



SEPTEMBER						
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RCWD BOARD OF MANAGERS WORKSHOP

Friday, September 8, 2023, 9:00 a.m.

**Rice Creek Watershed District Conference Room
4325 Pheasant Ridge Drive NE, Suite 611, Blaine, Minnesota**

or via Zoom Meeting:

<https://us06web.zoom.us/j/84617296460?pwd=M2thSi9aRjJCM25PeFlqMTd0OUR4Zz09>

Meeting ID: 846 1729 6460

Passcode: 169183

Dial by your location +1 312 626 6799 US (Chicago)

Meeting ID: 846 1729 6460

Passcode: 169183

****Note Date Change****

Agenda

ITEMS FOR DISCUSSION (times are estimates only)

- 9:00 Metro Shooting Settlement
- 10:00 In Lake Treatments
- 10:30 Staff Performance – Closed Session
- Administrator Updates (If Any)

9:00 Metro Shooting Settlement

MEMORANDUM

Rice Creek Watershed District



Date: August 31, 2023
To: RCWD Board of Managers
From: Nick Tomczik, Administrator
Subject: Metro Shooting Settlement Administration

Introduction

The Board of Managers is being asked to reach a consensus as to an administrative implementation of the Metro Shooting settlement.

Background

At its June 12, 2023 workshop meeting, the Board of Managers discussed how the Rice Creek Watershed District should understand its obligations under the 2005 settlement agreement with Metro Shooting Center Corp. (MSCC). The District administrator and legal counsel presented an implementation framework for the Board's consideration.

At the close of discussion, the Board was not yet prepared to concur in the administrator's recommendation. By consensus, it directed the administrator, working with counsel and the District engineer, to return to the Board with draft correspondence to the Wilders or relevant points in another form, in order to continue to develop its view of settlement agreement implementation. The present agenda item includes a memorandum from counsel that, as the Board requested, brings "relevant points" to continue the Board's discussion, and a draft letter to Rick Wilder.

Since the June workshop, RCWD staff has met with City of Blaine staff and provided an update on our implementation efforts and discussed the city's obligations per the settlement agreement. RCWD staff also conversed with Mr. Wilder regarding the recent tilling on the Metro Shooting property and reaffirmed that the implementation discussion would be brought back to our Board of Managers in September.

Recommendation

Staff recommends that the Board work to consensus on the framework for implementation of the Metro Shooting settlement. If managers have additional questions that need to be discussed in order for the Board to resolve its position, I encourage you to bring these to my or counsel's attention, before or during the September 11, 2023 workshop discussion.

Request for Board Discussion and Consensus

Staff requests Board discussion and consensus on the framework for implementation of the metro shooting settlement and proposed landowner letter.

Attachments

Smith Partners Metro Shooting Settlement Memo
Draft RCWD Landowner Guidance Letter



250 Marquette Avenue South
Suite 250
Minneapolis, MN 55401
(612) 344-1400 tel

www.smithpartners.com

MEMORANDUM

TO: Rice Creek Watershed District
Board of Managers
FROM: Chuck Holtman
RE: Metro Shooting Settlement Agreement Implementation
DATE: August 31, 2023

On June 12, 2023, the Board of Managers, at its workshop meeting, discussed the framework to implement the District's 2005 settlement agreement with Metro Shooting Center Corp. (MSCC). The basis for the discussion was a June 6, 2023 memorandum from the District administrator recommending a framework to implement the agreement. At the close of discussion, the Board had not reached a consensus with respect to the recommended framework.

Managers did not present specific questions about the recommended approach. However, the managers' discussion suggested that the following are two elements in implementing the settlement about which managers may be unresolved. By explicitly formulating and focusing on these questions, we hope to advance the Board's path to a consensus position. For your reference, and consistent with the Board's direction, the full framework itself is set forth in the draft letter to Rick Wilder that is in the workshop meeting packet as well.

Element 1: If the U.S. Army Corps of Engineers (USACE), implementing the Clean Water Act ("Section 404"), requires wetland impact mitigation in order for the owner to assemble 100 acres of contiguous non-wetland, the District is not responsible for the cost of that mitigation.

MSCC might assert that if the USACE, under Section 404, and the District, implementing the Minnesota Wetland Conservation Act (WCA) and its own Rule F, both require impact mitigation, then the District should bear the responsibility for that mitigation. In other words, the settlement would be read so that MSCC would be responsible for only that portion of Section 404 mitigation in excess of the WCA/Rule F requirement.

On the basis of the settlement context, counsel does not find this to be a sound reading of the settlement. The District had just adopted the Village Meadows Comprehensive Wetland Management Plan (CWMP) and its implementing rule (Rule M) as a substitute for standard WCA rules. The CWMP was in the nature of a negotiation between the District and the landowners within the CWMP boundary, to resolve longstanding disputes about maintenance of Anoka County Ditch (ACD) 53-62. The landowners agreed to an ACD 53-62 official profile of 891.46. In exchange, they would benefit from the CWMP plan that afforded each landowner a certain development footprint. The District determined the approximate area of each landowner's development footprint by aggregating strips of drained land that the District's engineer estimated (through modeling) would result from a repair of ACD 53-62 to the official profile.

By this calculation, MSCC was afforded 100 acres of contiguous non-wetland. The MSCC attorney requested the settlement term stating this entitlement so that MSCC could not be divested of it by a later District action revising the CWMP or Rule M. The following language in the settlement agreement is explicit that the purpose is to protect MSCC from a wetland impact mitigation cost that is the result of a change in the CWMP or the rule (emphases added):

The Rice Creek Watershed District agrees that under Rule M and this Agreement, Plaintiff is entitled to a minimum of one hundred (100) non-wetland acres; and that any future change in the Rice Creek Watershed District's Rule M and the CWMP or the interpretation or application thereof shall not reduce this entitlement of Plaintiff and the Property. The Rice Creek Watershed District will provide for any additional replacement acres required by the Wetland Conservation Act and Rule M as the result of wetland impacts on Plaintiff's Property.

In the settlement, the District agreed to use its "best efforts" to persuade the USACE to align its Section 404 review with the District's CWMP framework. But, quite explicitly, the District disclaimed responsibility for a USACE decision not to align its review, and for wetland impact mitigation that the USACE, consequently, might impose:

This Agreement deals solely with wetland issues within the authority of the Rice Creek Watershed District.

The Rice Creek Watershed District does not comment or make commitments for other Defendants or governmental agencies who are or are not a party to this Agreement.

The Rice Creek Watershed District represents to Plaintiff that the Rice Creek Watershed District has asked the U.S. Corps of Engineers for a general permit for the area covered by the CWMP, including the Property and that such general permit would eliminate any involvement of the U.S. Corps of Engineers in the Property and its development if such Property and any development thereof comply with the CWMP. The Rice Creek Watershed District shall use its best efforts to obtain such general permit from the U.S. Corps of Engineers.

If USACE Section 404 review of a development proposal were to impose wetland impact mitigation requirements, the cost to meet those requirements would not be the result of a "change in the Rice Creek Watershed District's Rule M and the CWMP." It would be the result of the USACE decision not to align its review with the CWMP. The cost would exist, whether or not the CWMP or Rule M had changed, or even was in place at all.

Element 2: If the owner of the MSCC parcel opts for a development approach that doesn't conform to the CWMP, the owner would not be following the settlement, and so would be responsible for all wetland impact mitigation.

The District's commitment to provide 100 acres of non-wetland protects MSCC's entitlement, as the CWMP and Rule M defined it. To obtain that entitlement, the owner of the MSCC property would need to start with a development proposal that conforms to the criteria set forth in the CWMP and Rule M. The settlement states:

Any future site plan for a specific development would have to be reviewed through the Rice Creek Watershed District's normal process and meet the specific criteria of Rule M.

This means: (a) a development layout on the southern part of the tract; (b) coordinating with the District to assess wetland and hydrologic resources at a site level; (c) using those data to define the boundary between the development footprint and the Wetland Preservation Area (WPA); and (d) replacing (presumably, but not necessarily, within the WPA), any impacts to Type 3 or Type 4 wetland.

Entitlement to 100 non-wetland acres for development requires that those acres be located where the CWMP intends them to be, with the remaining non-development acres protected as the CWMP intends, so that both development and water resource outcomes, as the CWMP intended, are achieved.

Rule M, of course, no longer exists. It was absorbed into the District's present wetland rule, Rule F, in 2016. But the District would apply the above-quoted sentence from the settlement to require an application to conform to Rule F, the successor to Rule M. Like Rule M, Rule F explicitly incorporates the CWMP:

All District Comprehensive Wetland Protection and Management Plans (CWPMPs) are incorporated into this Rule. The specific terms of Rule F will govern, but if a term of Rule F is susceptible to more than one interpretation, the District will apply the interpretation that best carries out the intent and purposes of the respective CWPMP.

The owner may opt for a development layout that disregards the CWMP. In particular, if the owner concludes that the USACE isn't likely to regulate favorably a layout that aligns with the CWMP, it may decide that it is better to begin with a different plan that it believes will move more quickly through USACE review or incur, under Section 404, a lower wetland impact mitigation cost.¹

If the owner were to follow this path, the District would be relieved of its obligation, since the owner's proposal would not "meet the specific criteria of Rule M," and therefore not conform to the terms of the settlement.

¹ The District would need to determine whether a variance would be required to proceed in a way not aligned with the CWMP.

As a final note, it is uncertain whether there will be Section 404 jurisdiction over the MSCC wetlands at the time the MSCC tract develops. The USACE consistently asserted jurisdiction over wetlands within the CWMP area, from before the date of the CWMP until the publication of a federal rule in 2020 that narrowed jurisdiction. Thereafter, the USACE declined jurisdiction over wetlands within the CWMP area on at least two occasions. Early in 2023, the Biden administration published a new rule, superseding the prior rule and reinstating the former, broader terms of CWA jurisdiction. However, in late May, the U.S. Supreme Court, in the case of Sackett v. U.S. Environmental Protection Agency, again narrowed CWA jurisdiction in certain respects. The USACE has just published a revision to the new rule to conform it to the Sackett decision. As should be apparent, the scope of federal CWA jurisdiction long has been a political matter. This is expected to continue. If, when development of the MSCC tract moves forward, the USACE concludes that it doesn't have jurisdiction, the two items discussed in this memo largely will be moot.

c: Nick Tomczik, RCWD Administrator
 Patrick Hughes, RCWD Permit Coordinator/Wetland Specialist
 Chris Otterness, RCWD Engineer



September XX, 2023

Rick Wilder
Metro Shooting Center Corporation
10601 Naples Street Northeast
Blaine, MN 55449

Re: RCWD Implementation of Metro Shooting Settlement

Dear Mr. Wilder:

I'm writing to communicate the intent of the Rice Creek Watershed District to continue to adhere to the terms of the Metro Shooting settlement agreement, and per your inquiry, outline how District staff will administer its regulatory role with respect to development of your property, in order to conform to the agreement.

At its June 12, 2023 workshop meeting, the District Board of Managers reviewed the agreement. You and several family members attended and participated in the discussion. The Board wanted to develop a greater understanding of the settlement and directed staff to prepare this correspondence for its consideration and to put forth administrative guidance from which you may progress on plans for property transfer and development. The Board considered the matter again at its September 11, 2023 workshop, where you again were present. The Board by consensus directed this letter documenting, consistent with the settlement, the following administrative steps in review of development of the MSCC property.

1. The owner of the MSCC property must submit a current wetland delineation for review and approval with the development application.

2. District staff will work with the owner and its technical consultant to help the owner prepare a development plan consistent with the Village Meadows Comprehensive Wetland Management Plan (CWMP). Using the current wetland delineation and other site-level data, and in accordance with the CWMP, the owner will define up to a 100-acre footprint of non-wetland on the southern part of the parcel, and a minimum of 35 acres of Wetland Preservation Area on the northern part.
 - a. The owner will apply to the U.S. Army Corps of Engineers (USACE) for parallel federal review under the Clean Water Act (CWA), Section 404, or else for a USACE determination that the development is not subject to Section 404.

4325 Pheasant Ridge Drive NE #611 | Blaine, MN 55449 | T: 763-398-3070 | F: 763-398-3088 | www.ricecreek.org

**BOARD OF
MANAGERS**

Jess Robertson
Anoka County

Steven P. Wagamon
Anoka County

Michael J. Bradley
Ramsey County

Marcie Weinandt
Ramsey County

John J. Waller
Washington County

b. The District will review the application under the Minnesota Wetland Conservation Act (WCA), by applying the CWMP and the District's own wetland rule, Rule F.

c. If District review identifies wetland impact replacement beyond what USACE Section 404 review requires, the District would supply this additional replacement. The City of Blaine, by separate agreement, has certain obligations to the District in the event that the District must supply replacement, and so would be engaged here as well.

3. If for any reason the owner opts not to conform its development proposal to the CWMP, it may prepare and proceed to USACE and District review with a different development plan. In this event, the owner would not be proceeding under the settlement framework and so would be responsible for all wetland credit replacement associated with the development.

4. The District will continue to maintain ACD 53-62.

Please contact me at ntomczik@ricecreek.org or Permit Coordinator/Wetland Specialist Patrick Hughes at phughes@ricecreek.org if you have any questions.

Nick Tomczik
Administrator

CC: RCWD Board
Dan Schluender, City of Blaine
Ben Meyer, Minnesota Board of Water and Soil Resources (BWSR)