

## NINE MILE CREEK WATERSHED DISTRICT

### Memorandum supporting and providing explanation of the proposed revision of the provisions of the Nine Mile Creek Watershed District Stormwater Management Rule applicable to roadway project

October 24, 2023

#### BACKGROUND

This memorandum presents background on and an explanation of amendments being proposed to the Nine Mile Creek Watershed District Stormwater Management Rule. 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 certain specific provisions. The amendments proposed at this time pertain only to NMCWD Rule 4 – Stormwater Management, and to application of the rule to linear (roadway) projects. (No changes to the definition<sup>1</sup> of “linear projects” in rules is proposed.)

This memo 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 effectiveness of the rules reasonably supports the compliance burden imposed on public entities undertaking road projects.

NMCWD invites all interested parties to submit **written comments** on the proposed changes by **December 11, 2023**. Submission of comments by email to Zach Stafslie [zstafslie@ninemilecreek.org](mailto:zstafslie@ninemilecreek.org) is encouraged and receipt of electronic submissions will be acknowledged. Road authorities are of course particularly encouraged to review the changes to the rules to help NMCWD ensure that they are as fully protective of water resources without generating excessive administrative costs or placing an undue burden on those subject to them. Comments on the proposed rules and how they may apply in practice are most useful. Similarly, criticisms are most valuable when accompanied by a suggested alternative regulatory approach or language.

In accordance with state law,<sup>2</sup> NMCWD will also hold a **public hearing** on the proposed changes. The hearing will be conducted at **5:30 p.m., December 7, 2023**, as part of the regular meeting of the managers at the NMCWD offices at **Discovery Point, 12800 Gerard Drive, Eden Prairie**. At the hearing, interested persons will have the opportunity to address the NMCWD Board of Managers concerning the proposed revisions and the amendment of the rules into the NMCWD Watershed Management Plan.<sup>3</sup>

The amendments may be revised in response to comments. In addition, this memo will be updated, as may be needed, to address comments received, and will be reissued in final form to support the managers' adoption of the final revisions to the rule.

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<sup>1</sup> “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.”

<sup>2</sup> Minn. Stat. § 103D.341, subd. 2.

<sup>3</sup> NMCWD is proposing to amend its watershed management plan to include the updated rules at the same time it solicits comment on the rules. Minn. Stat. § 103B.231, subd. 11. The two statutory processes are being pursued in tandem in the interest of efficiency. NMCWD signaled its intention to amend the plan to include the updated rules in the watershed plan. Section 6.2, p. 6-4, 2017 Plan.

The managers will consider adopting the rule revisions and setting the effective date of the revised rule at the December 20, 2023, regular meeting. At the time of issuance of the revisions in draft, NMCWD has set a **target effective date of January 1, 2024**. 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.

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.<sup>4</sup> 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 2020 general permit for Municipal Separate Storm Sewer Systems (MS4s).<sup>5</sup> NMCWD's present proposed revisions address the inconsistencies.

The changes in the proposed rules are in standard ~~strikeout~~/underline form.

## **2023 PROPOSED CHANGES**

### *Threshold*

Under the current NMCWD rule, stormwater management must be provided only for linear projects that create one acre of 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.<sup>6</sup> As proposed to be revised, the NMCWD linear threshold for stormwater in subsection 4.2.4 would match MPCA's. As under the present NMCWD rule (and the general permits), mill and overlay or other pavement rehabilitation does not count toward the one-acre threshold. (NMCWD would continue 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.)<sup>7</sup>

### *Requirements*

Under the 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.”<sup>8</sup> The general permit requires applicants to make “reasonable” attempts to acquire additional land for stormwater management if the applicant 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 is reluctant to incorporate such nontechnical and subjective standards, but also does not want to have higher permit thresholds than the state and thereby miss out on regulatory review and opportunities to

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<sup>4</sup> See <https://www.ninemilecreek.org/wp-content/uploads/Matrix-Supporting-and-Explaining-Rule-Revisions.pdf>.

<sup>5</sup> 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 October 18, 2023).

<sup>6</sup> Sec. 20.5, Minnesota Pollution Control Agency General Permit MNR040000 (Nov. 16, 2020).

<sup>7</sup> *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 October 18, 2023).

<sup>8</sup> Sec. 20.7, MPCA General Permit MNR040000 (Nov. 16, 2020).

help drive stormwater-management performance improvements for such projects. Somewhat reluctantly, therefore, NMCWD is incorporating 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 or new impervious surface, combined 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 will continue to need to provide stormwater-management plans that meet the applicable 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 have been able to work with NMCWD engineers toward compliant stormwater-management programs.

A principal driver for the proposed approach is that it will allow 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 proposes to add a new subsection – 4.3.7b – to provide a specific framework for regional and subwatershed-based approaches to linear projects. The existing regional stormwater-management approach in 4.3.7a will continue to allow for regional treatment for a contiguous subwatershed area that could include roadways and other right-of-way. But NMCWD is adding 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. NMCWD also proposes to apply treatment requirements 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.

NMCWD looks forward to comments, insights and questions on the proposed changes.