

RED LAKE WATERSHED DISTRICT

RULES AND GUIDANCE DOCUMENT

Amended Rules



Adopted: August 27, 2015

RED LAKE WATERSHED DISTRICT

**DISTRICT RULES
AND GUIDANCE DOCUMENT**

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**RED LAKE WATERSHED DISTRICT
DISTRICT RULES**

**PERMITTING PROCEDURES, FEES AND
FINANCIAL ASSURANCES RULE**

**Adopted August 27, 2015
Effective September 30, 2015**

1. **POLICY.** The District permit requirement is not intended to delay or inhibit development. Rather permits are needed so that the managers are kept informed of planned projects, can advise and in some cases provide assistance, and can ensure that land disturbing activity and development occurs in an orderly manner and in accordance with the overall plan for the District. All interpretations of these rules and permit decisions under these rules will incorporate and be consistent with District purposes set forth in Minnesota Statutes section 103D.201.

2. **PERMIT REQUIREMENT.** Any person or agency of the State of Minnesota or political subdivision undertaking an activity for which a permit is required by the District rules must first submit a permit application. The application must be submitted on the form provided by the District or the substantial equivalent, and must include all exhibits required by the applicable District rule(s). Application forms are available on the District web site at: www.redlakewatershed.org.
 - A. All permit applications must bear the original signature of the landowner.

 - B. No land-disturbing activity to which a District permit requirement applies may be commenced prior to receiving authority from the District, its administrator or staff.

 - C. Permit decisions will be made by the Board of Managers, except as specified in 3. PERMIT decisions may be delegated by the Board of Managers to staff or the District administrator for decision after consultation and review by the Board member representing that particular area of the District. If a permit is approved by staff or administrator, the permit will still be approved by the Board before being issued. The Board will review a staff or administrator permit decision at the applicant's request. Permit decisions may approve or deny an application and may impose reasonable conditions on approval. Conditions may include, consistent with the rules, requirements for financial assurances and maintenance agreements or declarations, and may require that these documents be properly executed or recorded before permit issuance.

 - D. A permit is valid for one year from the date the permit is approved, with or without conditions, unless specified otherwise or the permit is suspended or revoked.

 - E. To request an extension or transfer of a permit, the permittee must notify the District in writing prior to the permit expiration date and provide an explanation for the extension or transfer request. The District may impose different or additional conditions on an extension or deny the extension in the event of a material change in circumstances, except that on the first extension, a permit will not be subject to additional or different requirements solely because of a change in District rules. New or revised rule requirements will not be imposed on an extension of a permit where the permittee has made substantial progress toward completion of the permitted work. If the activities subject to the permit have not substantially commenced, no more than one extension may

be granted. An applicant wishing to continue to pursue a project for which permit approval has expired must reapply for a permit from the District and pay applicable fees.

- F. A permittee may transfer a permit to another party only upon approval of the District, which will be granted if:
 - 1) the proposed transferee agrees in writing to assume responsibility for compliance with all terms, conditions and obligations of the permit as issued;
 - 2) there are no pending violations of the permit or conditions of approval; and
 - 3) the proposed transferee has provided any required financial assurance necessary to secure performance of the permit.

The District may impose different or additional conditions on the transfer of a permit or deny the transfer if it finds that the proposed transferee has not demonstrated the ability to perform the work under the terms of the permit as issued. Permit transfer does not extend the permit term. The District may suspend or revoke a permit issued under these rules wherever the permit is issued on the basis of incorrect information supplied to the District by the applicant,

- G. A permit applicant consents to entry and inspection of the subject property by the District and its authorized agents at reasonable times as necessary to evaluate the permit application or determine compliance with the requirements of a District permit or rule(s).
- H. A District permit is permissive. Obtaining a permit from the District does not relieve the applicant from responsibility to comply with any procedures or approvals that may be required by Minnesota Statutes chapter 103E or any other rules, regulations, requirements or standards of any applicable federal, state, county, township, local government or subdivision thereof, or local agency.
- I. The District further requires as a condition of all permits that they be notified when said permitted work is completed.

3. DISTRICT WIDE PERMITS. The District may issue District-wide permits, approving certain routine activities or specific classes of projects where a standard design has been approved by the District, as long as the work is conducted in compliance with applicable District-wide rule requirements.

- A. Each District-wide permit activity or project classification will be subject to such specific requirements as the Board may establish.
- B. A hearing will be held before any District-wide permit activities or project classification are issued or established.

4. RECONSIDERATION.

- A. Before a permit decision is final for the purpose of appeal under Minnesota Statutes §103D.537, an applicant may request that the Board of Managers reconsider its decision. The applicant may submit a notice of reconsideration on a form provided by the District that includes concurrence in an extension of the time for District permit action under Minnesota Statutes §15.99. The notice must be submitted within 10 days of the permit

decision and at least one day before the date by which a permit decision must be rendered under §15.99. Within 10 days of submitting the notice, the applicant must in writing enumerate for the District the specific findings or conditions for which reconsideration is requested, along with any additional submittals or argument supporting applicant's request.

- B. The District will give the applicant due notice of when the Board of Managers will reconsider the permit decision. The Board of Managers will adopt findings on reconsideration. The District will not take longer than 120 days to issue a final decision including reconsideration, unless a further extension is approved by the applicant.
 - C. The permit decision is final if an applicant fails to timely file notice under paragraph 4.A, if the applicant otherwise waives the right of reconsideration, or if the Board of Managers is unable to reconsider the permit decision before the expiration of the District's time for review under §15.99. Otherwise, the Board of Managers' decision on reconsideration is the final decision.
 - D. District costs incurred for reconsideration are permit administration costs for which an applicant may be responsible under Section 5 of this rule.
5. "AFTER THE FACT" PERMIT. An "After The Fact" permit may be considered by the District and granted to an individual, if the "After The Fact" permit submission is the first submission provided to the District by said person or entity for the work that has been done. If a person or entity has had a prior written warning given to them in regard to their failure to follow the permitting rule requirements, a \$500.00 late filing fee shall be assessed against said person or entity for the "After The Fact" permit submission. Said late filing fee assessment is in addition to any other conditions or requirements that may be ordered by the District in regard to repair or restoration of non-permitted work by said persons or entity in regard to an approval or disapproval of an "After The Fact" permit application. In addition to the remedies provided in Minnesota Statute 103D.545 and other remedies provided for in these rules, in those instances where work has been performed before a permit has been approved, the District may require that the property be returned to its original condition before consideration of the "After The Fact" permit application. The District may also require the applicant to pay actual engineering and attorney's fees, allowed by law, incurred by the District in dealing with the un-permitted work.
6. FINANCIAL ASSURANCE. The managers, at their discretion, may require an applicant to file a bond, letter of credit or other escrow deposit in a form approved by the District as a condition of permit issuance. The amount of the financial assurance required will be set in accordance with a schedule established and maintained by the Board of Managers by resolution. When the permitted activities are certified as having been completed in compliance with the District permit and rules, the financial assurance will be released.
- A. If the District determines that the permitted activities have not been completed in compliance with the permit and District rules, the Board of Managers may determine that the assurance is forfeited and the District may use the funds to take such actions as the District deems necessary to bring the subject property into compliance with the permit and District rules, to prevent or mitigate harm to protected resources or other property, to abate or restore damages, or otherwise to ensure conditions in compliance with an applicable District permit and/or the District rules. If financial assurance funds prove insufficient to complete necessary work, the District may complete the work and assess the permit holder and/or property owner for any excess costs.

- B. No financial assurance will be required of any agency of the United States or of any governmental unit or political subdivision of the State of Minnesota. The District may require that the District be named as a beneficiary in the financial assurance of the agency's contractor.

PERMITTING PROCEDURES, FEES AND FINANCIAL ASSURANCES

Guidance to District Rule

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

A. Policy

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

B. Application Submittal

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

- The rule states explicitly that activity subject to District rules may not occur until a permit has been applied for and issued or authority given by the District to proceed.
- The landowner must sign the application form. The applicant and permittee should always be the party who is indicated in the county land records as the owner of the property on which the activity is to occur. If another party (such as a contractor or intended property buyer) is the District's contact, it should be identified as the agent for the landowner and the District should document its authority to represent the landowner. This insures: (a) that any activity pursuant to a District permit occurs with the knowledge of the landowner and (b) that if compliance action is necessary, the District or the contractor will have access to the property.
- The application must be made on a form supplied by the District. State law (Minnesota Statute §15.99) stipulates that once an application is submitted, the District must approve or deny the application within a specified time frame (60 days) or else the permit is deemed granted. Therefore it is important that an application be clearly identified as an application, and not, for example, merely a pre-application inquiry. The time limit in Minnesota Statute §15.99 begins upon the District's receipt of a written request containing all information required by law or by a previously adopted rule, ordinance, or policy of the District, including the applicable application fee. If the District receives a written request that does not contain all required information, the 60-day limit starts over only if the District sends written notice within 15 business days of receipt of the request telling the requester what information is missing. Additional information associated with an incomplete application is available for review per Minn. Stat. §15.99.
- When a landowner submits an application, it operates as a grant of permission for the District to enter the property. Entry typically will be needed for the District to evaluate the permit application and, once a permit is issued, to monitor activity for permit compliance. The watershed law (Minnesota Statutes §103D.335, subdivision 14) already authorizes the District to enter lands "to make surveys and investigations to accomplish the purposes of the watershed district." This

appears to give the District adequate legal authority to enter private property, outside of constitutionally protected areas such as those in or adjacent to homesteads. The rule language is consistent with this authority.

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

C. Permit Extension and Transfer

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

The model permit extension terms balance these considerations as follows:

- A permit may be extended for an indefinite number of years, at the District's discretion, provided the work has been "substantially commenced." However, if the work has not been substantially commenced by the end of the second permit year (two years), it may not be extended and the landowner will need to make a new application.
- The District may deny or place new conditions on an extended permit for a "material change in circumstances." This allows the District to ensure that the permit continues to protect water resources if there is new knowledge or information relevant to the work since the permit was approved or last extended. The term "material" is intended to give some protection to the landowner, and means that the District will not change the "rules of the game" unless the change is both significant and relevant.
- Further, on the first extension, a change in the District's rules occurring since permit approval will not count as a "material" change. This insulates a permittee from a change in the rules for a two-year period of time after a permit is approved. If a permittee seeks a second extension and the District rules have changed in the interim, the District may apply new conditions as needed for the work to conform to the new rules.

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

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

- The transferee, in writing, must assume all permit obligations. This avoids the situation where a permittee is excused from permit obligations and ceases to have authority over the land, but the new landowner disclaims knowledge of the permit responsibilities.
- At the time of permit transfer, the work must comply with the permit. First, it is important to document that the site was in compliance when a permit transferee assumes compliance responsibility. This precludes the transferee’s later claim that the site was non-compliant on the earlier permittee’s watch, and that the transferee was unaware of or should not be responsible for it. Also, practically speaking, property transfer is an effective moment to require that site condition be corrected, as it will be made a condition of sale.
- If the District holds a financial assurance, it will need a substitute assurance from the permit transferee and will return the existing one to the transferor permittee.

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

D. Standards Without Need for Permit Process

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

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

E. Reconsideration

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

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

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

This process must be carefully managed so that the District does not violate Minnesota Statutes §15.99, which as noted places a strict deadline on a District's final permit decision. The District rule states that if the reconsideration process cannot be completed within the section 15.99 (120 days) time frame, then the applicant is not required to complete the reconsideration step before exercising its appeal right. It is especially important for Districts to manage the permit process so that decisions are timely within these deadlines, and adequate time is anticipated for reconsideration of contentious permit conditions.

F. Permit Fee

Minnesota Statutes §103D.345, subdivision 2, states that a watershed district may require a permit fee that covers the actual cost for the District to process a permit application and then to monitor compliance with the issued permit. This includes staff and consultant costs (including attorney costs, as allowed by law) and related administrative costs. At section 5, the rule basically incorporates the statutory language. However if all rules are followed by the applicant while applying for a District permit, all fees will be waived and there will be no charge for the permit.

G. Financial Assurance

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

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

The rule provides that a financial assurance will not be required if the permittee is a federal, state or local unit of government. The watershed law does not specifically exempt governmental agencies from the District's authority to require a financial assurance. However, the practice of watershed districts

generally is not to impose such a requirement. It is reasoned that public permittees, in general, are more reliable in meeting permit requirements and that where a particular permittee is not, it remains accessible and is not going to disappear or go into bankruptcy. Further, the cost of a bond or letter of credit would just be an additional taxpayer cost. Notwithstanding, the rule states that if the public permittee requires a bond of its contractor, the District is to be named a beneficiary. The reasoning here is that this gives protection to the District without measurable added cost.

H. Permit Approval Authority

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

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

**RED LAKE WATERSHED DISTRICT
RULES AND REGULATIONS**

SURFACE DRAINAGE AND FLOOD MITIGATION

**Adopted August 27, 2015
Effective September 30, 2015**

DEFINITIONS

Board of Managers shall mean Board of Managers of the Red Lake Watershed District

District shall mean the Red Lake Watershed District

Dike shall mean a bank or mound of earth, berm or obstruction that is built or placed in a manner which will affect the flow of water and especially to protect an area from flooding.

Drainage Way shall mean a natural or artificial channel which provides a course for the flow of water, whether that flow be continuous or intermittent.

Flood Mitigation shall mean managing and control of flood water movement, such as redirecting flood run-off through the use of floodwalls and flood gates, rather than trying to prevent floods altogether.

Improve has the meaning set forth at Minnesota Statutes §103E.215, subdivision 2, which states that improvement means tiling, enlarging, extending, straightening, or deepening of an established and constructed drainage system.

Managers shall means the Red Lake Watershed District Board of Managers

Private Drainage Way shall mean a drainage way other than a public drainage way, which includes but is not limited to private tile drainage and surface drainage systems constructed along roadways.

Public or Legal Drainage Way shall mean a drainage way under the jurisdiction of the drainage authority pursuant to Minnesota Statutes chapter 103E.

Surface Drainage shall mean removal of surface water by development of the slope of the land utilizing systems of drains to carry away the surplus water.

Tile Drainage shall mean an agriculture practice that removes excess water from soil subsurface.

1. POLICY. It is the policy of the Board of Managers to promote the use of the waters and related resources within the District in a provident and orderly manner to improve the general welfare and public health for the benefit of the District's present and future residents. Further, it is the policy of the Board of Managers to regulate new construction, improvement, repair and maintenance of public and private drainage ways for the following purposes:

- A. To preserve the capacities of drainage systems to accommodate future needs.
- B. To improve water quality and minimize localized flooding.
- C. To minimize the loss of drainage capacity.
- D. To avoid drainage conditions that cause or aggravate erosion or sedimentation of downstream drainage ways or waterbodies.
- E. To ensure that parties responsible for accumulation of debris, soil and sediment in drainage ways maintain those drainage ways.

2. REGULATION

- A. A permit must be obtained from the District before undertaking any of the following:
 - i. Excavation of a new private drainage way located within any public right of way;
 - ii. Work below the top of bank of an existing public, legal or private drainage way located within any public right of way that disturbs soil or alters the dimensions or hydraulic profile of the channel;
 - iii. Constructing, installing or altering a road or utility crossing beneath or over a public or legal drainage way; or
 - iv. Constructing, altering or removing a dike which alters the flow of water.
- B. Section A notwithstanding, no permit from the District is required:
 - i. To construct, establish or perform maintenance on an existing private drainage way, as long as the private drainage way is located outside of any public right of way.
 - ii. To repair or replace tile drainage to the same size of tile as previously existed.
 - iii. To perform emergency work on any private drainage way located within a public right of way to avoid substantial property damage due to flooding, subsidence or other cause, in which case the District must be notified of the work and the reasons for the emergency action, as soon as possible. If at all possible, efforts to notify the District should be made before performing any emergency work. Any emergency work performed without the District's and governmental roadway authority's permission is performed at the owners own risk.
 - iv. To disturb surface soils in the course of ordinary cultivation or other agricultural activity. This may include general field ditching.
- C. The requirements of this rule are in addition to other applicable laws and procedures, including those of Minnesota Statutes chapter 103E. This rule is to provide for management of waters in the public interest and does not displace in whole or part any private legal rights a property owner or other person may have with respect to the use and drainage of waters.

- D. A contractor or equipment operator is responsible to ascertain whether a permit is required by this rule and, if so, that it has been obtained.
3. SURFACE DRAINAGE. The following criteria apply to applications under this rule other than those for the construction, alteration or removal of a dike:
- A. An applicant may not dispose of or alter the flow of surface water so as to unreasonably burden another landowner with surface flow.
 - B. Surface water will not be artificially directed from upper land to and across lower land without adequate provision on the lower land for its passage.
 - C. Surface water will not be artificially directed into a legal drainage system from land not assessed to that system unless express authority from the drainage authority is obtained as defined under Minnesota Statutes 103E.401.
 - D. Temporary storage and retention basins on the parcel or parcels proposed to be drained will be used to the extent feasible for upstream storage and to maintain peak flows, prevent erosion and avoid increased demand on public drainage systems.
 - E. An applicant shall control erosion and downstream siltation by the following means:
 - i. All work involving exposed or stockpiled soil or materials subject to erosion will conform to an erosion and sediment control plan approved by the District.
 - ii. Open drainage ways will be stabilized with vegetation above the low water mark or other best management practices to reduce channel erosion.
 - iii. To reduce sediment transport, where feasible drainage will be discharged through marsh lands, swamps, retention basins or other treatment facilities prior to release into the receiving public water. Where feasible, a retention basin will overflow to a wide, shallow grassed waterway.
 - iv. Drainage ways will be constructed with side slopes designed in accordance with proper engineering practice to minimize erosion, giving due consideration to the intended capacity of the drainage way; its depth, width and elevation; and the character of the soils to be drained.
 - v. Water inlets, culvert openings and bridge approaches must have adequate shoulder and bank protection to minimize land and soil erosion.
 - vi. Channels and outfalls must be designed to be stable.
 - vii. Consideration for establishment of a grass filter strip 16.5 feet in width where possible and maintained on each side of a new private drainage way and on each side of an existing private drainage way which is subject to work for which a permit is required by this rule.
 - F. The proposed activity may not adversely affect downstream water quality or quantity.
4. DIKES. The following criteria apply to the construction, alteration or removal of a dike:
- A. The dike may not unreasonably restrict flow onto down gradient property.
 - B. The dike may not be constructed or maintained within the 100-year floodplain unless plans and specifications, signed by a registered engineer, are submitted showing that:

- i. The work will not impede 100-year flood flows outside of the delineated retention area, or raise the 100-year flood level or increase flood peak downstream;
 - ii. Overflow sections are designed to handle overtopping during major floods without significant erosion or risk of failure and without sandbagging or other manual measures before or during a flood; and
 - iii. The capacity of pumping facilities to remove surface water stored behind a dike is consistent with Minnesota Hydrology Guide criteria.
 - C. Operational procedures must prohibit pumping when the agricultural dike is overtopped during a rain or snow-melt event until downstream flood peaks have occurred.
 - D. Outlet drainage must be sized to the applicable capacity in the Minnesota Hydrology Guide (Curve 1) for agricultural drainages, or other technical specifications established by the District.
 - E. A permit to construct or maintain an agricultural dike will be conditioned on the applicant's granting the District the right in perpetuity to:
 - i. Enter onto property to assure landowner has installed and is maintaining traps/gates to restrict or eliminate outflow from the diked area during and after overtopping flood events; and
 - ii. Enter on the subject property to inspect traps/gates during and after an overtopping flood event.
- 5. EXHIBITS. The following exhibits may be requested to accompany the permit application. Two copies, (standard paper size of 8.5 inches by 11 inches), which include:
 - A. Map showing location of project and tributary area.
 - B. Plans and specifications for the project.
 - C. Existing and proposed cross sections and profile of affected area.
 - D. Description of bridges or culverts required.
 - E. List of owners of properties benefitted or affected by the proposed work.
 - F. Such other submittals as the District reasonably may require to evaluate whether the proposed activity meets the standards of this rule.

SURFACE DRAINAGE AND FLOOD MITIGATION

Guidance to District Rule

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

A. Policy

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

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

- To preserve capacity in public drainage systems into which lands assessed benefits for those systems discharge. Note that the drainage law (Minnesota Statutes chapter 103E) does not control the volume that may flow from assessed benefited lands into the system or the rate of that flow. However, a watershed district under its regulatory authority (Minnesota Statutes chapter 103D) may regulate both volume and peak flow off of lands benefited into a drainage system to provide drainage benefits equitably to all lands paying into the system.
- To limit the movement of soils into channels and preserve the integrity of channel banks, in order to limit maintenance costs for public ditch systems and limit the transport of sediment, nutrients and other pollutants to downstream receiving waters.
- To protect the structural integrity of public drainage systems from destabilizing hydraulic forces.
- To prevent unassessed benefited lands from draining into public or private drainageway systems, in order to preserve system capacity for those property owners bearing the cost of those systems, and in the interest of equity.

B. Regulation

The regulation section identifies proposed changes to the landscape that require a permit from the watershed district. The separation between those activities that require a permit from those that don't is made with reference to the four policies identified in the preceding section. What this section does is identify those activities that, if not done properly, can cause impacts to public drainage systems and downstream waters that, as the policies spell out, the watershed district is trying to prevent. The goal is to exercise watershed district oversight of those activities while, to the extent possible, avoiding imposing permitting burdens on other activities that don't pose a substantial risk of impact.

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

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

- diking.
- Any work in or over a public surface drainage system or within any right of way of a governmental roadway.

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

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

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

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

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

C. Criteria for Surface Drainage Changes

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

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

- Flows - volume or peak - onto adjacent property may not unreasonably increase.
- Unassessed lands may not be drained into a public system without obtaining express permission from the drainage authority in accordance with 103E.401.
- To the extent reasonable, flows resulting from proposed changes must be retained on-site before discharge, or discharged to off-site retention - natural or artificial - in order to mitigate flow changes and limit downstream sediment transport.
- Erosion and sedimentation in drainage systems will be minimized through a number of means, as feasible:
 - An erosion and sediment control plan must be submitted and approved;
 - Channels must be vegetated above low-water mark;
 - Channel banks must be designed with proper slopes;
 - Hydraulic forces must be assessed and provided for in the design;
 - Grass filter strips establishment should be considered wherever channel work is conducted.
- Finally, there is a general requirement that downstream flows or water quality may not be adversely affected.

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

Note that the procedural rules include a step by which an applicant may ask the board of managers to reconsider a permit decision before it is appealed. Where the board denies a permit, or includes certain conditions in the permit, this reconsideration step is the opportunity for the District, through its engineer, to re-examine the facts of their decision and to closely review their findings about potential impacts.

D. Criteria for Dikes

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

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

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

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

E. Exhibits

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

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

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

F. Definitions

This section defines certain terms used in the rule. Specifically, it defines "drainage way" as pertaining only to surface drainage systems, which may include tile portions, and establishes the terminology to distinguish between public and private systems. It also: (a) defines drainage system "improvement" as having the same meaning as under Minnesota Statutes chapter 103E.

**RED LAKE WATERSHED DISTRICT
DISTRICT RULE**

SUBSURFACE TILE DRAINAGE

**Adopted August 27, 2015
Effective September 30, 2015**

1. POLICY. It is the policy of the Board of Managers to promote the sound construction and management of subsurface tile drainage systems in order to minimize downstream flooding and maximize soil storage and agricultural productivity.
2. REGULATION
 - A. No person shall install or construct any non-incidental subsurface tile drainage system, **after the effective date** of adoption of these rules, without obtaining a required permit from the Watershed District.
3. CRITERIA. An application for a permit must meet the following requirements:
 - A. All subsurface tile drainage systems must protect from erosion and include RLWD approved erosion control measures.
 - B. All subsurface tile outlets including lift station pumps, must be located out of a legal drainage system and governmental roadway right of way unless approved by District and must be visibly marked.
 - C. It is recommended that after harvest, tile outlet controls, including lift station pumps, be opened or turned on to remove water from the system unless downstream culverts are freezing.
 - D. Obtaining a permit from the RLWD Managers does not relieve the applicant from the responsibility of obtaining any other additional authorization or permits required by law. (Ex: NRCS, SWCD, Township, County, State, etc.)
 - E. Upon completion of the project, “As Built” plans must be provided to the District.
 - F. Consideration must be made for turning off pumps for short period of times during the summer so maintenance can be performed on public, legal and private drainageways, such as road ditches or private natural field drains.
4. EXHIBITS. The following exhibits may be requested to accompany the permit application. Two copies, (standard paper size of 8.5 inches by 11 inches), which include:
 - A. Legal description and site map and/or GPS coordinates to accurate scale showing location of all tiles, surface water inlets, outlet(s), lift stations, pumps, and flow control devices;
 - B. Land area to be tiled (acres);

**RED LAKE WATERSHED DISTRICT
DISTRICT RULE**

Pursuant to authority granted by Minnesota Statutes section 103D.341

**RULE XX
ENFORCEMENT RULE**

**Adopted August 27, 2015
Effective September 30, 2015**

1. **MANNER OF ENFORCEMENT.** In the event of a violation or threatened violation of a District rule, permit, order or stipulation, or a provision of Minnesota Statutes chapter 103D, the District may take action to prevent, correct or remedy the violation or any harm to water resources resulting from it. Enforcement action includes but is not limited to injunction; action to compel performance, abatement or restoration; and prosecution as a criminal misdemeanor in accordance with Minnesota Statutes sections 103D.545 and 103D.551.

2. **INVESTIGATION OF NONCOMPLIANCE.** The District's authorized representatives may enter and inspect a property in the watershed to determine the existence of a violation or threatened violation as described in section 1, above.

3. **ADMINISTRATIVE COMPLIANCE ORDER.** The District may issue a preliminary compliance order without notice or hearing when it finds a violation or threatened violation as described in section 1, above, and that the violation or threatened violation presents a serious threat of adverse effect on water resources. A preliminary compliance order may require that the property owner or responsible contractor cease the land-disturbing activity; apply for an after-the-fact permit; and take corrective or restorative action. A preliminary compliance order is not effective for more than ten days. The Board of Managers by resolution may delegate to District staff the authority to issue preliminary compliance orders.

A. **BOARD HEARING.** After due notice and a hearing at which evidence may be presented, the Board of Managers shall make findings. If the Board finds a violation as described in section 1, above, it may issue a compliance order of indefinite duration that may require the property owner or responsible contractor to cease land-disturbing activity; apply for an after-the-fact permit; take corrective or restorative action; reimburse the District for costs under Minnesota Statutes section 103D.345, subdivision 2; and/or be subject to any other remedy within the District's authority. A compliance order may supersede a preliminary order or may be issued without a prior preliminary order.

4. **LIABILITY FOR ENFORCEMENT COSTS.** To the extent provided for by Minnesota Statutes section 103D.345, subdivision 2, a property owner or responsible contractor is liable for investigation and response costs incurred by the District under this rule, including but not limited to the costs to inspect and monitor compliance, engineering and other technical analysis costs, legal fees and costs, and administrative expenses.

5. **CONTRACTOR LIABILITY.** Any individual, firm, corporation, partnership, association or other legal entity contracting to perform work subject to one or more District rules will be responsible to ascertain that the necessary permit has been obtained and that the work complies with the permit, rules and statutes and any applicable District orders or stipulations. A contractor that, itself or through a subcontractor, engages in an activity constituting a violation or threatened violation under section 1, above, is a

responsible contractor for purposes of this rule.

ENFORCEMENT

Guidance to District Rule

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

1. Manner of Enforcement

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

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

2. Investigation of Noncompliance

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

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

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

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

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

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

3. Administrative Compliance Order

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

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

There are two concerns about staff’s issuance of legally binding orders in the field. One is a “due process” concern: that the authority of a public agency to issue a legally binding order without giving the recipient notice and a chance to be heard is legally limited. The second is that the authority to issue orders lies in the board of managers and must be specifically delegated to district staff. Historically, court cases have limited the ability of a public decision-making body to delegate its authority to staff. The law is concerned when, by doing so, the body is transferring its broad judgment and discretion to staff.

The model language attempts to address both of these concerns:

- With respect to the due process concern, the district rule requires the district to find that there is a violation or imminent violation that poses a serious water resource threat. In other words, order authority is to be exercised only when it is necessary to avert an important impact that otherwise would occur if no action could be taken until the managers were able to meet.

Also, the rule states that a staff order has effect only for ten days. The intent is that a staff order allows for harm to be prevented and the status quo to be maintained, only until the board of managers has a reasonable opportunity to convene and hear the facts with notice to, and participation of, the affected property owner. The “ten days” in the district rule is not a specific legal requirement; a board of managers may choose a different duration based on the frequency of its regular meetings and its ability to convene for a special meeting. However, the longer this period is, the more legally vulnerable the delegation to staff may be. Optimal practice is for the district administrator to coordinate with the board president so that the time and place of the board hearing can be included in the staff order itself.

- Regarding the delegation concern, the rule requires that delegation be accomplished by written resolution of the board. In this resolution, the board should consider spelling out constraints on

staff's authority so that the level of discretion given to staff is only so much as is absolutely necessary to achieve the purpose of the delegation, that is, to protect the resource until the board is able to give notice and hold a hearing. This may include, for example, requiring that an order contain specific findings as to what the violation is, what the actual or threatened impact is, and why that impact is serious. The resolution also may direct that permittee action demanded by the order be only what is necessary to prevent the resource impact until the board has the opportunity to hear the matter.

If a board of managers is not comfortable delegating order authority to its staff, there are options. For example, the district may simply institute a structured procedure for staff to issue a formal document in the nature of a "notice of probable violation" in place of a legally binding order. The notice would identify the apparent violation and impact, and would advise of recommended compliance actions, but would not purport to order that those actions be taken. Instead, it would advise of a compliance hearing by the board of managers and notify that the hearing will occur unless the suggested actions are timely taken. If the responsible party did not agree with staff's determination that there was a violation, it could choose not to take the recommended action, and wait to present its case to the board.

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

A. Board Hearing

This paragraph provides for a board hearing before a district compliance order (other than a preliminary order) may be issued. Because a district order may impose substantial cost on a property owner or contractor - by delaying work, requiring restoration action or imposing district costs - the law requires that the potential recipient of an order be given notice and an opportunity to appear and present evidence to the board before the board makes findings. The law does not specify how many days' notice must be given, how notice must be given, or the specific procedures that must be afforded at the hearing beyond an "opportunity to be heard." District legal counsel should be consulted on these details, and whether they should be included in the rule language or simply followed as district practice.

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

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

4. Liability for Enforcement Costs

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

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

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

Enforcement may result in a variety of costs to a district - staff hours, administrative and consultant costs, sampling and analysis costs, manager per diems for special meetings, contract costs for restoration work undertaken by the district, and potentially costs for court proceedings. The proposed rule language does not take a position on the precise extent to which each of these falls within the scope of the statute. Each district should determine its position with the advice of district legal counsel (for example, attorney fees for court proceedings may be excluded from the scope of §103D.345, subdivision 2, by virtue of separate treatment in §103D.545, subdivision 3). Note also that in the absence of the authority to impose a fine, a watershed district’s ability to require that a responsible party reimburse its costs may be a measurable financial incentive for early compliance.

5. Contractor Liability

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

However, there is nothing in the watershed law that prevents a district from also holding directly accountable the contractor that, itself or through its subcontractor, is responsible for the violation. A district may decide that it will have more leverage to gain compliance if both the property owner and the

contractor are directly subject to district orders and enforcement proceedings. If the district encounters a situation where the property owner appears to be innocent of the violation, holding the contractor responsible as well allows the district to take enforcement action directly against the contractor with minimum imposition on the property owner.

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