwater facility cost.

- At subsection C.9(f), the rule would provide more detail on soil data submittals required for a proposed infiltration practice. The indicated soil data details already are being required of applicants. The District needs these data in the context of a history of failing practices attributable to lack of information as to seasonal high-water table or other relevant conditions. The requirement is consistent with professional practice.

- Subsection C.12(a) exempts "single family residential construction" from the permit requirement. The term now would appear in the Definitions to make clear that it refers to residential construction on an individual lot of record. It does not refer to residential subdivision, or to construction on individual lots subdivided pursuant to a District permit.

- The District proposes to delete section C.13, which concerns certain types of development that occur over a period of time, referred to as "area development" and "phased development." Section C.13 provides for permits longer than the standard 18 months (B.6) and insulates a permittee against rule changes that otherwise would apply at a time of permit renewal. The

section is lengthy and somewhat complicated, and according to the District's records, no applicant has sought to utilize it in some time. The District has the discretion to authorize a longer permit duration in an appropriate case, so as to achieve the same purpose as the section.

**Erosion and Sediment Control Plans (Rule D)**

There has been some confusion and/or concern from some entities responsible for maintaining stormwater management basins that completing their required maintenance activities would trigger the need for a District permit. This confusion could potentially dissuade these entities from completing required maintenance in a timely manner.

To avoid this confusion, the proposed rule would add a new subsection D.2(e), clarifying that sediment excavation from a constructed stormwater basin is exempt from the Rule D permit requirement, even if it is subject to a permit under another District rule. As specified in subsection D.2(b), a notice of intent must be filed with the District before the work begins, so that the District is aware of the activity and that it is on record as exempt from permitting. If the excavation exceeds the thresholds of subsection D.2(b), best practices must be followed.

**Floodplain Alteration (Rule E)**

The District proposes four limited changes to the Floodplain Alteration rule.

Section E.3 now prohibits fill within designated floodway. Floodway is that part of a watercourse adjacent to the channel that conveys the majority of flow and is often subject to a higher degree of protection from encroachment than the rest of the floodplain. In the interest of simplifying the rule, this clause would be removed. The District has not designated "floodway" for the purpose of this rule, and it has not been necessary to apply this provision of the rule. In the judgment of the District Engineer, fill in a floodway poses no added risk as compared with fill within the floodplain when it is accompanied by compensatory flood storage or is of an inconsequential (*de minimis*) amount. Because the rule requires a permittee to provide compensatory flood storage for any fill in the floodplain above a *de minimis* amount, the District finds it unnecessary to prohibit fill within a narrower floodway.

Subsection E.3(b) would be modified to clarify that storage volume within a stormwater basin, above the basin's ordinary water level, does not count toward compensatory flood storage unless the applicant shows by modeling that the volume is available during the 100-year flood peak.

In its rule revision that became effective Jan. 1, 2021, the District added to the rule, at subsection E.3(e), an exemption from the flood storage replacement requirement for a one-time deposit of up to 100 yards of fill per parcel. The District proposes to allow this exemption to be used cumulatively for a parcel of record, rather than limiting it to a one-time deposition. This is consistent with the purpose of the exemption, will not increase the risk of downstream adverse impact due to floodplain fill, and will decrease the expenditure of time by both the applicant and District in demonstrating rule compliance.

The District will track the cumulative amount of floodplain fill on a parcel through documentation in each respective permit.

Present subsection E.3(g) requires that the low floor of a new structure be at least two feet above the 100-year flood elevation of a natural waterbasin, stream or wetland. Similar to the change to subsection C.9(g) as discussed above, the proposed rule would exempt structures on residential property not intended for habitation from this requirement, if the applicant demonstrates that it is impractical to achieve the separation, and files a notation of non-conformance on the deed.

**Wetland Alteration (Rule F)**

Under Minnesota Rules 8420.0233, an agency implementing the Minnesota Wetland Conservation Act (WCA) may adopt replacement requirements more strict than those specified in WCA. The District proposes to add, in a new subsection F.5(e), that when an applicant proposes to replace wetland impacts through the use of banked wetland credits, credits generated within District watershed boundaries must be used, if available. If such credits aren't available, the applicant may use credits generated within the larger Bank Service Area, as defined in WCA. WCA has required, first, the use of bank credits from within the same "minor watershed" as the impact, followed by major watershed, bank service area, and other bank service area. The major watershed as defined matches the District's boundary fairly closely. In a pending rulemaking, WCA requirements may be loosened to allow credits from anywhere within the same Bank Service Area. See Minn. Stat. §103G.222, subd. 3(c). However, the District considers it important to pursue "no net loss" of wetland resources within the hydrologic system encompassed by the District's boundaries.

The District also proposes a minor change to subsection F.7(b), which presently requires a wetland delineation supporting an application to have been conducted between May 1 and October 15. This would be revised to require the delineation "during the growing season." It is the District's intent that this allow more flexibility, so that delineation can occur whenever seasonal conditions allow it to be done accurately, and to avoid unnecessarily subjecting an applicant to project delay.

**Regional Conveyance Systems (Rule G)**

The District proposes two small clarifications to its Regional Conveyance Systems rule.

First, while the rule applies both to work that disturbs a conveyance system and work (such as utility boring) that passes beneath it, the rule's applicability section (section G.2) refers ambiguously to work "within" a system. The rule would add "within or under."

Second, subsection G.3(a) prohibits replacement of a culvert or other conveyance element with one that expands the system's hydraulic capacity; section G.6 grants an exception to this prohibition when certain technical criteria are met by modeling. The District proposes to make this exception more

flexible by amending subsection G.3(c) to allow a change in hydraulic capacity provided there is no adverse effect on "downstream flooding characteristics."

**Public Drainage Systems (Rule I)**

Pursuant to Minnesota Statutes §103E.005, subdivision 9, the District is the drainage authority responsible to maintain the 115 miles of public drainage systems (PDSs) within its boundaries. Pursuant to this responsibility, the District has adopted Rule I to protect against an obstruction within, or unauthorized alteration to, a PDS that may affect channel stability or its capacity to conduct flows.

Impact may result from work that encroaches on PDS channel or tile, whether that disturbance is permanent or temporary. It also may result from work or a structure (such as a temporary or permanent crossing) that doesn't physically disturb the PDS, but crosses it at a height that may obstruct flow under certain conditions or impede maintenance. However, the present rule, at I.2(a), states only: "No work may be completed on the public drainage system, including connecting to a public drainage system, without first obtaining a permit from the District." For clarity, the District proposes to revise this to read: "Temporary or permanent work in or over a public drainage system, including any modification of the system, requires a permit under this rule."

In addition, the District proposes a new subsection I.3(j) to address proposed temporary obstruction or crossing of a PDS for the purpose of property access during development or other activity. This new clause would require an applicant to specify how they will assure that this condition will not cause an obstruction in the event of a substantial rainfall or flow condition during the period of disturbance. The District may incorporate appropriate terms or conditions into the permit to ensure that PDS function and integrity are not impaired. Separately from managing temporary physical disturbance to a PDS, under subsection I.2(c) the District presently regulates temporary discharges into a PDS to protect channel stability and capacity.

Finally, in conjunction with revisions to the Stormwater Management rule as discussed above, the District proposes to delete subsection I.3(i), which requires as a condition of a Rule I permit that the permittee convey to the District a maintenance easement over the PDS. As discussed above, while the easement, recorded on the title, provides a benefit to the District and notice to potential successors in interest to the underlying property, the District is comfortable that it may exercise legal access to the PDS for maintenance purposes without it. The District has found that permits sought solely under this rule often are for minor work in instances where the burden to prepare and convey the easement may be excessive in proportion to the work being done.

**Enforcement (Rule K)**

The District proposes to add a section K.4 referencing the scope of its tools to respond to a violation of a permit or of its rules. In addition to civil and criminal court proceedings, the District has administrative authorities including the ability to enter and inspect properties, to issue compliance orders, to suspend

or terminate a permit, and to obtain reimbursement for costs incurred in these activities. The additional text wouldn't change the substance of the rules but would be for informational purposes only.

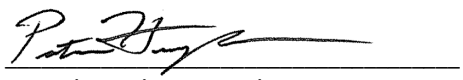
**Variances (Rule J)**

The District's variance rule, at section J.1, allows an applicant to request a variance on the basis of either "undue hardship" or "practical difficulty." The District proposes to delete reference to the "undue hardship" standard for a variance. This is not intended as a substantive change.

For many years, pursuant to statute, "undue hardship" was the legal standard for a variance under development codes administered by land use authorities. No statute specifies the variance standard for watershed districts, but districts, including the District, typically adopted the same standard. More recently, the legislature changed the legal standard for land use variances from "undue hardship" to "practical difficulty." Shortly thereafter, the District, instead of replacing "undue hardship," simply added "practical difficulty" as an alternative standard.

"Practical difficulty" is a less restrictive standard, resting not on whether the variance is needed for the property owner to obtain economic value from the property but, largely, on whether the applicant can demonstrate that the request is reasonable. Accordingly, to the District's recollection, since it added the practical difficulty standard, all variance applications have been put forward under that standard. The District finds that there is no reason to retain the "undue hardship" standard, and that the rule will be more simple without it.

Also, in section J.3, where the criteria to decide "practical difficulty" are listed, the District proposes, solely for clarity, to rephrase the present criterion, "The effect of the variance on government services." It would read, instead: " Whether the variance would shift cost to adjacent property owners or the public." The existing phrase is taken from case law and its meaning is obscure to permit applicants. The District believes the proposed language is more clear as to what the criterion means, and what the District board of managers will consider.



Patrick Hughes, Regulatory Manager