

WATERSHED RULEMAKING HANDBOOK

By:

Louis N. Smith
Waverley Eby Booth
Smith Parker P.L.L.P.
808 Colwell Building
123 North Third Street
(612) 344-1400
admin@smithparker.com
www.WaterLaws.com

Published by the Minnesota Association of Watershed Districts
3848 Westbury Drive
St. Paul, Minnesota 55123
through a grant from the Minnesota Board of Water and Soil Resources
1998 Minnesota Association of Watershed Districts

TABLE OF CONTENTS

FOREWORD.....	3
I. WHY MAKE RULES?.....	4
II. THE RULEMAKING PROCESS.....	9
III. GENERAL DRAFTING GUIDELINES: SOME DO’S AND DON’Ts.....	16
IV. POLICY CONSIDERATIONS IN WATERSHED RULEMAKING.....	19

APPENDICES

- A. MODEL RULE FORMAT
- B. SURVEY OF MINNESOTA WATERSHED DISTRICT RULES
- C. SURVEY OF STORMWATER MANAGEMENT ORDINANCES IN THE UNITED STATES

FOREWORD

Over forty years ago, the Minnesota Legislature adopted the watershed-based approach to managing water resources. The Minnesota Watershed District Act adopted in 1955 provides for the establishment of watershed districts “to conserve the natural resources of the state by land use planning, flood control, and other conservation projects.” By creating a special purpose local unit of government defined by hydrologic boundaries, the legislature provided for our water resources to be managed by boards of local citizens charged with implementing a comprehensive “watershed vision.”

Of course, watershed districts do not work in isolation. While responsibility for land use and zoning regulation continues to rest principally with municipalities, watershed districts supplement municipal regulation with an exclusive focus on water quality and flood control. This watershed approach is now considered the national model, but water resources management has nevertheless become more complex and challenging. Many jurisdictions are now involved in water policy at the federal, state, and local levels of government. In Crosscurrents: Managing Water Resources, the Minnesota Planning Agency recognized this complexity and the need to streamline water management by delegating responsibility to the local level of government – the level closest to the resource.

In the interest of supporting the local watershed approach, the Minnesota Board of Water and Soil Resources has joined with the Minnesota Association of Watershed Districts to create this handbook to serve as a resource in watershed district rulemaking. While every watershed district is unique and confronted with its own set of challenges, we hope that this handbook provides a common, practical resource to guide your local regulatory program.

Woody Love, President
Minnesota Association of Watershed Districts

Kathleen Roer, Chair
Board of Water and Soil Resources

I. WHY MAKE RULES?

Watershed districts are mandated by the legislature to adopt rules. The legislature has declared that all watershed districts in Minnesota “must adopt rules to accomplish the purposes of the [Watershed District Act] and to implement the powers of the managers.” The Watershed District Act separately delineates these “purposes” and “powers.”

A. Accomplishing Watershed District Purposes

Pursuant to Minnesota Statutes Section 103D.201, a watershed district may be established for any of the following purposes:

1. To control or alleviate damage from flood waters;
2. To improve stream channels for drainage, navigation, and any other public purpose;
3. To reclaim or fill wet and overflowed land;
4. To provide a water supply for irrigation;
5. To regulate the flow of streams and conserve the streams’ water;
6. To divert or change all or part of watercourses;
7. To provide or conserve water supply for domestic, industrial, recreational, agricultural, or other public use;
8. To provide for sanitation and public health, and regulate the use of streams, ditches, or watercourses to dispose of waste;
9. To repair, improve, relocate, modify, consolidate, and abandon all or part of drainage systems within a watershed district;
10. To control or alleviate soil erosion and siltation of watercourses or water basins;

11. To regulate improvements by riparian property owners of the beds, banks, and shores of lakes, streams, and wetlands for preservation and beneficial public use;
12. To provide for hydroelectric power generation;
13. To protect or enhance the water quality in watercourses in water basins; and
14. To provide for the protection of groundwater and regulate its use to preserve it for beneficial purposes.

Each of these listed purposes contemplates either the exercise of regulatory authority, or the construction of capital improvements, or both. While it has been argued that these purposes do not by themselves constitute an express power to exercise regulatory authority, this issue has not been squarely decided by the courts.¹ The legislature has authorized rulemaking to accomplish watershed district purposes, and thus rules which do so should be presumed valid, regardless of whether they also implement an express power of a watershed district.

B. Implementing Watershed District Powers

Watershed districts have the following specific governmental powers authorized by Minnesota Statutes § 103D.335:

1. *General powers.* To the extent necessary for lawful conservation purposes:
 - a. to sue and be sued;
 - b. to incur debts, liabilities, and obligations;
 - c. to exercise the power of eminent domain;
 - d. to provide for assessments and to issue certificates, warrants, and bonds; and
 - e. to perform all acts expressly authorized, and all other acts necessary and proper for the watershed district to carry out and exercise the powers expressly vested in it.
2. *Joint powers.* To enter joint powers agreements;

¹ See In re 1994 and 1995 Shoreline Improvement Contractor Licenses of Landview Landscaping, Inc., 546 N.W.2d 747, 749 (Minn. Ct. App. 1996), *rev. denied* (Minn. June 11, 1996) (“specific purpose” of watershed districts to “regulate improvements by riparian property owners” does not provide express power to license shoreline contractors); Minnehaha Creek Watershed District v. Gayle’s Marina Corp., 461 N.W.2d 224, 225 (Minn. 1990) (“specific purpose” to “regulate improvements by riparian property owners” authorizes regulation of dredging through watershed district permits); 451 N.W.2d 907, 908 (Minn. Ct. App. 1990) (purposes of watershed districts furthered by watershed district controls on development which may impact public waters, specifically regulation of dredging).

3. *Acquire and dispose of property from state and federal agencies;*
4. *Data acquisition.* Make necessary or use reliable surveys and hydrologic data;
5. *Cooperate or contract* with governmental or non-governmental agencies;
6. *Perform ditch and watercourse work;*
7. *Water control works.* Acquire, operate, construct and maintain water control works;
8. *Water use and conservation.* Conserve and control the use of water within the watershed district;
9. *Acquire property* by gift, purchase, taking under the procedures of this chapter, or by the right of eminent domain, necessary real and personal property;
10. *Enter Into Contracts* for construction or implementation authorized by law;
11. *Enter Lands* inside or outside the watershed district to make surveys and investigations to accomplish the purposes of the watershed district;
12. *Take over a drainage system* when so directed by a drainage authority;
13. *Sanitation and pollution prevention.* Provide for sanitation and public health and regulate the use of streams, ditches, or watercourses to dispose of waste and prevent pollution;
14. *Borrow Funds* from government agencies or financial institutions;
15. *Prepare floodplain maps* of the lands of the watershed district located in the floodplain of lakes and watercourses;
16. *Control land use and development in the floodplain, greenbelt, and open space areas of the watershed district* in the absence of county or municipal ordinances regulating these matters;
17. *State association membership.* Appropriate necessary funds to provide for membership in a state association of watershed districts;
18. *Enter into contracts* with other governmental bodies for cooperation and assistance;

19. *Projects in other states.* Purchase lease or acquire land or other property in adjoining states for watershed purposes;
20. *Regulate land use and development in the Metropolitan area* under the conditions specified in Section 103B.211, subdivision 1; and
21. *Water resource management activities.* Conduct studies and monitoring of water resources within the watershed and implement resource management programs.

Many of these express watershed district powers do not contemplate the exercise of regulatory authority. A few of these express powers require further amplification or clarification through rules. The rules adopted by a watershed district should be based legally on a specific “purpose” or an express “power,” and ideally both.

C. Other Reasons to Adopt Rules

Watershed district rules should not be considered simply a response to a legislative mandate. Rules serve several key functions for your watershed.

1. Rules Implement Your Watershed Plan

Your district’s rules establish basic policies for your watershed. Through creating your watershed district, and preparing a water resources management plan, your board of managers has expressed the essential mission and key goals for your watershed.

You may consider the implementation of your watershed district plan to be a “three-legged stool.” Some of these goals are best accomplished through constructing capital improvements. Other watershed goals may be achieved simply through public education. The third leg of the stool is the regulatory program expressed through the watershed district’s rules.² Your rules reflect important decisions about the types of land use and water-related activities which your watershed district may prohibit or restrain.

2. Rules Guide the Public Through Your Permitting Process

Exercise of control or regulation of land use and water resource activities is implemented through a permitting program. Rules provide the essential function of affording notice and general guidance to the public about the substantive criteria considered by a watershed district board of managers determining whether and under what terms to grant a permit. The rules also

² Regulatory controls are a required component of the implementation program in a watershed management plan for watershed districts in the Twin Cities metropolitan area. Minn. Stat. § 103B.231, subd. 6; Minn. Rule 8410.0100.

provide guidance to the public on the procedures for applying for permits and the enforcement of permit terms and conditions.

3. Rules Legislate General Prospective Policy

Just as the landscape within a watershed is constantly evolving, new policy problems continuously evolve for a watershed district. Some of these problems are best resolved in a case by case approach, based upon unique facts and circumstances. Other problems represent larger, more general policy questions. Sorting through these issues requires a board of managers to determine whether to “legislate” general future policy, or to “adjudicate” by deciding policy issues one case at a time. Although the Minnesota Administrative Procedures Act only applies to state agencies and not to watershed districts, it is instructive to note that all state agencies must follow a public rulemaking process whenever they adopt “any agency statement of general applicability and future effect.”

Prospective rulemaking has the advantage of providing wider notice to the public and therefore more public participation in making watershed policy. Ideally, more public participation will provide the board of managers with more information on a particular issue and the implications of particular policy decisions. Rulemaking also allows the board of managers to practice “preventative medicine” by setting the policy agenda and addressing issues early. A policy decision expressed through an adopted rule also will lead to more uniform application of policy, avoiding inconsistencies from case to case.

D. Not All Policy Decisions Are Rules

Some policy decisions are best confined to individual situations, leaving the board of managers to adopt changes gradually within the language of existing rules. So long as the decision does not conflict with the clear terms of the rule, and is supported with facts in the record, making policy through “adjudication” may be prudent and perfectly appropriate.

Other policy decisions do not affect the rights of the public and concern the internal management of the watershed district. Personnel policies, records management, and other internal matters need not be addressed through rules.

II. THE RULEMAKING PROCESS

This Section of the Handbook presents a “problem-solving” approach to rulemaking; reviews procedural steps to follow in drafting and adopting rules; discusses the use of a Statement of Need and Reasonableness, or “SONAR;” and describes some alternative means of assuring public participation in the rulemaking process.

A. Rulemaking as Problem-Solving

The rulemaking process begins with the question -- why regulate? By adopting and enforcing rules, your watershed district will be making policy which has the force of law. You will be asserting a classic role of government – to restrain or prohibit private activities – because of their effect on water resources. This is not a role to take lightly; adopting a rule should be accompanied by the will to enforce it when necessary.

1. Define the problem

It is in the long term interest of your watershed district to assure that your regulatory program expressed through your rules is the result of careful analysis of the needs and priorities of your watershed. Begin by considering the petition which created your watershed district: what were the basic purposes for which your watershed district was formed?

Next consider the key water resource problems identified in your plan. For example, is flooding a primary concern? Under what circumstances and in what areas is the flooding occurring? Is water quality declining? What lakes, streams, or wetlands are of particular concern? Is erosion a problem? Where? Is shoreline and lake vegetation being destroyed?

These kinds of questions should be asked and answered in your plan. The intensive study of your watershed, and the long term perspective reflected in your plan will help you to base your rulemaking on the most important problems. This perspective will also help to assure that your rules will provide sound policy through both the “high water” and “low water” years.

2. Focus your efforts

As you identify key problems to address through rulemaking, determine the underlying causes for these problems. For example, if the problem is declining water quality, the cause of the decline may be excessive nutrient loading from livestock, fertilizer or stormwater, or the cause may be excessive sedimentation from erosion. Again, your watershed district plan should contain much of this information.

Identifying the cause of the problem is an important step in rulemaking because it assures that your watershed district is focusing its energy and efforts in the most effective manner. No

watershed district has the resources to regulate everything that may be considered a concern. Regulate the activity that has the most harmful consequences. Identifying the causes of the problem is also important because, if a rule or permit decision is challenged, your watershed district will have evidence to show why a rule was enacted and how the provisions of the rule are “rationally related” to remedying the identified problem.

Keep in mind also that some problems are not best addressed by a watershed district through regulation. Public education about best management practices, partnerships that create incentives to implement these best management practices, or direct watershed capital improvement projects may provide better alternatives to regulation.

As you develop your watershed district’s regulatory solutions to the problem you have identified, it is worth considering whether other watershed districts have addressed similar problems. Section IV of this Handbook provides a review of the policy considerations for many of the subjects regulated by watershed districts. Appendix B provides a survey of watershed district rules.

3. Consider regulations from other agencies and avoid duplication

Another important step in the watershed rulemaking process is to investigate and determine whether the harmful activity is currently being regulated by other government agencies. This step is important for several reasons. Your watershed district can avoid unnecessary duplication of regulation, thereby reducing the various layers of government confronting the public. There is no need to waste your watershed district resources to address issues already regulated effectively by other agencies of government.

Your watershed district may also be in a position to learn whether the method of regulation chosen by the federal, state or other local government agency is effective. You may be in a position to learn from their mistakes, or to make policy changes which these other agencies cannot adopt due to bureaucratic or other constraints. We live in an era when many effective policy initiatives are arising from local government, and less initiatives emanate from Washington D.C.

You may also find that the method of regulation adopted by another government agency is effective, but it is not being enforced within your watershed due to a lack of administrative resources. If this is the case, you may find that your watershed district goals can also be served through a partnership with this other agency. Such a partnership can be accomplished through regulatory delegation, a general permit, or a joint powers agreement.

4. Consider good will

As you consider whether to address a problem in your watershed through rulemaking, consider also the management of a critical, though intangible, resource: the good will of the

public. Rules which solve problems but also have the support of your watershed stakeholders will inevitably be the most effective over the long term. Engaging these stakeholders in the rulemaking process, which is discussed more fully below, is essential from the very beginning of this problem-solving process.

B. The Drafting Stage: the Rule and the SONAR

The next step in the process is to draft the proposed rule and an accompanying Statement of Need and Reasonableness or “SONAR.” Rule drafting is an interdisciplinary process, involving your attorney, your engineer, your administrator and possibly other staff. The watershed district attorney should determine that there is proper legal authority for the proposed rule, and review proposed language to assure clarity, evidentiary support for the rule in the record, and compatibility of the proposed rule with other existing rules. Section III of this Handbook provides further drafting guidelines.

The watershed district engineer and other technical staff guide the substance of the rule to assure that the problem-solving approach developed for the proposed rule has technical merit. Your technical staff will have knowledge of the best management practices, and the structural or nonstructural solutions to the problem your proposed rule is addressing. They also provide the technical analysis in supporting materials in the record.

The watershed district administrator coordinates all of these players to manage this process. Each watershed district of course will utilize these players as appropriate to the issues and resources of the watershed.

The board of managers is ultimately responsible to decide whether a proposed rule should be adopted, and in what form. The fundamental policy decisions described in the “problem-solving” process above are decisions for managers to make based on staff and consultant analysis and recommendations. The board of managers’ decision to adopt a rule reflects a judgment that the rule is in the best interests of the public health and welfare and accomplishes the purposes or implements the powers of the watershed district.

A SONAR is simply a document that discusses the proposed rules or rules revisions and gives the reasoning for the rules. The reasoning for the rules should include the problem the rules seek to address, the causes of the problem, and why the method selected is the best method for addressing the problem and its causes. If the watershed district has followed the problem-solving steps described above, the SONAR should be quite simple to draft. Although not required by law, drafting a SONAR can result in a smoother rule adoption process because people interested in the rule have a better understanding of the purpose of the rule and the district will spend less time explaining why a measure is being proposed.

C. Public Participation in Rulemaking

Much of the success in the rulemaking process is determined by how effectively you engage the public and watershed stakeholders. Depending upon the complexity and level of controversy surrounding your proposed rule, you have a variety of ways to assure public participation.

1. The Basics

The legislature has prescribed a simple process for adopting watershed district rules, which can be considered a basic checklist. See Minn. Stat. § 103D.341. Any rules adopted by your watershed district must include these eight basic steps:

a. Publish notice of a hearing on the proposed rule.

The notice must be published in one or more legal newspapers published in the county and generally circulated in the watershed district. The statute does not specify a minimum notice period, but it is prudent to follow the same procedure required for noticing watershed capital improvements: publish two times, in successive weeks, with the last publication occurring at least 10 days before the hearing.

b. Submit the proposed rule to BWSR for review and comment.

BWSR's review is advisory, meaning their comments should be carefully considered but need not be adopted in the rule. The statute provides that BWSR has a period of 45 days to review the rule before it can be adopted by the watershed district.

c. Hold a public hearing.

d. Vote on the adoption of the proposed rule.

The board of managers may vote immediately after closing the public hearing, but if there are extensive or conflicting comments, it may be appropriate to conduct the deliberations of the board of managers at a subsequent meeting. A majority vote of the managers is required to adopt or amend rules.

e. Sign and record the adopted rule.

The rules must be signed by the Secretary of the Board of Managers and recorded in the minute book.

f. Publish notice of the adopted rule.

Follow the same procedures as for publishing notice of the public hearing in order to advise the public that your rule has been adopted.

g. File the adopted rule with the county recorder and BWSR.

The adopted rule must be filed with the county recorder for each county in the watershed district and with BWSR. It may be useful to provide your county recorders with a citation to Minnesota Statutes Section 103D.341, subdivision 2(c) to explain why you are sending these rules to them.

h. Mail the adopted rule to each municipality in the watershed district.

The rule is not legally effective within the boundaries of a municipality until it has been sent to the governing body of that municipality.

2. Beyond the Basics

More complex or controversial rules may require additional measures to engage the public in the rulemaking process. Advisory Committees comprised of local citizens or technical experts may also provide valuable feedback and direction. You may elect to go beyond published notice to provide specific notice of your proposed rule to identified stakeholders in your watershed. Carefully consider who will be most directly affected by your proposed rule. Municipalities, counties, state or federal agencies, property owners or developer associations, and conservation groups may be some of the possible stakeholders in your watershed who would be interested in receiving a copy of the proposed rule.

It may be useful to solicit comments directly from these stakeholders. Many may choose to send written comments to the watershed district instead of or in addition to attending the public hearing. You may find that in some cases a log of telephone comments is another useful means of obtaining public input on your proposed rule. Electronic mail and a web site provide a similar opportunity for a “virtual public hearing.”

You may also find that it is useful to provide for an extended comment period or a series of public hearings and informational meetings. Complicated or controversial rules may benefit from more time taken in the rulemaking process.

Whether any of these measures beyond the “basics” is worthwhile will depend upon the particular problems you are tackling through your rulemaking process. One further approach to consider is called “negotiated rulemaking.”

3. Negotiated Rulemaking

In some cases, a negotiated rulemaking approach can reduce or eliminate opposition to a proposed rule, and can render a more effective rule that is easier for your watershed district to enforce. This approach involves meeting with representatives of affected parties or stakeholders to seek a consensus solution to the watershed problem.

With all of these stakeholders involved, each contributing their own technical or policy expertise, the watershed district may be able to develop a more comprehensive rule. Bringing affected parties into the process directly allows them to begin to adopt the new regulatory environment even as the new rule is being formulated. Achieving consensus in the rulemaking process can reduce or even eliminate political opposition to the proposed rule. A negotiated rule should also be easier to enforce - affected parties will not only cooperate with the rule, but they may also want to assure that their competitors do not unfairly profit by breaking the rule.

Negotiated rulemaking is not always suitable. If your watershed district is considering this approach, you will benefit by first asking a series of questions:

Are there a reasonably limited number of stakeholders and affected parties? Too large a group (over 25) will present an unmanageable array of interests and issues, rendering consensus difficult if not impossible to obtain.

Can you convene a reasonably balanced work group? Seek balance both in terms of numbers and expertise. Avoid an imbalance of interests that would prompt stakeholders to question the fairness of the process or your watershed district's openness to a variety of possible outcomes.

Will you have a working group? There is no point to convening a negotiated rulemaking process if the participants do not have the time or resources to participate in a meaningful way. Working effectively also means that the members of the working group indicate a willingness to compromise.

Can you watershed district adequately lead or support the working group? The working group may require your watershed district to provide the facilities and technical expertise to assure that negotiators have enough information to make informed decisions. Occasionally outside consultants may assist the working group with information or insight that the working group members do not already have. In some cases, it may also be helpful for your watershed district to bring in an outside facilitator or neutral mediator, rather than to direct the process itself. This outside neutral may be especially appropriate if your watershed district is inclined to take a more active, advocacy role in the negotiations.

Will negotiation cause too much delay? Negotiation, especially negotiation seeking consensus, takes time. Your watershed district may face a rulemaking problem that requires immediate attention, in which case negotiated rulemaking is not appropriate.

Are there meaningful deadlines? A working group that understands and supports a deadline for the negotiation process is much more likely to achieve consensus.

What if consensus turns out to be impossible? Despite the best of intentions, the goal of consensus is not always attainable. Even without achieving consensus, there still can be value in

having pursued the negotiated rulemaking process. Many areas of agreement can be identified, and your watershed district's rule will reflect a majority if not all of the identified stakeholders.

D. The Rulemaking Record

1. The importance of creating a record.

Creating a rulemaking record is easy and serves several important purposes. First, a sound record will assist a watershed district in defending a rule if the rule is the subject of a legal challenge. A court reviewing a rule will be more likely to determine that the rule is reasonable and supported by the record if the record is thorough and complete. Creation of a rulemaking record that sets out the facts and reasons for a rule may also assist future managers and district staff by explaining the intent and purpose of the rule.

Creation of a rulemaking record will also facilitate public participation and public confidence in the rulemaking process because public access to the record will allow interested persons to become more informed about the rule and the process. A well developed record will indicate that the watershed district takes a serious and informed approach to the problem, the solution, and the process.

2. What should be in the record?

The rulemaking record includes all of the notice procedures undertaken by the watershed district and any correspondence or comments relating to the rule or the rulemaking process. The rulemaking record should also include minutes of any board meeting or hearing where the rule was discussed. It is also helpful, although not required, to create and place in the record a list of persons attending public hearings or meetings on the rule.

Most importantly, the record should contain evidence or factual support for the rule. The record should reflect the factual documentation of the problem you are addressing through the rule and reflect the policy alternatives that were considered and balanced by the board of managers. Creation of a Statement of Need and Reasonableness (SONAR) can serve to provide all of this information in one document that then becomes part of the record.

The question of how much evidence is enough to withstand a challenge to the rule depends on a number of factors such as: (1) how significant a burden the rule would place on regulated parties; (2) how much controversy surrounds the rule; (3) how sophisticated and organized is the opposition to the rule; and (4) whether the rule establishes rates or fees. If the rule places a significant burden on parties, is controversial, or establishes rates or fees, the record should include more extensive documentation. If the opposition to the rule is sophisticated and organized, more extensive documentation may be necessary to respond to the concerns raised by the opposition.

One simple way to obtain factual support for the rule is to contact other agency personnel and gather their comments on a rule. A letter from the DNR, MPCA, Department of

Agriculture, or local soil and water conservation district for example supporting your rule is an easy way to generate factual support for the rule.

III. GENERAL RULE DRAFTING GUIDELINES: SOME DO's and DON'Ts

A. Do clearly state what is required or prohibited.

The number one rule of rule drafting is *clarity*. Ambiguous, vague language is not enforceable, or at least invites enforcement problems. Watershed districts need not only regulate through permits. Simple notification of specified activities, similar to the process used by the Army Corps of Engineers for general permits, may provide your watershed district with important information about activities affecting your watershed without consuming administrative resources through permit review. Regardless of the option chosen - permitting or notification - it is important that the rules clearly state what is required.

B. Do establish substantive criteria for issuing permits.

If your watershed district requires a permit for a certain type of activity, the rules should also state the substantive criteria that the project must meet in order for a permit to be issued. For example, if your watershed district requires a permit prior to the installation or replacement of drainage tiles, the rules should set out the criteria that the installation must meet. There are “design” criteria which specify a preferred design that is generally accepted as a best practice. There are also “performance” criteria which do not specify a design, but rather the outcomes which any design is required to achieve.

Specifying the substantive criteria to guide permit decisions is a fundamental, legislative exercise for watershed districts. While it is desirable to maintain reasonable flexibility for both the benefit of the permit applicants and the board of managers, the substantive standards should be as specific as possible. These criteria may be listed in the rules themselves or, if the standards are long or are listed in a readily available source such as a handbook or manual, the rule may reference another source. Incorporated sources should be referenced with precision. A reference to “all other applicable regulations and laws” merely invites permit applicants and the courts to guess at what your watershed district intended.

C. Do specify the information or exhibits that must accompany a permit application.

The rules should list the information or exhibits a permit applicant must submit along with the permit application. This information should be included in the rules because most watershed district rules state that the district will act on a permit application within a certain time frame, usually within 30-60 days of receipt of the permit application and supporting data. A clear, specific list of required supporting data will guide both the applicant and the district in determining when an application is complete and considered “received.” This ensures that permit

applicants will be treated fairly and it also reduces the amount of time staff must spend requesting additional information.

D. Do clarify whether permits can be issued by staff or require board action.

It is helpful for the rules to state explicitly whether permits can be issued by district staff or if the permit requires action by the board of managers. Inclusion of such language in the rules both ensures that permit applicants will be treated equally and helps establish permit applicant expectations.

If staff will have the authority to issue permits, your watershed district should consider including language in the rules setting out the circumstances when the board may step in and require full board review. One way to resolve the issue is to create two classes of permits: staff issued permits and board issued permits. The rules can provide that staff will issue permits for projects meeting certain substantive criteria, but that proposed projects that do not meet those criteria will require board action.

E. Do establish variance procedures.

If your watershed district allows variances from strict adherence to district rules, the rules should include a section on variances. The rules should state that variances may be granted and under what circumstances. Most rules provide for variances “when strict enforcement of the rules would result in undue hardship.” “Undue hardship” should be defined, as in this example:

“Hardship” as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by these Rules; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variances, if granted, will not adversely affect the essential character of the locality and other adjacent land. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of these Rules.

F. Do define terms used throughout the rules.

It is important that the rules define key terms or terms that could become the subject of debate. It is especially critical that the rules define the terms that are used to trigger affirmative action by an individual, such as the terms defining when a permit is required. For example, if a rule requires that an individual obtain a permit prior to draining or filling a wetland, it is essential that at least the term “wetland” if not the terms “draining or filling” be defined. The term “wetland” is a key term because it triggers the requirement for a permit and the term is also subject to a great deal of debate.

G. Don't rely on the phrase “at the board's discretion.”

This guideline is a corollary of the “Do establish clear substantive criteria” guideline discussed above. Some measure of discretion is necessary and acceptable, but your rules must furnish a reasonably clear policy or standard of action which controls and guides your watershed district’s decision. A permit applicant or a member of the public should be able to judge whether a permit should be granted based upon the terms of the rule, and not upon the whim or caprice of the board of managers.

H. Don’t restate a statute.

Think of your watershed district rules as expressions of policy which amplify or implement a statute. You need not repeat the law that the legislature has already adopted. While it is always important to be mindful of the statutory authority for your rules, reciting the statutory provisions within the rules is unnecessary and can result in conflict if the statutory language is changed.

I. Don’t restate agency rules.

With limited exceptions, state agency rules apply across the entire state, regardless of whether a watershed district says so in its rules. There is no need for your watershed district to adopt state agency rules unless the state agency’s authority is delegated in some way to your watershed district.

IV. POLICY CONSIDERATIONS IN WATERSHED RULEMAKING

While each watershed district is unique, a survey of watershed district rules indicates that there are a number of common policy considerations. This Section of the Handbook outlines some key considerations for your watershed in the most common policy areas where watershed districts exercise regulatory authority.

A. Stormwater Runoff

1. Introduction

Uncontrolled stormwater runoff or “non-point source pollution” is often considered the primary cause of water quality deterioration and can exacerbate flooding problems. Effective stormwater management includes regulating the quantity (rate control) and quality of stormwater entering lakes, rivers, and streams. Stormwater management approaches generally fall into two categories:

a. Structural solutions. Examples of structural solutions include:

- retention areas
- swales
- infiltration trenches
- filter strips
- detention basins (wet or dry)
- vegetative buffer zones

b. Nonstructural solutions. Examples of nonstructural solutions include:

- temporary erosion and sedimentation control practices
- street cleaning
- fertilizer and pesticide application control
- solid waste collection
- protection of wetlands, floodplains, and shorelines

The Watershed District Act provides that one of the purposes for which a watershed district may be established is “to protect or enhance the water quality in watercourses or water basins.” Minn. Stat. § 103D.201, Subd. 2(13). Watershed district managers also have the power to regulate and control the use of water within the watershed district and to regulate the use of streams, ditches and watercourses to prevent pollution. Minn. Stat. § 103D.335, subd. 10 and 16. Watershed districts have the power to regulate land use and development within the floodplain, open space, and greenbelt acres of the watershed in absence of county or municipal

ordinances regulating these items. Minn. Stat. § 103D.335, subd. 19. Watershed districts in the Twin Cities metropolitan area are authorized to regulate land use and development where local government units have not adopted local water management plans. Minn. Stat. § 103D.335, subd. 23; § 103B.211, subd. 1.

Most watershed districts require significant land use development to provide for the management of stormwater runoff. Several watershed districts, including Prior Lake-Spring Lake and Minnehaha Creek, require some sort of stormwater management plan for both development and redevelopment. The stormwater management plan always requires the use of erosion and sedimentation control best management practices and several watershed districts require structural solutions. Other watershed districts manage stormwater runoff solely through requiring the use of erosion and sedimentation control best management practices.

2. Drafting rules to manage stormwater runoff

Selecting the particular stormwater runoff control methods and means of regulation for your watershed district involves consideration of the policies and circumstances unique to your watershed. There are, however, certain guiding principles that can be used in drafting a stormwater runoff management rule.

a. Establish performance standards

It is important that the goal of the stormwater management plan be defined for the permit applicant. Two examples of performance standards include:

- 1) “Stormwater runoff rates for the proposed project shall not exceed pre-project runoff rates for 2-year and 100-year frequency events.” Prior Lake-Spring Lake Watershed District Rule C, ¶ 3 (b).
- 2) “The rate of stormwater runoff from the site shall not increase as a result of the proposed development. Developed peak rates of runoff shall be controlled such that the existing peak rates are not exceeded. The criteria shall be analyzed and met for runoff producing events of critical duration with return frequencies of 1, 10 and 100 years in the subwatershed in which the site is located.” Minnehaha Creek Watershed District Rule B, ¶ 3 (a).

b. Determine and clearly define the activities to which the stormwater management requirements apply

Most watershed districts provide that erosion and sedimentation control best management practices apply when any type of land altering activity takes place. Other watershed districts require on-site stormwater storage facilities for certain types of activity. On-site storage facilities may be required: (1) on all sites that are being developed; (2) on all sites being developed or redeveloped; or (3) only on larger sites exceeding a certain size. The rule should clearly state which activities trigger the stormwater management requirements.

c. Establish the structural and non-structural requirements for a site

The rules should state if certain types of practices are mandatory or whether the permit applicant can select from a list of approved methods. If the watershed district provides a list of choices of methods, it becomes even more essential that performance standards are established. Essentially, the permit applicant can select an alternative so long as that alternative at that project site achieves the performance standard.

d. If structural components are required, set forth maintenance responsibilities

A common problem with structural components such as swales and detention basins is that they are only effective so long as they are maintained. The rule should establish the party responsible for maintenance, a maintenance schedule, and procedures to follow if maintenance is not performed.

B. Erosion and Sedimentation Control

1. Introduction

In addition to the authority for watershed districts described above in relation to regulations of stormwater runoff, regulation of erosion and sedimentation is authorized by the specific watershed district purpose “to control or alleviate soil erosion and siltation of watercourses or water basins.” Minn. Stat. § 103D.201, Subd. 2(10).

Most watershed districts require some type of erosion and sedimentation control for construction and other land altering activities, although the requirements differ a great deal. Valley Branch, for example, requires sedimentation ponds upstream of all wetlands where grading activities above a certain acreage are proposed. Lac Qui Parle-Yellow Bank requires a permanent grass buffer strip on either side of all new and improved drainageways.

Some watershed districts treat erosion and sedimentation control as one component of a required stormwater management plan. Other watershed districts treat erosion and sedimentation control as a separate independent requirement. Some watershed districts use a permit system to regulate erosion and sedimentation control, others simply require that erosion and sedimentation control practices be utilized but do not require a permit from the watershed district.

2. Drafting rules to provide for erosion and sedimentation control

As with regulating stormwater runoff, the erosion and sedimentation control methods and means of regulation chosen by your watershed district reflect policy considerations dependent upon the circumstances unique to your watershed. There are, however, certain guiding principles that can be considered in drafting an erosion and sedimentation control rule.

- a. Determine the mechanism for how the watershed district will regulate erosion and sedimentation control - through permitting, notification, or simply requiring certain practices to be followed

Your watershed district may not wish to require a permit for every activity but may wish to ensure that all activities include provisions for erosion and sedimentation control. Alternatives to requiring a permit are to simply require that the district be notified of certain types of activities prior to their commencement and/or to require that certain types of activities, although not requiring a permit or notification, must follow certain standards. The district could also combine permitting and notification by requiring a permit for certain activities with the potential for significant impact (based on acreage or amount of earth disturbed for example) while requiring only notification for activities of lesser consequence.

Regardless of the option chosen - permitting, notification, a combination of the two or neither- it is important that the rules clearly state what is required.

- b. Define the type of activities to which the requirements will apply

The rules should clearly state who must get a permit and/or notify the district and for what types of activities. If there are exceptions to requirements, for example based on the acreage impacted, the rules should clearly list these exceptions. If the district is not requiring a permit or notification, the rule should state that neither a permit nor notification is required, but that certain erosion and sedimentation control practices must be used and enforcement action may be taken if it is found that the practices are not in place.

- c. Define the practices that must or may be used

There are many types of erosion and sedimentation control best management practices. The rule should state exactly what the district's expectation are. One easy way to define acceptable best management practices is to cite to one of the many erosion and sedimentation control best management practices handbooks available.

- d. Determine the types of exhibits that must accompany the permit application

Several watershed districts, including Valley Branch and Minnehaha Creek, require the submittal of a detailed erosion and sedimentation control plan that shows the methods to be used and their location. Other watershed districts require only that practices be put in place. The rule should state the types of exhibits the watershed district will need in order to issue the permit or for notification to be effective.

C. Onsite Sewage Disposal Systems

Effluent from individual onsite disposal systems such as septic tanks can have an extraordinary impact on surface and ground water quality. In Minnesota, the Pollution Control Agency, Department of Health, and Department of Natural Resources regulate onsite disposal systems. Some watershed districts also regulate individual onsite disposal systems.

Watershed districts may regulate onsite sewage disposal systems based on both a specific purpose and an express power. Watershed districts may be established for the specific purpose “to provide for sanitation and public health, and regulate the use of streams, ditches, or watercourses to dispose of waste.” Minn. Stat. § 103D.201, Subd. 2(8). Watershed district managers have the express power to “provide for sanitation and public health and regulate the use of streams, ditches, or watercourses to dispose of waste and prevent pollution.” Minn. Stat. § 103D.335, Subd. 16.

The most common way watershed districts regulate individual onsite disposal systems is by: (1) prohibiting the construction of onsite disposal systems when municipal collection facilities are available; (2) requiring that individual systems be constructed in accordance with MPCA and Department of Health regulations; and (3) prohibiting systems from outletting directly or indirectly into a lake, river, stream, or public or private drainage system.

There are several other approaches that may assist watershed districts in ensuring that individual onsite disposal systems do not present environmental risks. The watershed district rules can be drafted to set out these requirements.

1. Requiring notification of the installation, abandonment or removal of a system. This notification may be helpful in that it may allow a watershed district to keep an inventory of systems in the watershed. This information can be useful to a watershed district when trying to determine the cause of water quality problems in particular waterbodies.

2. Requiring homeowners to periodically certify that a qualified maintenance firm has inspected and, if necessary, cleaned and pumped the system.

3. Requiring certification of inspection of a system prior to the system changing hands.

D. Livestock Control

Watershed districts may seek to control the impact of livestock on water resources. One of the purposes of watershed districts is “to protect or enhance the water quality in watercourses or water basins.” Minn. Stat. § 103D.201, Subd. 2(13). Watershed district managers also have the express power to “provide for sanitation and public health and regulate the use of streams,

ditches, or watercourses to dispose of waste and prevent pollution.” Minn. Stat. § 103D.335, Subd. 16.

At least two watershed districts have provisions for controlling the impact of livestock (other than feedlots which are regulated by the Pollution Control Agency) on water resources. Neither watershed district requires a permit but forbids certain activities.

Buffalo Creek:

Livestock must be prevented from crossing the ditches or any waterways in an unrestricted manner. Fences or any contrivance deemed acceptable by the Board can be used to prevent livestock from crossing ditches and waterways.

Pelican River:

Watering, feeding or pasturing of livestock in a lake designated as General Development or Recreational by the Becker County Zoning Ordinance, or in the shore impact zone of a stream leading directly to such a lake, or in a public ditch, is not permitted.

E. Wetlands

On the state level, wetlands are primarily regulated by the Department of Natural Resources (public water wetlands) and local government units under the Wetland Conservation Act (all wetlands other than public water wetlands). The majority of watershed districts also regulate wetlands in some fashion. In the metropolitan area, watershed districts may regulate wetlands as a local government unit under the Wetland Conservation Act. Minn. Stat. § 103G.005, Subd. 10e. Watershed districts may also regulate wetlands under the Watershed District Act in furtherance of the district’s statutory purpose and pursuant to an express power.

Purposes for which a watershed district may be created include “to control or alleviate soil erosion and siltation of watercourses or water basins,” “to regulate improvements by riparian property owners of the beds, banks, and shores of . . . wetlands,” and “to protect or enhance the water quality in watercourses or water basins.” Minn. Stat. §§ 103D.201, Subd. 2(10) (11), and (13). Regulation of activities affecting wetlands may be in furtherance of these statutory purposes. The express powers described above in relation to stormwater runoff and erosion control may also authorize regulation of wetland activities.

In drafting rules to address wetlands, a watershed district should consider the following:

1. Make sure the term “wetland” is defined in the rules.

Prior to defining the term “wetland,” your watershed district must determine which types of wetlands it will exercise jurisdiction over. For example, some watershed districts only regulate Wetland Conservation Act wetlands as the local government unit, leaving regulation of public water wetlands to the Department of Natural Resources. Other watershed districts regulate both types of wetlands or a subcategory of both.

Once it has been determined which types of wetlands will be regulated, the rule should be drafted to clearly set this out. The easiest way to articulate this determination is by defining the term “wetland” in the definition section of the rules.

2. Clearly define the types of activities in wetlands that will be regulated.

Most wetland alteration rules surveyed regulate the “draining” or “filling” of wetlands. These terms should be clearly defined in the definition section of the rules. In addition, your watershed district should give some thought as to whether other activities in wetlands are negatively affecting the quality of the district’s wetlands. For example, excavation in wetlands may be harmful but is not being regulated because it is not considered “draining” or “filling.” The Wetland Conservation Act does not regulate excavation in wetlands. If your watershed district wishes to regulate this type of activity it should make separate rules requirements addressing excavation.

3. The rules should set out the criteria for wetland alteration.

The rules should set forth the criteria your watershed district will use to determine if wetland alteration will be allowed and the actions required by a permit applicant if the alteration is allowed. For example, will alteration only be allowed if the wetland cannot be avoided? If alteration is allowed, is mitigation or replacement required?

F. Variances

If your watershed district allows variances from strict adherence to district rules, the rules should include a section on variances. The rules should state that variances will be granted and under what circumstances.

Here are two examples of variance criteria:

1. Prior Lake - Spring Lake Watershed District Rule I

VARIANCES AUTHORIZED. The Board of Managers may grant variances from the literal provisions of these Rules. Variances shall only be permitted when they are in harmony with the general purpose and intent of the Rules in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any Rules, and when the terms of the variance

are consistent with the District's watershed management plan and Minnesota Statutes, Chapter 103D.

HARDSHIP. "Hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by these Rules; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variances, if granted, will not adversely affect the essential character of the locality and other adjacent land. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of these Rules.

2. Sauk River Watershed District Section 1.7

A. Variances Authorized

The Board of Managers may hear request for variances from the literal provisions of these rules in instances where their strict enforcement would cause undue hardship because of circumstances unique to the property under consideration and having made public notice of such hearings. The Board of Managers may grant variances where it is demonstrated that such action will be in keeping with the spirit and intent of these rules.

B. Standard

In order to grant a variance, the Board of Managers shall determine that the special conditions which apply to the structure or land in question do not apply generally to other land or structures in the district, that, in granting of such variance, will not merely serve as a convenience to the applicant and that the variance will not impair or be contrary to the intent of these rules.

For Further Reading

M. Corbett, Minnesota Rules Drafting Manual (Revisor of Statutes, 1984).

G. Beck et al., Minnesota Administrative Procedure (1982).

Administrative Conference of the United States, Guidelines for Rulemaking (1992 et seq.).