STATE OF MINNESOTA
BEFORE THE RICE CREEK WATERSHED DISTRICT BOARD OF MANAGERS

IN ITS CAPACITY AS DRAINAGE AUTHORITY UNDER MINNESOTA STATUTES CHAPTER 103E
FOR WASHINGTON COUNTY JUDICIAL DITCH 2 (JD2)

In Re: The Petition of the Minnesota Department of Natural Resources Under Minn. Stat. § 103E.227 to Impound Waters on JD2

RESOLUTION NO. 2014-06

RESOLUTION TO ADOPT FINDINGS, CONCLUSIONS AND ORDER APPROVING THE PETITION OF THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES TO IMPOUND WATERS ON JD2 BY PERMANENTLY MODIFYING THE DRAINAGE SYSTEM AND DRAINAGE SYSTEM PROFILE BY PLACING A SHEET PILE WEIR IN THE CHANNEL OF JD2 AT THE OUTLET OF RICE LAKE, PUBLIC WATERS #82-146P

February 12, 2014

Manager Daga offered the following Resolution and moved its adoption, seconded by Manager Waaman

WHEREAS, on February 12, 2013, the District received a petition from the Minnesota Department of Natural Resources (DNR) for an impoundment proceeding based on plans and specifications for a weir installed in the outlet of Rice Lake at elevation of 920.4 feet National Geodetic Vertical Datum of 1929 (NGVD 1929);

WHEREAS, by Resolution 2013-02 the Board of Managers accepted the petition and appointed its Engineer to investigate the effect of the installation and file a report of findings;

WHEREAS, by Resolution 2013-33 the Board of Managers acknowledged the filing of the Engineer’s report of findings and directed a hearing be set for November 20, 2013;

WHEREAS, the Board of Managers held a duly noticed hearing on November 20, 2013, which was continued by recess to February 12, 2014;

WHEREAS, upon hearing all testimony and comments at the November 20 public hearing, and considering the Engineer’s report of findings and all of the other information in the record;

THEREFORE BE IT RESOLVED that the Board of Managers makes the following Findings, Conclusions, and Order:
FINDINGS

1. The record of decision in this matter consists of the following documents made part of and incorporated in these Findings by reference:

- January 8, 2014 Minutes of RCWD
- Notices of Continued January 8, 2014 Public Hearing
- Letter to RCWD President from Ruth Waller Carr dated November 30, 2013
- Letter to RCWD Board from Quentin F. Marier (received December 3, 2013)
- JD2 Public Hearing Transcript, November 20, 2013
- JD2 Public Hearing Presentation, November 20, 2013
- JD2 Public Hearing Sign-In Sheet, November 20, 2013
- JD2 Public Hearing Notices for November 20, 2013 Hearing
- JD2 Public Hearing Notice for November 20, 2013 Hearing
- RCWD Resolution No. 2013-33—Resolution Filing the Engineer's Report and Findings and Authorizing to Setting a Date for a Public Hearing on the Petition and Direct the Notice for such Hearing for Impoundment Proceeding for Washington County JD2
- Engineer's Technical Memorandum for JD2 from Houston Engineering dated August 16, 2013
- RCWD Resolution No. 2013-02—Resolution Accepting Petition for Impoundment Proceeding for Washington County JD2
- RCWD Resolution No. 2013-01—Resolution Approving Permit to Repair Weir in Washington County JD2
- DNR Petition to Enter into an Impoundment Approval Process dated February 12, 2013
- Letter to DNR from RCWD dated February 1, 2013
- Letter to Division of Fish & Wildlife from RCWD dated March 14, 2013 regarding Impoundment Petition, Public and Public Benefit of Weir Installation
- Letter to RCWD from Cynthia Osmundson of the DNR dated June 28, 2013
- Letter to DNR from RCWD dated October 9, 2013 regarding DNR Petition to Modify Drainage System to Impound Waters
- Letter to RCWD from Tom Landwehr of the DNR dated November 6, 2013

2. The record of decision is contained in a compact disk entitled, "Petition of the Minnesota Department of Natural Resources Under Minn. Stat. § 103E.227 to Impound Waters on JD2: Record of Decision", which shall be filed with these findings.

3. The Minnesota Water Resources Board, now the Board of Water and Soil Resources, established the RCWD by Order on January 18, 1972.

4. In 1974, Washington County transferred to the District authority to administer all county and judicial ditches within its boundary according to statutes chapter 103E.
5. JD2 was established by Order of the Washington County District Court on April 12, 1909. JD2 is the altered natural watercourse of Hardwood Creek flowing north from Rice Lake within the City of Hugo.

6. Rice Lake is an inventoried public water designated #82-146P. Rice Lake has an established ordinary high water elevation of 922.5 feet NGVD 1929.

7. Maintenance of JD2 has been funded, under a policy of the RCWD, by ad valorem tax revenues generated by taxes on properties throughout the District. Since becoming the drainage authority for JD2, the RCWD has not made an assessment to benefitted property for any work performed on JD2.

8. Before 2001, the District had no as-built profile for JD2 to guide its maintenance decisions for the public drainage system. On May 9, 2001, the Board adopted an as-built profile for JD2. The adopted as-built profile of JD2 places the elevation of the ditch bottom at the location of the current, temporary weir at approximately 918 feet NGVD 1929.

9. The as-built alignment of JD2 does not extend south through the entire extent of Rice Lake. Rather, the as-built alignment extends south a few hundred feet and terminates in a semi-permanent mass of cattails and other aquatic vegetation.

10. On April 10, 2002, the Board accepted its own petition to repair JD2. In the spring of 2004, the District performed “minor maintenance” of a portion of JD2 near the outlet of Rice Lake. The scope of the maintenance was purposely limited so not to drain Rice Lake below levels deemed acceptable to the District and DNR.

11. Subsequent to the minor maintenance, DNR performed vegetation management activities in Rice Lake that included the removal of cattail mats near the outlet channel of the lake.

12. Subsequent to both the District’s minor maintenance activities and the DNR’s vegetation management activities, water levels in Rice Lake dropped below levels deemed acceptable by DNR.

13. In Fall 2005, pursuant to an order of the Washington County District Court sought by DNR, the District installed a temporary sheet pile weir at elevation 920.4 feet NGVD 1929 in JD2 downstream of Rice Lake, in order to reinstate the pre-existing condition of JD2 consistent with the District’s and DNR’s repair authorization.

14. Following the maintenance of JD2 performed by the RCWD and installation of the temporary sheet pile weir, water levels in Rice Lake remained approximately 1.5 below the water levels that had existed prior to the District’s maintenance.

15. On April 27, 2010, the District became aware of a breach allowing water to flow around the side of the sheet pile weir. In the course of examining the breach and assessing the
need for repair, the District Engineer observed that the regime of natural soil, sediment and vegetation conditions forming the effective outlet of Rice Lake before the 2005 washout had reestablished itself; and that the sheet pile weir no longer played a material role in controlling the water level in Rice Lake. The Engineer presented data and analyses in memoranda to the Board dated July 7, 2010 and October 21, 2010.

16. Notwithstanding the breach and reestablishment of natural soil, sediment and vegetation conditions forming the effective outlet of Rice Lake, water levels on Rice Lake remained approximately 1.5 feet below the water levels that had existed prior to the District’s maintenance.

17. On December 14, 2012, DNR applied to the District for a permit to repair the sheet pile weir. By resolution 2013-101, on February 13, 2013, the Board approved permit 12-101 allowing the weir as a temporary structure but requiring a petition and proceedings under statutes section 103E.227 for the weir to become a permanent modification of the drainage system.

18. For the current petition, DNR has, among other purposes, stated that the weir is necessary as a permanent modification of the drainage system in order to protect the outlet of Rice Lake from future failure or deterioration that would result in reduced water levels in Rice Lake.

19. By letter dated November 6, 2013, the Commissioner of Natural Resources confirmed that in any future drainage proceeding to repair JD2, DNR would not give its permission to modify the current sheet pile weir in any way that would permanently drain any portion of public water.

20. Statutes Section 103E.227 allows the state or a department or agency of the state to petition to impound, reroute, or divert drainage system waters for beneficial use. Purposes of a petition to impound drainage system waters can include to conserve and make more adequate use of our water resources or to incorporate wetland or water quality enhancements.

21. On February 12, 2013, the District received a petition from DNR for an impoundment proceeding based on plans and specifications for a weir installed in the outlet of Rice Lake at elevation of 920.4 feet NGVD 1929.

22. By Resolution 2013-02, the Board of Managers accepted the petition and appointed its Engineer to investigate the effect of the installation and file a report of findings.

23. By Resolution 2013-33, the Board of Managers acknowledged the filing of the Engineer’s report of findings and directed a hearing be set for November 20, 2013.
24. For its report of findings, the Engineer filed with the drainage authority a "Technical Analysis for the Impoundment Proceedings, Washington County Judicial Ditch 2, Rice Lake Water Control Structure (Weir)" dated August 16, 2013. For the purpose of these Findings, the report will be referred to as the Engineer's technical analysis.

25. The Engineer's technical analysis is part of the record of decision.

26. In preparing its technical analysis, the Engineer consulted and analyzed the following documents:

- Packet of Aerial Photos of Rice Lake
- Field Book Printout dated 1-10-02
- Weir Survey
- Elevation Aerial Photo of Rice Lake (listing owners)
- Elevation Aerial Photo of Rice Lake (detailed numbers)
- Elevation Aerial Photo Labeling Proposed Sheet Pile Weir at 920.4 Elevation
- Report of Blue Ribbon Task Force on JD2/Hardwood Creek Subwatershed Management Plan
- Pipeline at 450+00 Vertical Datum Profile
- Survey of Cross Sections of Anoka-Washington JD2
- Sheet Pile Weir Concept Design by Emmons & Olivier
- Rice Creek Watershed District Resolution 2010-38
- Rice Lake Weir Inspection Memo from Houston Engineering dated 5-27-10
- Rice Lake Outlet Technical Analysis Memo from Houston Engineering dated 7-7-10
- Rice Lake Weir Crest Elevation Memo from Houston Engineering dated 8-7-09
- Rice Lake Weir Repair Post Construction Elevation Shots from DNR
- Letter dated 11-24-10 memorializing Francis & Mary Ann Miron's interest in property benefitted by JD2
- Summary of Technical Issues of JD2 Temporary Weir Repair dated 11-24-10
- Summary of Technical Issues of JD2 Temporary Weir Repair dated 11-25-10
- Summary of Technical Issues of JD2 Temporary Weir Repair dated 11-26-10
- Public Questions Comments
- Public Drainage Ditch Inventory Form and Proposal dated 11-1-93
- Hydraulic Survey for JD2 by WSB dated 6-27-97
- Preliminary Report on Hardwood Creek (JD2) Profile from Montgomery Watson dated 6-10-98
- DNR Office Memorandum re: Proposed Maintenance for JD2 dated 7-31-98
- DNR correspondence re: Inspection Report, Channel Maintenance Hardwood Creek (JD2) dated 2-10-99
- Potential Impacts of Repairing JD2 on Public Waters and Public Water Wetlands by Dale Homuth (DNR) dated 7-28-00
- 100 Year Event Flood Impact Area of Washington County JD2 Survey by Geoffrey G. Griffin dated 7-24-00
- Field Survey Report of Rice Lake dated 4-24-00
- Evaluation of Washington County JD by Krebsbach & Haik and Griffin dated 7-31-00
- Project Summary of JD2 Ditch Profile Survey by Geoffrey G. Griffin dated 11-17-00
- Rice Creek SW Engineer’s Report on Washington County Judicial Ditch 2 (Hardwood Creek) dated 9-1-00
- Mediated Profile for JD2 from Montgomery Watson dated 11-2-00
- Minutes of Board of Managers Regular Meeting dated 4-25-01 and Project Summary of JD Ditch Profile Survey by Geoffrey G. Griffin dated 11-17-00
- Judicial Ditch 2 Culvert Replacement Project Construction Plans by Emmons & Olivier Resources dated 3-12-02
- Letter dated 5-15-02 from MN DNR in support of the Management Plan by Blue Ribbon Task Force
- Preliminary Draft Rehabilitation/Engineer’s Repair Report for Hardwood Creek/JD2 dated 10-20-03 by Emmons & Olivier Resources
- Preliminary Draft Rehabilitation/Engineer’s Repair Report for Hardwood Creek/JD2 January 2004 Revision by Emmons & Olivier Resources
- Letter dated 1-6-04 from MN DNR to Representative Vandeveer with update of DNR involvement
- Letter dated 7-26-04 from MN DNR to Emmons & Olivier Resources with detailed location of highpoint elevation for outlet of Rice Lake
- Washington County Judicial Ditch 2 Repair Report dated 10-29-04 by Emmons & Olivier Resources
- Additional Testimony to RCWD Board of Managers dated 11-20-04 from Margaret Waller, Edward Waller and John Waller
- Minutes of the 12-15-04 Regular Meeting of RCWD Board of Managers
- RCWD Board of Managers Findings on Hardwood Creek/JD2 Repair Petition dated 12-15-04
- Minutes of the 1-12-05 Regular Meeting of RCWD Board of Managers
- Draft Minutes of 1-14-05 Special Joint Meeting of RCWD Board of Managers and The Hugo City Council
- Status of Natural Gas Pipeline Crossing of JD2 Memorandum from Emmons & Olivier Resources dated 6-6-05
- Plan and Profile of 20-inch MNB 87701 for Northern Natural Gas by Egan, Field & Nowak
- JD2/Hardwood Creek Excavation from Rice Lake to 157th Street, Hugo Profile
- Elevation Breakdown Memo from John Scherek (Survey Crew Supervisor) to Travis Germundson (Area Hydrologist) dated 6-7-05
- Letter dated 6-16-05 from MN DNR to RCWD requesting outline for plan & timelines to remedy harm to Rice Lake
- MN DNR Public Waters Cease and Desist Order dated 9-8-05
- Certificate of Satisfactory Restoration from MN DNR dated 10-12-05
- Letter dated 10-12-05 from MN DNR requesting removal of misinformation on RCWD website
- RCWD Letter to Northern Natural Gas with notification of obstruction dated 10-17-05
- Email correspondence between Phillip Belfiori and Ken Powell dated October, 2005
- Update on Gas Pipeline Crossing of JD2 Memo from Emmons & Olivier Resources dated 2-17-06
- Letter from MN Board of Water & Soil Resources dated 4-3-06 with Outline of Maintenance to JD2
- Notice of Wetland Conservation Act Application for Impacts <10,000 Square Feet from WSB dated 8-8-06
- Minor Maintenance Project 2006/2007 JD2 Aerial Photos and Profile by WSB
- Notice of Wetland Conservation Act Decision dated 8-21-06
- RCWD letter to Representative Rick Hansen providing information to clarify information provided by Waller and Miron
- Washington JD2 Maintenance & Inspection Log Book
- Notice of Motion and Motion to Define the Nature and Scope of the Taking dated 7-24-09
- Consolidated Cases Findings of Fact and Order dated 6-10-11
- The Mirons' Memorandum of Law in Support of Motion to Define the Scope of the Taking dated 7-24-09
- Fourth Affidavit of Francis Miron dated 7-24-09
- Affidavit of Geoffrey Griffin dated 7-24-09
- Affidavit of Steve Hobbs dated 9-20-05

27. The documents consulted and analyzed by the Engineer in making its technical analysis are contained in a compact disk entitled, “Petition of the Minnesota Department of Natural Resources Under Minn. Stat. § 103E.227 to Impound Waters on JD2: Engineer’s Appendix”, which shall be filed with these findings.

28. The drainage authority finds, based on its own knowledge and review of the documents consulted and analyzed by the Engineer, that the conclusions of the Engineer, as set forth in the technical analysis, are reasonable and supported by substantial evidence. Therefore, the drainage authority adopts the Engineer’s technical analysis and incorporates it into these Findings by reference.

29. Notice of the Impoundment Hearing was given pursuant to Minnesota Statutes Sections 103E.227 and 103E.261 and according to RCWD internal protocols.

30. Statutes Section 103E.261 requires that at least ten days before the hearing, the drainage authority shall give notice by mail of the time and location of the hearing to the petitioners, owners of property, and political subdivisions likely to be affected by the proposed modification of the drainage system.
31. The Board provided notice of the hearing as follows:

- On 11/4/2013 mailed 10-day notice to affected parties, cities, agencies & parties requesting notice
- Provided email notice of the hearing to RCWD email notice subscribers on 10/10/2013
- Posted notice of the hearing on the RCWD website under public notices section on 10/10/2013
- Posted notice of the hearing at the RCWD office on 10/10/2013
- Published notice in:
  - Pioneer Press (RCWD official newspaper): October 27th, November 3, and November 10th.
  - The Citizen: October 17 and 31, November 14

32. The notice provided was substantially as follows:

Rice Creek Watershed District
Washington County Judicial Ditch 2 Public Hearing

PLEASE TAKE NOTICE that the Rice Creek Watershed District (RCWD) Board of Managers, Drainage Authority for Washington County Judicial Ditch 2 (JD 2) will hold a public hearing on the Minnesota Department of Natural Resources' (DNR) petition to permanently modify JD2 in the City of Hugo by installing a weir to impound waters in Rice Lake. The hearing will be held at 6:30 p.m., Wednesday, November 20, 2013 in the City of Hugo Council Chambers, 14669 Fitzgerald Ave. N., Hugo, MN. The District Engineer's report of findings regarding the effect of the weir installation can be viewed on the District's web-site: www.ricecreek.org or at the District office in Blaine, MN. Those interested in the petition may appear and provide comment or may submit written comments by the date of the hearing to Phil Belfiori at: pbelfiori@ricecreek.org, phone: 763-398-3071 or mail: 4325 Pheasant Ridge Dr. NE, Suite 611, Blaine, MN 55449.

33. The drainage authority received public comment at the hearing on November 20, 2013. The Board closed the public testimony portion of the hearing but left the written comment period open until 5:00 p.m. on December 11, 2013. After closing the public testimony portion of the hearing, the drainage authority adopted a motion directing staff to prepare findings and an order consistent with the proceedings, including responses to all comments received through the public comment process; also directing that, unless further written comment cast substantial doubt on the evidence presented, the draft findings and order be written to grant the petition of the Department of Natural Resources to impound waters of Washington County Judicial Ditch #2 with conditions as suggested by the Engineer; and recessing the hearing to the Board's regular meeting on January 8, 2014, at 9:00 a.m., or by adjournment to an appropriate time on the Board's agenda, in the Council Chambers at the City of Shoreview, at which meeting the Board
would consider findings and an order for the proposed modification of the drainage system.

34. A quorum of the Board was not present to act on the petition at the Board’s regular meeting on January 8, 2014. Therefore, the hearing was further recessed to the Board’s regular meeting on February 12, 2014, at 9:00 a.m., or by adjournment to an appropriate time on the Board’s agenda, in the Council Chambers at the City of Shoreview.

35. Because of the extended elapse of time between the original public hearing date and the second, continued date, the Board provided additional notice of the continued hearing in the same manner as the original notice.

36. At the public hearing, the Engineer presented and described its analysis of the impact of the proposed permanent modification of JD2.

37. The Engineer performed its investigation of the effect of the installation to determine (1) whether the modification of the drainage system would impair the utility of the drainage system or deprive affected landowners of its benefit; and (2) whether flowage easements would be required from any landowners due to the modification of the drainage system.

38. The Engineer concluded, based on the evaluation criteria established for its review, that the modification of the drainage system would not impair the utility of the drainage system or deprive affected landowners of its benefit and that flowage easements would not be required from any landowners due to the modification of the drainage system.

39. During the public hearing, comments were received from the following persons:

- Ruth Waller Carr, Letter dated November 30, 2013
- Quentin F. Marier, Birchvale Farm, undated letter received by the RCWD on December 3, 2013
- Mr. Francis Miron, oral comments
- Ms. Alice Waller, oral comments
- Ms. Cynthia Osmundson
- Mr. Gene Zerwas
- Ms. Kerrin Ptacek
- Mr. John Waller, oral comments

40. Ms. Waller-Carr asked whether Rice Lake could “be mucked out like the ditch was cleaned out?”

41. The drainage authority is responsible for managing the public drainage system on behalf of the landowners. Original construction of the public drainage system open channel stopped short of (north) of the Miron/Department of Natural Resources’ (DNR) property
line. The District lacks the legal authority to "muck out" the lake. However, maintenance of the open channel between the weir location and the southern legal limit of excavation, to ensure the weir becomes the sole control for water levels within the lake, could reduce the duration of high water following runoff events within Rice Lake.

42. Mr. Marier comments that the high water levels in Rice Lake have affected his woods to the extent of killing the tamarack trees and birch trees. There now exists a larger cattail bog. There will be bog where trees grow now [if the weir becomes a permanent modification of the drainage system].

43. The issue before the drainage authority is whether the permanent modification of the elevation of the open channel of the public drainage system at the weir location impairs the utility of the public drainage system, or requires flowage easements. Measured water levels within Rice Lake are available for assessing the effect of the weir. Measured water levels are available beginning in 1998. The weir was installed in late 2005.

44. Measured water levels within Rice Lake imply no effect of the weir on lake levels, a loss of drainage quality, or an increase in the frequency of flooding when compared with prior conditions. Measured water levels within Rice Lake prior to 2005 were consistently higher than after 2005. The median lake level prior to 2005 generally exceeded 921.5 (1929 datum). The median lake level following 2005 has generally been near 920.5, slightly above the crest elevation of the weir. Lake levels were lowest in 2005 and 2012. The median lake level declined rather than increased, following maintenance of JD2 and weir construction in the fall of 2005. The 75th percentile and 90th percentile lake levels also declined after weir construction, rather than increase, as expected if flooding increased. The maximum lake level measured each year (i.e., the annual maximum series) has declined rather than increased since installation of the weir.

45. During the public comment portion of the Washington County JD2 Impoundment proceedings, Mr. John Waller orally commented about the measured water level data. He suggested that use of the measured water level data to reach conclusions about the effect of the weir on lake levels is flawed, because the data is affected by the downstream culvert replacements and channel maintenance activities which occurred beginning in 2002 and ending in 2005. The District Engineer represented during the hearing that if the weir caused flooding or higher water levels in general, then this should be reflected in the measured water levels data for Rice Lake (i.e., the measured water levels should increase after weir installation). The District Engineer did not claim that the weir caused lower water levels, simply that an increase in water levels should occur if the weir has an effect unrelated to climate.

46. It is possible that the combined effect of the culvert replacements and the completion of maintenance masked a water level increase caused by weir installation in late 2005, but if this is the case, then the water level increase caused by the weir is small (and immeasurable) compared to the change resulting from the combined effect of culvert
replacement and maintenance. The 157th Street, 165th Street, 170th Street and Harrow Avenue culverts were replaced in late 2002 / early 2003. These culverts were basically placed at the as-constructed elevations. The RCWD 2004 Wetland Conservation Act (WCA) Application for Certificate of No Loss or Exemption (unsigned copy dated Feb 18, 2001) shows sediment removal was planned within two areas during 2004: 1) upstream and downstream of 157th St. N.; and 2) downstream of 170th street. Sediment removal occurred generally throughout the system during 2005 from downstream of the current weir location downstream north to Harrow Avenue. According to the RCWD 2005 drainage system inspection report, the 2005 maintenance involved removal of 1 to 3 feet of sediment and debris resulting in a ditch bottom that is 1 to 3 feet above the official profile elevation. The DNR also operated a machine called a “cookie cutter” within Rice Lake upstream of the current weir location in 2005. The current District Engineer has previously represented that the combination of maintenance activities caused the lake level to fall.

47. The data clearly shows, however, that water levels following installation of the weir, are lower than prior to weir installation. Therefore, this is no evidence that the weir caused tree mortality as suggested by Mr. Marier. Dr. S. Verry, in a letter dated November 16, 2004 to Mr. Brett Emmons, concluded that a half foot rise in water levels during the growing season sufficient to submerge the root crown is sufficient to kill mature peatland conifers if the water levels are sustained over a period of two weeks during the growing season. Dr. Verry provided an opinion that tamarack mortality occurred during the 1993 high water condition or sometime previous to 1993.

48. Mr. Marier further commented that “The 920.4 water level at the weir is meaningless.”

49. The 920.4 elevation is believed to be the elevation of the channel blockage which controlled the water runout elevation from Rice Lake, prior to the lowering of water levels in 2005. The weir was intended to replace the runout conditions in place prior to 2004.

50. Ms. Osmundson spoke on behalf of the DNR and commented that restoration of the weir provides a safeguard against a future lowering of the lake below the historic lake level. Maintaining the historic level of Rice Lake will provide numerous public benefits, including providing critical habitat for waterfowl and other species; protecting the public investment of the Paul Hugo Farms WMA; providing a quality opportunity for public hunting in an urbanizing region where public hunting opportunities are becoming scarce; providing a basin of surface water storage to lessen downstream flooding; and promoting groundwater recharge in an area where aquifers are impacted by growth and development.

51. Mr. Zerwas commented that when he bought his property in 1985 he was able to mow hay and cannot anymore. He further complained about the process being followed by the drainage authority and said that he would like to use his low-lying property to create ponds.
52. The historic water level measurements for Rice Lake do not support Mr. Zerwas' comments. Water levels prior to 2005 were approximately 1.5 feet higher than they are today. The drainage authority is following the drainage system impoundment process found in Minnesota Statutes to ensure that the property interests of landowners benefitted by the ditch are protected and to ensure owners have a process to present evidence of possible harm. Nothing resulting from these proceedings would prevent Mr. Zerwas from seeking permits to create ponds on his low-lying property.

53. Ms. Ptacek commented that she is concerned that she be able to sell her land in the future without concern for flooding.

54. As previously found, water levels on Rice Lake are approximately 1.5 feet lower now, even with the weir in place, than they were prior to 1995. The Engineer has recommended, as a condition to the possible grant of the DNR's petition, that a channel to open water be maintained between the open water portion of Rice Lake and the weir. Such a condition would ensure that the weir provided the sole hydraulic control of the outlet of Rice Lake and provide more predictable and stable lake levels in Rice Lake – further reducing the risk of flood damage to adjacent properties.

55. Mr. Miron commented that there are tile lines on adjoining properties [to Rice Lake]. There are lateral ditches that depend on not the maintenance profile, but the official profile to function as they were constructed.

56. Aside from this comment, Mr. Miron provided no specific examples of drain tile that would be obstructed by the presence of the weir. Again, the current water levels on Rice Lake are approximately 1.5 feet lower than water levels existing prior to 2005. The condition with the weir in place is being compared to a baseline condition of repair using the extent of minor maintenance authorized by the drainage authority in 2004. The analysis shows no change in the water levels. Therefore, there is no change in drainage quality from privately connected tiles and open channels compared to the baseline condition.

57. Mr. Miron criticized the Engineer's comparison criteria and noted various hydraulic and drainage studies that were completed for the District by prior engineers that showed over 100 acres impacted by the weir – noting that those studies did not assume the maintenance profile, but assumed an as-built. G-Cubed [another engineering firm hired by Mr. Miron] also did extensive work and that also was based on the official profile.

58. The previous estimates of the amount of land inundated because of the weir as referred to by Mr. Miron is based on a comparison that differs from what presently is being used (i.e., Ongoing Minor Maintenance without the weir and Ongoing Minor Maintenance with the weir) for these proceedings and inconsistent with the current findings issued in 2004 by the Board of Managers for repair using Ongoing Minor Maintenance.
59. The information Mr. Miron refers to is based on an email dated January 19, 2004 from Mr. Kent Brander to Mr. Brett Emmons (EOR). The baseline for comparison referred to by Mr. Miron is for a normal water level in Rice Lake of 919.2 (presumably repair to the as-constructed and subsequently improved condition) and a 100-year flood elevation 921.24. Returning the runout elevation to a pre-2004 maintenance condition and the normal water level of 920.4 in Rice Lake (either by natural causes like sediment accumulation and beaver dams or the weir) resulted in an estimated 100-year elevation of 921.88 (and an estimated 110.3 acres).

60. The District Engineer concurs with the previous studies which indicate a loss of drainage function assuming a baseline condition of the as-constructed and subsequently improved condition. However, the drainage authority must balance the reasonably attainable drainage efficiency of JD2 with the environmental impacts of actions taken relative to the drainage system. The drainage authority, working with the DNR, achieved this balance in 2004 when it determined that a limited extent of maintenance, referred to by the Engineer as Ongoing Minor Maintenance, was proper for JD2 near the outlet of Rice Lake. It was the failure of the outlet after the combined maintenance actions of the drainage authority and the vegetation management actions by the DNR that damaged the historic runout elevation and threatened Rice Lake. Ultimately, a weir was placed in JD2 to protect the lake and secure its outlet. The Engineer’s analysis indicates that impacts associated with the weir, as a permanent modification of the drainage system, remain below the established ordinary high water level of Rice Lake and do not cause the conversion of any upland areas adjacent to the lake to wetland. Additionally, the Engineer’s analysis indicates that while maintaining the drainage system to its as-built profile will reduce ordinary lake levels on Rice Lake, it will not prevent inundation of adjacent property in large storm events and will not create any new upland areas from current wetland.

61. Mr. Miron asked that the Board order creating Ongoing Minor Maintenance be included in the record.

62. What constitutes “Ongoing Minor Maintenance” can be followed through the records for the drainage system proceedings, and therefore was sufficiently described and ordered as the repair regime by the Board of Managers by vote on December 15, 2004. These documents are included in the Engineer’s appendix to these findings.

63. The concept of maintenance is described in the three versions of the Repair Report (October 20, 2003; January 2004; and finally October 29, 2004). The elevation of the open channel downstream of the weir is shown for “Option 2” in Figure 27 of the January 2004 revision as the “Balanced Focus” and is representative of the maintenance profile. Figure 27 shows an open channel bottom elevation generally 1-2 feet above the elevation for the as-constructed and subsequently improved condition. The subsequent October 29, 2004 Engineer’s Report defines maintenance on page 15, maintenance is shown in Figure 5 on page 19 and is further referenced on Page 40. The December 15, 2004 findings establish Ongoing Minor Maintenance as the regime for repairing the public drainage system. The
RCWD 2004 WCA Application for Certificate of No Loss or Exemption shows sediment removal was to occur within two areas: 1) upstream and downstream of 157th St. N.; and 2) downstream of 170th street. The application includes a maintenance profile that generally matches the channel profile described as Option 2 (Figure 17), within the January 2004 revision, although there are some differences. The August 8, 2006 WCA application from the City of Hugo contains engineering plans showing “minor maintenance”.

64. Mr. Miron suggested that any decision to maintain the drainage system to a condition less than the as-built condition would require an abandonment proceeding.

65. Abandonment of the public drainage system is not applicable, as the public drainage system continues to provide a drainage benefit to landowners. Additionally, the case of Slama v. Pine County, A07-1091 (Minn. Ct. App. 2008), recognizes the drainage authority’s discretion to determine an appropriate scope of maintenance.

66. Finally, Mr. Miron asked whether there are any other ditches administered by the drainage authority where a maintenance profile was created which differed from the as-built or official profile.

67. The Board of Managers periodically considers and establishes an elevation of the open channel which is higher than the As-Constructed and Subsequently Improved elevation; i.e., the repair profile differs from the As-Constructed and Subsequently Improved profile. A recent example is Branch 1 of ACD 53-62 within the area of Lochness Lake, where the repair elevation at the lake is higher than the As-Constructed and Subsequently Improved elevation to avoid adverse impact to Public Waters.

68. Ms. Alice Waller commented that she believed that she has lost use of her property because the weir creates high water conditions on her property. During her comments she also referenced a ditch on her property needing maintenance.

69. It is possible that wetter conditions adjacent to Rice Lake are the result of private drainage ditches connected to JD2 being in disrepair. As discussed above, the water levels on Rice Lake are and continue to be 1.5 feet lower than those that existed prior to the drainage authority maintaining JD2. The Engineer’s analysis indicates that impacts associated with the weir, as a permanent modification of the drainage system, remain below the established ordinary high water level of Rice Lake and do not cause the conversion of any upland areas adjacent to the lake to wetland. Additionally, the Engineer’s analysis indicates that while maintaining the drainage system to its as-built profile will reduce ordinary lake levels on Rice Lake, it will not prevent inundation of adjacent property in large storm events and will not create any new upland areas from current wetland.
70. Mr. John Waller commented on the Engineer’s acknowledgment that “It is plausible that landowner observations are real and simply reflected neither in the previous modeling analysis nor the measured lake levels.”

71. The quoted portion of the Engineer’s technical analysis, p. 36, explains the basis of the Engineer’s low flow analysis to determine the weir’s impact in low water conditions.

72. Mr. Waller commented that the Engineer’s analysis seems to suggest that installation of the weir actually made water levels decrease in Rice Lake.

73. The District Engineer did not imply installation of the weir reduced the water levels in Rice Lake. The District Engineer stated that if the weir increases water levels it should be reflected in the measured water elevations within Rice Lake. As explained in the response to Mr. Marier’s comments, the data clearly shows that water levels following installation of the weir, are lower than prior to weir installation. This reflects the effect of maintenance of the drainage system and the fact that improved drainage conditions are achieved even with the weir in place.

74. Mr. Waller asked whether the modification of the drainage system will cause a permanent conversion of his property by causing it to be wetter.

75. A change in wetland type would be driven by an increase in water elevation within Rice Lake and more saturated soils. The technical analyses show with reasonable certainty a lack of increase in the Rice Lake water levels as a result of the weir compared to the baseline condition of Ongoing Minor Maintenance with no weir in place. This is because the open channel upstream of the weir is currently unmaintained, and has a bottom elevation at or near the weir crest elevation of 920.4. To ensure that future accumulations of cattail mats and sediment do not cause a harmful increase in the Rice Lake elevation and result in the damages of concern to Mr. Waller, and to ensure that the weir, and not some lack of maintenance conditions, is the sole hydraulic control for Rice Lake, the Engineer recommends, as a condition to any grant of the DNR’s petition, that the drainage authority be authorized by DNR permit to maintain a channel to open water of Rice Lake.

76. Mr. Waller commented that “Mr. Griffin, in an affidavit that was written for my mother when she was alive, had wrote, ‘The weir – the installed weir is more than 1400 feet further downstream from the highest point which was previously a controlled discharge. By moving this point downstream, the area encompassed within will likely – normal water elevation will expand and permanently flood portions of the Waller Farm. The weir is obstructing the drainage system. And by changing the run-out location, altered and expanded the basin for its hydrological footprint, more land will be permanently under water. The installed weir does not restore existing conditions. The installed weir changes the character of flooding to a permanent condition.’''
77. No single location currently controls or historically controlled neither the normal water level within nor the rate which water leaves Rice Lake. Historically, the location of the “high spot” most influencing the normal water level and the rate which water leaves Rice Lake, has moved through time, as indicated in the DNR 2000 Field Survey Report and related correspondence with the DNR relative to the runout “location.”

78. Failure to place the weir in the **exact** location may or may not result in a local area of the wetland complex which becomes wetter. This would occur **only** if the weir were placed upstream of the runout location. It would not occur if the weir were place downstream of the runout location. The weir location is to the best available knowledge of the drainage authority at the location of the runout prior to maintenance in 2004. As mentioned above, the Engineer recommends, as a condition to any grant of the DNR’s petition, that the drainage authority be authorized by DNR permit to maintain a channel to open water of Rice Lake so that the weir will serve as the sole hydraulic control of the lake outlet.

79. Mr. Waller noted that prior engineering studies used a baseline elevation 919.2 to determine impacts associated with an outlet weir and that those studies concluded a large area of impact.

80. As explained in the response to Mr. Miron, the previous estimates of the amount of land inundated because of the weir are based on a comparison that differs from what presently is being used (i.e., Ongoing Minor Maintenance without the weir and Ongoing Minor Maintenance with the weir) for these proceedings and inconsistent with the current findings issued in 2004 by the Board of Managers for repair using Ongoing Minor Maintenance.

81. The drainage authority is balancing the reasonably attainable drainage efficiency of JD2 with the environmental impacts of actions taken relative to the drainage system. The drainage authority, working with the DNR, achieved this balance in 2004 when it determined that a limited extent of maintenance, referred to by the Engineer as Ongoing Minor Maintenance, was proper for JD2 near the outlet of Rice Lake. The Engineer’s analysis indicates that impacts associated with the weir, as a permanent modification of the drainage system, remain below the established ordinary high water level of Rice Lake and do not cause the conversion of any upland areas adjacent to the lake to wetland.

**CONCLUSIONS**

A. Based on the record, the DNR has demonstrated that its proposed permanent modification of the grade of JD2, by placing a sheet pile weir in the channel of JD2 at the outlet of Rice Lake, Public Waters #82-146P, is of public benefit.

B. Based on the record and comments and testimony received during the public hearing process, the proposed permanent modification of the grade of JD2, by placing a sheet pile weir in the channel of JD2 at the outlet of Rice Lake, Public Waters #82-146P, at elevation
920.4 feet NGVD 1929, will not impair the utility of the drainage system or deprive affected landowners of its benefit.

C. "Impairment of the utility" of the drainage system is not merely an evaluation of whether the installation will affect any change to the function of the drainage system. Rather, the phrase goes to an analysis of whether functional performance of the drainage system to provide beneficial drainage is impaired. The phrase must be read in the context of the second factor, "deprive affected land owners of its [the ditch's] benefit." The Engineer's technical evaluation analyzed the impact of the proposed modification under this standard.

D. Based on the record and comments and testimony received during the public hearing process, the proposed permanent modification of the grade of JD2, by placing a sheet pile weir in the channel of JD2 at the outlet of Rice Lake, Public Waters # 82-146P, will not cause any substantial impairment of property rights or values that would require the acquisition of flowage easements or other property rights.

E. The drainage authority's prior repair order limited the scope and elevation of repair in order to maintain the then-existing outlet elevation for Rice Lake. The function and efficiency of the drainage system anticipated by the prior repair order is reflected in the 2004 repair report. At present, the scope of repair and attendant conditions previously ordered is the only record action of the drainage authority indicating a scope of future maintenance. This scope was later reduced to agreement with the City of Hugo as a repair profile and minor maintenance regime. Subsequent action of the drainage authority, consistent with the District's drainage strategy, as contained in the Watershed Management Plan, is required before any repair of the drainage system to the as-built condition could occur. The drainage authority has discretion to determine the manner in which the ditch will be maintained. **Slama v. Pine County, A07-1091 (Minn. Ct. App. 2008).**

F. The DNR has established an Ordinary High Water (OHW) elevation for Rice Lake. Riparian rights below the ordinary mark of high-water are subject to the superior right of the public, and a taking thereof by the State for a public use, as by raising the waters of a lake for public purposes, does not cause a compensable taking. **Mitchell v. St. Paul, 225 Minn. 390, 394-397 (Minn. 1948).**

G. The Engineer's analysis shows that impacts from the proposed modification are contained below the established OHW.

H. The DNR has secured all permits necessary for its proposed project.

I. No part of the drainage system located within the project boundaries is in need of repairs and, therefore, there are no separable repair costs that will be avoided as a result of the petitioned project.
J. The drainage authority recognizes that its proceedings and its decision are quasi-judicial in nature and that any decision arising out of its proceedings will be reviewable by application to the Court of Appeals.

ORDER

1. The Petition of the Minnesota Department of Natural Resources to impound waters on Washington County Judicial Ditch 2 by permanently modifying the drainage system and drainage system profile by placing a sheet pile weir in the channel of the drainage system at the outlet of Rice Lake, Public Waters 382-146P, at elevation 920.4 feet NGVD 1929, is GRANTED.

2. The authority to permanently modify the drainage system is granted only for the modification indicated in the engineering plans and specifications included in the petition.

3. The authority to permanently modify the drainage system is conditioned on the DNR's issuance of a permit to the drainage authority to maintain a channel to open water from the weir southward to the open water portion of Rice Lake. Said permit is to be issued for the purpose of ensuring that the weir provides the sole hydraulic control of the outlet and of water levels in Rice Lake.

4. The DNR is solely responsible for construction, operation, and maintenance of the drainage system modification according to the engineering plans and specifications included in the petition.

5. The drainage authority may, in its discretion, provide funds to establish and maintain the channel to open water to ensure that the weir provides the sole hydraulic control of the outlet and of water levels in Rice Lake.

6. Those portions of Rice Creek Watershed District permit 12-101 and Resolution 2013-01 indicating approval of the current weir as a temporary modification of the drainage system are superseded by this order which allows the weir to be placed as a permanent modification of the drainage system.

7. The drainage system record shall reflect the permanent modification of the drainage system granted herein.
The question was on the adoption of Resolution 2014-06 and there were 3 yeas and 0 nays as follows:

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Upon vote, the Chair declared the Resolution passed.

Dated: February 12, 2014

Harley Ogata, Secretary

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I, Harley Ogata, Secretary of the Rice Creek Watershed District, do hereby certify that I have compared the above resolution 2014-06 with the original thereof as the same appears of record and on file with the District and find the same to be a true and correct transcript thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand this 12th day of February, 2014.

Harley Ogata, Secretary