

**MINUTES OF THE MEETING
OF THE
BOARD OF MANAGERS
OF THE
NINE MILE CREEK WATERSHED DISTRICT**

WEDNESDAY, AUGUST 19, 2020

1. Call to Order

Chair Cutshall called the Regular Meeting of the Board of Managers of the Nine Mile Creek Watershed District to order at 7:00 p.m., Wednesday, August 19, 2020. The meeting was conducted by web-based video conference, pursuant to Minnesota Statutes section 13D.021, after the president determined that because of the COVID-19 pandemic it was not prudent for the Board of Managers, or any committee thereof, to meet in person.

Managers Present: Bob Cutshall, Erin Hunker, Larry Olson, Grace Sheely, and Jodi Peterson

Managers Absent: None

Staff: Randy Anhorn, Lauren Foley, Megan Jester, Janna Kieffer, Bob Obermeyer, Erica Sniegowski, Michael Welch, Gael Zembal

Advisors Present Louise Heffernan (Barr), Janna Kieffer (Barr), Bob Obermeyer (Barr), Keith Pilgrim (Barr), Michael Welch (Smith Partners)

Other Attendees: Bryan Gruidl (City of Bloomington), Anita Hall, Peggy Kvam, Ted Lockhart, Emily Shaw (ISG)

2. Approval of Regular Meeting Agenda

Manager Sheely moved, seconded by Manager Olson to approve the meeting agenda as presented. On a roll call vote, the motion was approved 5-0.

3. Reading and Approval of Minutes

a) Draft Minutes of the July 15, 2020, Public Hearing

Manager Sheely noted that in the first paragraph under item 1, a comma is needed after “Minnesota Statutes section 13D.021.”

Manager Sheely moved, seconded by Manager Olson to approve the minutes of the District’s July 15, 2020, public hearing as amended. On a roll call vote, the motion was approved 5-0.

b) Draft Minutes of the July 15, 2020, Regular Board Meeting

Manager Olson moved, seconded by Manager Sheely to approve the minutes of the District’s July 15, 2020, Regular Board Meeting. On a roll call vote, the motion was approved 5-0.

4. Public Open Forum

Administrator Anhorn presented the District’s procedure for the public open forum and explained the managers take no action on items raised, but may refer a matter to staff for further attention. He said a member of the public, Ted Lockhart, indicated the he has comments that will take approximately seven and a half minutes to make and the chair agreed to allow him that time.

Mr. Lockhart, resident of Bloomington, introduced himself and thanked the managers. He stated that he is representing roughly a score of concerned citizens who live around and near Normandale Lake. Mr. Lockhart asked the chair to make changes to its rules, policy, practice and procedures to allow him more than the standard three minutes to speak. In response to a question from the chair, Michael Welch said that no changes to NMCWD rules are on the agenda this evening. President Cutshall confirmed that Mr. Lockhart could have seven and a half minutes to speak. Mr. Lockhart made the following statement:

Let me begin by representing the Normandale community, who collectively have over two and a half centuries of Normandale observations. We have grievous public safety, integrity, and accountability concerns regarding Nine Mile’s stewardship of the body of water properly known as Normandale Ditch #1, “the Army Corps of Engineers Flood Control Project,” or as Nine Mile Vice President Ms. Sheely refers to the water, paraphrase, Normandale is at best a marsh – it’s no lake.

In our collective observation, Normandale ditch has significantly declined since the 2005 Use Attainability Analysis was published. Normandale has so precipitously declined that currently it remains in the worst water quality conditions ever observed. We encourage the board to

personally make observations of Normandale this week to see for themselves how far the water has declined since the UAA.

For the record, Barr Engineering reported to Nine Mile serious concerns of harmful algal blooms and toxicity of Normandale in a hidden report, paraphrased and summarized for the record here:

These expansive algal blooms are toxic to animals during large blooms and interfere with recreational uses of Normandale. Excess phosphorus loads such as those seen in Normandale stimulate blue-green algal growth. The warm growing conditions and release of dissolved phosphorus during July and August are particularly favorable to blue-green algae, and blue-green algae have a competitive advantage over the other algal species during this time.

To date, monitored blue-green algae levels in Normandale have been recorded above the level of mild adverse health effects albeit remaining below the World Health Organization's threshold for moderate health risk.

Barr Engineering provided us the methodology and training to determine the presence of harmful algal blooms and suspected blue-green algae, the methods are known as the stick and jar methods. Over the summer 2020, we administered bi-weekly testing by a registered professional engineer, with results repeatedly showing Normandale exhibiting harmful algal blooms and suspected blue-green algae.

In addition, Barr Engineering recommended to us that if a person comes in contact with the water during harmful algal blooms, they recommend washing with fresh water and soap. Barr Engineering also recommended via their written procedure, whenever harmful algal blooms are observed during the recreational season, that routine regular (weekly) monitoring be undertaken to determine blue-green algae and toxicity presence.

To be painfully clear, it is not possible to determine whether a large harmful algal bloom is producing toxins without special testing. Therefore, it is both recommended and warranted to warn people and their pets to avoid contact with surface scums whenever a harmful algal bloom blue-green algae is suspected – Barr Engineering recommended such condition warnings and monitoring, Lower Colorado River Association in consultation recommends such warnings and monitoring, and the state of Minnesota also recommends such warnings.

Sadly, as you know or should know, Nine Mile has not/never warned people (and their pets) regarding harmful algal blooms despite the recommendations to do so -- this is a failure in duty as stewards of the watershed toward the concerned citizens of Normandale.

Not only has Nine Mile been painfully derelict to their duty toward public safety while failing to provide any public warnings, during this same time, Nine Mile continues publicly to support the UAA recreational use for Normandale water quality which fully supports swimming - swimming as defined by the MPCA's Use Support Classification for Swimming Relative to Carlson's Trophic State Index report.

Just as egregiously during this time period, Nine Mile employee Mr. Anhorn purported to us, quote, In general, we are pleased with the results.

In testimony - for the board to make of record - we know of community members who have or are currently suffering adverse health effects while in and around Normandale - as Nine Mile knows or should know.

While the stewardship of the water and concern for public safety is the most grievous failure of Nine Mile, significant other failures in integrity and lack of accountability are enumerated in the electronic correspondence, which Mr. Cutshall and Ms. Sheely have acknowledged. Integrity and accountability failures include:

- *Nine Mile contractors polluting Normandale with no accountability*
- *Nine Mile making false or misleading claims that Normandale is not an impaired waterway when of record the Minnesota Pollution Control Agency downgraded water quality to “Class 3 Industrial Use” and declared the waterway impaired in 2018 and again in 2020*
- *Nine Mile making false or misleading claims that Normandale citizens should be pleased with the benefit an increased carp population after the drawdown*
- *Nine Mile making repeated false or misleading comparisons of Normandale to the Boundary Waters, recently suggesting that before drinking Normandale Water one should simply filter, similar to filtering water done in the Boundary Waters - I want to make painfully clear and on the record, Normandale comparisons to the Boundary Waters, and in specific the filtering analogy comparison is not only wrongful, its dangerously wrongful to suggest filtering Normandale water makes it safe for consumption. To be painfully clear, using Mountain Safety Research filter which can confidently and safely be used regularly in the Boundary Waters, will not filter out toxins as such, filtering is never a recommended method to purify the industrial use classified water or water suspected of toxicity of Normandale in order to make potable*

Mr. Chairman and members of the board, ask you to accomplish the following during tonight’s open meeting and reap the benefits borne from integrity and accountability

- *Make motion, pass, and ensure every board member has access to the electronic correspondence of Nine Mile & Barr Engineering from May culminating in August 2020, including the attached photographs and videos.*
- *Make motion, pass, and immediately undertake efforts to contact a trusted consultant, test Normandale’s harmful algal blooms, including tissue samples, as well as Environmental Protection Agency testing Method 544 and make public a determination if Normandale is safe for recreational use*
- *Make motion, pass, and develop a timely and responsive plan to implement the recommended minimum public safety actions described in the electronic correspondence*
- *Make motion, pass, and name an individual to identify the root cause of the integrity and accountability failures at Nine Mile and make report at the next open board meeting*

- *Make motion, pass, and develop a plan to correct the Nine Mile failures on Normandale ditch #1 using the provided electronic correspondence as a guide*
- *Make motion, pass, and immediately halt spending of any of the remaining \$1 million funding for the Normandale project, and only resume disbursement upon published plans to remedy errors made during the spending thus far.*

The benefits of taking these actions begin to repair the integrity and confidence loss by the community of Normandale and set the conditions toward improving Normandale water quality.

We welcome your questions.

The managers had no questions for Mr. Lockhart. Mr. Lockhart said he would provide a written copy of his comments to the District.

5. Consent Agenda

a) Administratively Approved Permits

No comments or questions on the administratively approved permits were raised.

b) Permit Inspection Report

No comments or questions on the permit inspection report were raised.

c) Staff Reports

- i. Permit and Water Resources Coordinator
- ii. Education and Outreach Coordinator
- iii. Program and Project Manager

Manager Hunker moved, seconded by Manager Peterson to accept the Consent Agenda as presented. On a roll call vote, the motion was approved 5-0.

6. Hearing of Permit Applications

a) Permit #2020-67: Film Tec Parking Lot Improvements: 5230 West 73rd Street, Edina

Engineer Obermeyer noted that Louise Heffernan of Barr Engineering was included as an author of the permit review memo and explained that she is a relatively new employee at Barr and her work for the District includes permit application reviews and preparing permit review memos. Engineer Obermeyer presented the Engineer's review of the permit application for this parking lot reconstruction project located in Edina. He went into detail on why volume retention is not feasible on the site because of high groundwater conditions, and

that the volume retention provided on the site will be zero. Engineer Obermeyer pointed out that with the recent revisions of the 100-year frequency flood elevation on the site using Atlas 14 precipitation data, there has been an increase in flood elevation since original construction of the existing building. He explained that the District's low floor criteria apply here, but do not impose any requirement on the building because no additions or alterations to the existing on-site building are proposed.

Engineer Obermeyer stated the Engineer recommends approval of the permit with the conditions stated in Engineer's memo, including a financial assurance in the amount of \$166,100, of which \$5,000 is for compliance with the chloride management requirements, and standard procedures regarding the necessary maintenance agreement, the District Engineer receiving a plan showing the actual floodplain on site and an as-built drawing of the flood-storage replacement.

Engineer Obermeyer responded to questions. Manager Sheely commented the applicant could look at the green space on the site to see if something could be done there to infiltrate more water. Engineer Obermeyer said he will pass that comment on to the applicant. Attorney Welch stated it is required that volume control be provided to the maximum extent practical, and the Engineer has determined the maximum extent practical is zero. Attorney Welch said if there were a voluntary measure feasible to address volume control on site, it would be reasonable to include it in the permit requirements.

Manager Peterson commented that this area is seeing redevelopment. She said that regarding the issue with close groundwater and lack of infiltration, she asked if there is an effort to look at the area to provide infiltration rather than on an individual project-by-project basis. Engineer Obermeyer said such work would be through the city process, and the city is the first step for developers. He noted that this area of Edina is being considered for master planning and redevelopment, and if the city prepares a redevelopment plan, it would likely come to the District for comment, and this review and comment process would be the best mechanism for the District to address this topic. Attorney Welch remarked that this topic could be one that Administrator Anhorn brings up with the City of Edina.

Manager Sheely moved, seconded by Manager Hunker to approve Permit #2020-67: Film Tec Parking Lot Improvements: 5230 West 73rd Street, Edina. Upon a roll call vote, the motion carried unanimously.

b) 2020-73 Three Rivers Park District Nine Mile Trail Connection 169 Underpass; Minnetonka and Edina

Engineer Obermeyer said this project is the continuation of the Three Rivers Park District trail, and it is the final section of the trail within the Nine Mile Creek watershed. He described the project, which extends approximately 1,500 lineal feet, and is a combination of boardwalk and bituminous trail. He went through the Engineer's permit review. Engineer Obermeyer talked about the proposed fill in the floodplain and mitigation. He explained the boardwalk would need to be constructed below the 100-year flood elevation of the creek in order to meet Americans With Disability Act requirements and connect to the extending bike/pedestrian crossing beneath T.H. 169.

Engineer Obermeyer pointed out on a PowerPoint slide the location where there would be excavation, resulting in the conversion of wetland from Type 2 to Type 3, to provide the necessary floodplain volume mitigation. He reported the excavation is considered a de minimis exemption by the Wetland Conservation Act (WCA). He noted that the Nine Mile Creek Watershed District is the Local Governmental Unit (LGU) administering the Wetland Conservation Act for the project east of T.H. 169 (Edina side), and the City of Minnetonka is the LGU administering the Wetland Conservation Act for the project west of T.H. 169. Engineer Obermeyer said the City Minnetonka in its capacity as LGU reviewed and approved the wetland impacts whereas both LGUs reviewed and approved the wetland boundary and type within their respective jurisdictions.

Engineer Obermeyer talked about the variance requested for this project, which results from construction of 306 lineal feet of boardwalk below the 100-year flood elevation of the creek. He reminded the Board that the boardwalk it is a structure under the NMCWD rules.

Engineer Obermeyer said the District Engineer recommends approval of the variance and the permit. He said the actions in front of the Board are approval of the variance request for boardwalk construction below the 100-year flood elevation and approval of the permit with as-built drawings of the floodplain mitigation to be submitted to the District by the applicant.

Manager Olson commented in favor of the project. Manager Sheely asked for the District to do a better job of record keeping as to who did the WCA determinations. She said she assumed Barr Engineering did the determination on behalf of the NMCWD and wondered who did the determination on behalf of the City of Minnetonka. She voiced her concerns for residents adjacent to the project site and wondered what type of notification they received regarding the project's proposed tree removal, remarking it can be disconcerting for trees to be removed without warning in what feels like one's backyard.

Manager Sheely shared her concern about how far below the 100-year flood elevation the boardwalk will be because the trail adjacent to Minnehaha Creek near Methodist Hospital floods, leaving debris when water recedes, making

the trail difficult for her to walk. She said she assumed TRPD will be responsible for trail maintenance. Engineer Obermeyer said the proposed trail should be similar to the trail to the east of Tracy Avenue at Valley View Road in Edina. He described the height of that boardwalk and addressed Manager Sheely's concerns about the boardwalk height and the tree removal. Manager Sheely requested that going forward the permits will document who does the WCA determinations, and she asked that the District Engineer communicate to the applicant that the District is concerned about trees being removed without residents being notified. Engineer Obermeyer said he will notify the applicant that the Board raised this concern. Administrator Anhorn said that this project included three separate WCA decisions, and it would be a lot of documentation to include those decisions in the Board's meeting packet. Mr. Welch noted that his experience is that staff and the engineer do a fine and thorough job of documenting the WCA Technical Advisory Panel's consideration of applications and documenting the basis for WCA decisions.

Manager Olson moved, seconded by Manager Peterson to approve the variance request for the TRPD Nine Mile Trail Connection 169 Underpass as presented in the Engineer's Report. On a roll call vote, the motion was approved 5-0.

Manager Hunker moved, seconded by Manager Peterson to approve Permit 2020-73 for the TRPD Nine Mile Trail Connection 169 Underpass as presented in the Engineer's Report. On a roll call vote, the motion was approved 5-0.

7. Treasurers Report

a) Sunram Pay Application for Non-Profit Site Best Management Practice Retrofit Projects

Administrator Anhorn stated the pay application for the nonprofit site best management practice retrofit projects is for the amount of \$206,693.07, including a small change order for redesign of one of the sites and which was within his change order authorization.

b) Sunram Pay Application for Warranty Work and Maintenance on Edina Streambank Project

Administrator Anhorn said the Edina Streambank work had a change order in the amount of \$614.75, which was within his change order authorization. Engineer Kieffer noted that she and Attorney Welch determined a change order isn't required for the additional work in the amount of \$614.75 because the change was a change in quantities, not price or time.

Manager Sheely moved, seconded by Manager Hunker to accept the Treasurer's Report, pay the bills, and pay both Sunram pay applications. On a roll call vote, the motion was approved 5-0.

8. Administrator's Report

Administrator Anhorn noted his report is in the packet, and he noted that the dates for the Storm Con webinar are listed incorrectly in his report and the correct dates are September 9th and 10th. He highlighted the news that Lauren Foley recently finished her graduate studies, and he thanked District intern Megan Jester for her work this summer and her last day is Friday, August 21st. Administrator Anhorn mentioned the deadline for early bird registration for the Water Resources Conference, being held virtually, is September 25th and for Board members to let him know if they want to attend, if they haven't already let him know. He noted there may be things coming up related to the COVID Family First Coronavirus Response Act and federally funded sick time for reimbursements for care.

Administrator Anhorn reported the District has a budget public hearing scheduled for Thursday, September 3rd at 5:30 p.m., and he said there may be a permit and a few other items also on that meeting agenda.

Administrator Anhorn summarized the District's August 6th Special Meeting discussion and the District's resulting position on cyanobacteria and cyanotoxin monitoring and analysis. He said the District discussed that if during the course of the District's routine lake monitoring an algal bloom or potential algal bloom is seen, the District will do an algal enumeration and identification and provide that information to the city to conduct public communication or notification postings. Administrator Anhorn stated that the District's position regarding receiving a citizen report outside of the District's routine monitoring is to refer those people to the Minnesota Pollution Control Agency (MPCA) and the Minnesota Department of Health (MDH), which have phone numbers and systems in place for receiving such reports. He noted the District has on its website the contact information for the MPCA and MDH regarding such reports.

Administrator Anhorn provided lab results from the test for blue-green algae that was discussed at the Board's last meeting. He reported that the results from the cyanobacteria identification showed there was blue-green algae present in the lake and in greater amounts in the stormwater basin. Results of the cyanotoxin test for the stormwater basin and the lake came back negative. He said he has forwarded the results and information on to the City of Bloomington, and the city decided not to post communications about the high numbers of blue-green algae in the stormwater basin based on the fact that the stormwater basin is not designed for recreational use or bodily contact. Administrator Anhorn reported the District has received a Data Practices Act request, and the District has initiated the response process. He said the request is for all District information, meaning data and communications, related to the North Branch, South Branch, and Normandale Lake from 2004 to now.

Administrator Anhorn announced the District has been awarded a Hennepin county Opportunity Grant of \$96,000 for the Rosland Park Stormwater Filtration BMP Project. He reported he submitted a grant application for a Minnesota Board of Water and Soil Resources Clean Water Fund grant for \$550,000.

9. Unfinished Business

a) Rosland Park Stormwater Filtration Best Management Practice Project

i. Draft Resolution 2020-05 Ordering Rosland Park Stormwater Filtration Best Management Practice Project

Administrator Anhorn reminded the Board that the District held a public hearing on July 15th to receive comments on the Rosland Park Stormwater Filtration BMP proposed project. He noted no public comments were made at the hearing, and he described questions and comments the District received through other channels. Engineer Kieffer provided details on the Engineer's recommendations for addressing project comments from the City of Edina, which includes evaluating a modified pumping scenario that would slightly increase the control elevation of Swimming Pool Pond and Lake Otto to lessen the lowering of water levels through pumping, as compared with existing conditions.

Attorney Welch explained the action in front of the Board is to adopt the resolution ordering the project and authorizing the president to enter into agreement with the City of Edina. He reported that the City of Edina authorized the agreement at its meeting August 18.

Manager Cutshall provided ideas for the District to consider for the project, including recirculating water from Lake Cornelia as a means to ensure the project continues to function in its designed capacity during times of low water. Engineer Kieffer said Barr Engineering could put together some initial ideas and costs for such an approach and present the information to the Board.

Administrator Anhorn pointed out that if new project components or design variations are added to the project, the related costs will change the numbers identified in the resolution, but the Board can amend the resolution if the Board ends up taking action at a future meeting to make project changes. Manager Sheely spoke in favor of the District implementing as part of the project the means to address how the system can operate in periods of low water or drought. She also commented that the agreement provides the city with a 15-day review period in one

instance, and she asked the staff to consider for future agreements that turn-around times may need to be longer due to COVID-19.

Manager Olson moved, seconded by Manager Hunker, to adopt Resolution 2020-05 as presented in the meeting packet, ordering the Rosland Park Stormwater Filtration Best Management Practice Project and authorizing the president to enter into the cooperative agreement with the City of Edina. Upon roll-call vote, the motion carried 5-0.

b) Update on Current NMCWD Capital Projects

Administrator Anhorn provided brief updates on the District's current capital projects.

c) 2021 Draft Budget

Administrator Anhorn reported about the Board's August 6th Special Meeting discussion of the 2021 draft budget and levy request. He highlighted that the District is proposing a 2021 budget of \$3,956,250 and a levy of \$2,600,000, and noted the Board's budget public hearing is Thursday, September 3rd.

10. New Business

a) Cost-Share Grant Program

Program and Project Manager Sniegowski pointed out there is a memo in the Board packet detailing the policy recommendations that the Cost-Share Grant Program ad hoc subcommittee is putting forth for the Board's consideration. She summarized the program, its history, eligibility for the grants, the number of grants provided by the District since the program's inception in 2008, as well as the types of grants awarded and cities where grants have been awarded.

Program and Project Manager Sniegowski presented the recommendations of the subcommittee, including moving forward with two new grant tracks: native habitat restoration and stewardship. She explained that if the Board approves the District's 2021 budget as currently proposed, the cost-share grant program would have \$300,000 in total funding available. Program and Project Manager Sniegowski asked the Board to approve designating \$50,000 of the 2021 Cost-Share Program budget to habitat restoration grants.

Program and Project Manager Sniegowski asked the Board to adopt a policy to set award amounts for habitat restoration grants so that the maximum residential grant is

\$3,000, the maximum association grant is \$5,000, and the maximum commercial/ nonprofit/ government grant is \$10,000. Program and Project Manager Sniegowski said the board is also being asked to consider that the habitat restoration grants require a minimum of 50% matching funds for all costs and require projects to be completed within two years. She said project start dates would be in spring and fall and applications deadlines would be in spring and fall.

Program and Project Manager Sniegowski said vegetation and invasive species removal would not be eligible for grant funds, but costs for such work may be used as grant match. She noted that bee lawns and fescue lawn conversions would not be eligible for habitat restoration grants. Applications for grants of \$5,000 and under would be administratively approved and grants for more than \$5,000 will go to the Board with staff recommendations. She added the stewardship grants-review process would remain as currently configured. Program and Project Manager Sniegowski noted that these recommendations could be adopted as a two-year pilot.

Manager Sheely moved, seconded by Manager Olson to adopt the native habitat restoration grants policies based on the recommendations of the ad hoc habitat restoration subcommittee. On a roll call vote, the motion was approved 5-0.

b) Update on Wetland Analysis Inventory Study

Administrator Anhorn said this item doesn't need immediate action. The Board consented to defer this item to the Board's next meeting.

11. Engineer's Report

Engineer Kieffer noted an update to the report, explaining that the second paragraph on page one regarding Normandale Lake was revised since original distribution of the monthly report to include a summary of results from the cyanobacteria laboratory analysis that was conducted, in addition to the discussion on the cyanotoxin laboratory analysis results.

12. Attorney's Report

Attorney Welch had no report.

13. Managers' Reports

Manager Sheely commented on the salt virtual presentation put on by Fortin Consulting, sharing it was an amazing online learning experience. She said she hopes the District's Green Corps member could get more involved in the topic area of water softeners.

14. Adjournment

It was moved by Manager Olson, seconded by Manager Hunker to adjourn the meeting at 9:24 p.m. Upon a roll call vote, the motion was approved 5-0.

Respectfully Submitted,

Erin Hunker, Secretary