

NINE MILE CREEK WATERSHED DISTRICT

Memorandum supporting and providing explanation of the proposed revision of the Nine Mile Creek Watershed District Stormwater Management Rule for linear projects

December 20, 2023

BACKGROUND

This memorandum presents background on and an explanation of how 2023 amendments to the Nine Mile Creek Watershed District Stormwater Management Rule apply to linear (roadway) projects. In addition to supporting the proposed changes, this memo provides guidance on application and interpretation of the rules, as well as explanation of NMCWD's intent in adopting the changes. The amendments pertain only to NMCWD Rule 4 – Stormwater Management, and to application of the rule to linear projects. (No changes to the rules' definition of "linear projects"¹ was made.)

This memo also supports NMCWD's determination that the proposed changes will improve the capacity of the NMCWD regulatory program to protect water resources in the Nine Mile Creek watershed. It establishes the basis for NMCWD's determination that the improved effectiveness of the rules reasonably supports the compliance burden imposed on public entities undertaking road projects.

NMCWD invited all interested parties to submit written comments on the proposed changes by December 11, 2023, and a number of comments were received. In accordance with state law,² NMCWD held a public hearing on the proposed changes at the December 7, 2023, workshop meeting of the managers. No comments were offered at the hearing.

The written comments received were from watershed cities. NMCWD reviewed and responded to each, but reasoned that the comments could best be addressed in the permit-review process and no change to the text of the proposed amendments was necessary. The comments and NMCWD responses are available on the district's website: <https://www.ninemilecreek.org/permits/>

The managers adopted the rule revisions and set an **effective date of January 1, 2024**, for the revised rule at the December 20, 2023, regular meeting. Permit applications that are not complete and land-disturbing activities that have not begun as of the effective date will be subject to the updated linear-project provisions.

Background

In 2022, NMCWD completed an update of its rules that included changes to requirements for single-family home projects, refining the rules' low-floor requirement and making housekeeping revisions to improve the operation of the rules. At the time, NMCWD and members of its Technical Advisory Committee had identified inconsistencies between how the NMCWD rules regulated roadway projects and the requirements of the Minnesota Pollution Control Agency's

¹ "Construction or reconstruction of a public improvement in a linear corridor, or construction, repair or reconstruction of a utility or utilities in a linear corridor that is not a component of a larger contemporaneous development or redevelopment project."

² Minn. Stat. § 103D.341, subd. 2.

2020 general permit for Municipal Separate Storm Sewer Systems.³ NMCWD elected to go ahead finalize the housekeeping changes and defer the linear revisions until 2023.

2023 CHANGES

Threshold

Under the prior NMCWD rule, stormwater management needed to be provided only for linear projects that created one acre or more of new (or additional) impervious surface. The MS4 general permit requires volume control for linear projects that result in a total of one acre of either new or fully reconstructed impervious surface.⁴ As revised, the NMCWD linear threshold for stormwater in subsection 4.2.4 matches MPCA's. As under the prior NMCWD rule (and the general permit), mill and overlay or other pavement rehabilitation does not count toward the one-acre threshold. (NMCWD continues to require erosion and sediment control for smaller projects than are regulated by MPCA – those causing land disturbances of 5,000 square feet or 50 cubic yards, or more, compared to the MPCA's one-acre threshold.⁵)

Requirements

Under the current MS4 general permit, stormwater volume control must be provided for “the larger of one (1) inch times the new impervious surface or one-half (0.5) inch times the sum of the new and the fully reconstructed impervious surface.”⁶ The general permit requires applicants to make “reasonable” attempts to acquire additional land for stormwater management if the applicable volume cannot be provided within the right-of-way. (*Id.*) Further, volume-reduction practices are preferred, but need not be pursued if not “cost effective.” No standards or guidance is provided for engineers reviewing stormwater plans to determine whether *reasonable* land-rights acquisition efforts have been undertaken or to measure cost effectiveness. NMCWD was reluctant to incorporate such nontechnical and subjective standards, but also did not want to have higher permit thresholds than the state and thereby miss out on regulatory review opportunities and opportunities to help drive stormwater-management performance improvements for such projects. Somewhat reluctantly, therefore, NMCWD incorporated a required showing of “reasonable efforts” to acquire additional land-use rights for stormwater treatment where needed and the cost-effectiveness off-ramp – but only for projects that create more than an acre of fully reconstructed and/or new impervious surface, but less than an acre of new (additional impervious surface). Such projects must also be compliant with the NMCWD rate-control criterion in paragraph 4.3.1b.

Applicants with projects creating an acre or more of new impervious surface continue to need to provide stormwater-management plans that meet the criteria of subsection 4.3.1 or 4.3.2 (for restricted sites, as defined in the rule). NMCWD did not want to lose any opportunity to protect water resources and mitigate flood risk by backsliding from requirements now in the rule; projects triggering the one-acre of new impervious threshold are few and far between, but to date

³ Available, along with additional information about the state's municipal stormwater program, at <https://www.pca.state.mn.us/business-with-us/municipal-stormwater-ms4> (last visited December 15, 2023).

⁴ Sec. 20.5, Minnesota Pollution Control Agency General Permit MNR040000 (Nov. 16, 2020).

⁵ *Id.* secs. 19.2, 20.2, which is consistent with MPCA's general permit for construction activity, available at <https://www.pca.state.mn.us/business-with-us/construction-stormwater> (last visited December 18, 2023).

⁶ Sec. 20.7, MPCA General Permit MNR040000 (Nov. 16, 2020).

applicants have been able to work with NMCWD engineers toward compliant stormwater-management programs.

A principal driver for the revised approach is that it allows NMCWD to engage with road authorities as they plan and design road projects, such that NMCWD will be able to develop sound working knowledge and experience with such projects to be able to represent to the board of managers and citizens that NMCWD is cost-effectively and efficiently working with cities and road authorities to fulfill its role in pursuing water-resource protection and flood-risk mitigation.

Regional projects

NMCWD also added a new subsection – 4.3.7b – to provide a specific framework for regional and subwatershed-based approaches to linear projects. The preexisting regional stormwater-management approach in 4.3.7a continues to allow for regional treatment for a contiguous subwatershed area that could include roadways and other right-of-way. But NMCWD added the regional linear framework to provide applicants with a framework for addressing stormwater-management for several linear projects within a particular region or subwatershed through common, centralized best-management practices. NMCWD hopes to work with cities especially on plans for such regional approaches that address the inherent space limitations individual projects face while providing more protective management. The criteria to be met are the same as for other linear projects – those in section 4.3.3. The treatment requirements apply in the same manner as applies to individual projects: Those creating one acre or more of new impervious surface will need to meet criteria in 4.3.1 or 4.3.2, as applicable, while all other regional linear projects will be assessed against the MS4-type criteria in 4.3.3.