

MEETING MINUTES

Riley-Purgatory-Bluff Creek Watershed District

August 5, 2015, Board of Managers Monthly Meeting

PRESENT:

Managers: Mary Bisek, Vice President
Richard Chadwick
Jill Crafton, Treasurer
Perry Forster, President
Leslie Yetka, Secretary

Staff: Claire Bleser, RPBCWD Administrator
Michelle Jordan, RPBCWD Water Quality and Outreach Coordinator
Josh Maxwell, RPBCWD District Technician/Compliance Officer
Louis Smith, Attorney (Smith Partners)
Scott Sobiech, Engineer (Barr Engineering Company)

Other attendees: Bob Admoniaitis, CAC; LRIA
Bruce Malkerson, Malkerson, Gunn, Martin LLP;
Attorney for Post
Laurie Hable, CAC
Dorothy Pederson, CAC
Jessica Herzog, Eden Prairie Resident
Bob Shurson, Eden Prairie Resident
Jon Herzog, Eden Prairie Resident
Leslie Stovring, City of Eden Prairie
Larry Koch, CAC
Matt Lindon, CAC; Eden Prairie

1. Call to Order

President Forster called to order the RPBCWD Board of Manager's Wednesday, August 5, 2015, Board of Managers Monthly Meeting at 7:05 p.m. at the RPBCWD office at 14500 Martin Drive, Suite 1500, Eden Prairie, MN 55344.

2. Oath of Office

Richard Chadwick took the Oath of Office, administered by Attorney Smith, for the office of Manager with the Riley Purgatory Bluff Creek Watershed District. The managers and staff congratulated Manager Chadwick, and he offered comments.

3. Approval of the Agenda; Election of RPBCWD Board Secretary

a. Approval of the Agenda

Attorney Smith recommended that the Board amend the agenda to move up item 10 H – election of Board Secretary – so that it is the next item on the agenda following approval of the agenda. He recommended that the Board add after the Board Action item on permit 2015-013 Lake Susan Spent Lime Treatment an

item regarding the annual renewal of insurance through the League of Minnesota Cities Insurance Trust (LMCIT). Attorney Smith recommended that directly after the LMCIT insurance renewal item, the Board take up the topic of the claim against CH2M Hill. He noted that the Board could have a closed session about that topic but said that he is comfortable with the Board having an open discussion about it. Administrator Bleser requested moving ahead in the meeting agenda item 11i – Manager’s Discussion of the Major Plan Amendment. She explained that staff member Josh Maxwell has a presentation on that item, and she requested that the item become 4c. Administrator Bleser announced that she will provide an update on the Wenck study as part of that item. She explained that attending the meeting is the applicant for the Herzog cost-share application, agenda item 10ciii. She requested that item 10ciii be moved up in the agenda to become item 4b, immediately following the reading and approval of the meeting minutes. Manager Crafton moved to approve the agenda as amended. Manager Yetka seconded the motion. Upon a vote, the motion carried 5-0.

b. Election of Secretary of the RPBCWD Board of Managers

President Forster called for nominations for the position of RPBCWD Board Secretary. Manager Crafton moved to nominate Manager Yetka as secretary. Manager Bisek seconded the motion. President Forster called for nominations two more times. Manager Crafton moved to close nominations. Manager Bisek seconded the motion. President Forster announced that nominations are closed. Upon a vote, the motion to approve the nomination of Manager Yetka as Secretary carried 5-0.

4. Reading and Approval of Minutes; Herzog Cost-Share; Major Plan Amendment Update; Wenck Study Update; July 22 Post Variance Reconsideration Request

a. Reading and Approval of Minutes

i. July 14, 2015, RPBCWD Board of Managers Special Meeting Minutes

Manager Bisek requested a correction to item 3a on page 1 to correctly reflect which manager seconded the motion. Manager Crafton moved to approve the minutes as amended. Manager Yetka seconded the motion. Upon a vote, the motion carried 5-0.

ii. July 27, 2015, RPBCWD Board of Managers Special Meeting Minutes

Manager Bisek moved to approve the minutes as presented. Manager Crafton seconded the motion. Upon a vote, the motion carried 5-0.

b. Herzog Cost-Share Agreement (Formerly Agenda Item 10ciii.)

Ms. Jordan reported that the cost-share review for the Herzog’s application is in the Board meeting packet. She summarized the project and the information in the application. Ms. Jordan reported that the Citizen Advisory Committee (CAC) recommends this project for cost-share funding and that staff also recommends the project for funding. She responded to comments and questions. Ms. Stovring of the City of Eden Prairie reported on the City of Eden Prairie’s anticipated contribution to and participation in the project. Manager Crafton moved to approve the cost-share agreement. Manager Yetka seconded the motion. Manager Bisek requested that if there is opportunity for educational signage and public education with this project that the opportunity be pursued. Upon a vote, the motion carried 5-0.

c. Major Plan Amendment Update

Administrator Bleser reminded the Board that there are two parts to this Major Plan Amendment, one part for the Alum Treatment project and the other part for the Creek Restoration Action Strategy (CRAS). She said that this presentation is tied to the CRAS.

Mr. Maxwell described developing the CRAS and working closely with Barr Engineering on the development of it. He described the objectives of the CRAS including that the primary objective of CRAS is to be a framework to compare different stream reaches and to establish creek restoration priorities across all three creeks in the watershed. Mr. Maxwell explained the CRAS criteria and the scoring method, described the differences between Tier 1 and Tier II, talked about the prioritization variables, and discussed the Tier 1 and Tier II results. He displayed a Tier 1 table that indicated the reach, subreach, the Tier 1 rank, the location of the reach, and the scores for each of the prioritization variables. Mr. Maxwell reminded the Board members that the document containing this information for the 80 sites is in the meeting packet.

Mr. Maxwell displayed a slide of the Tier 1 map indicating the results of the CRAS and showing via color code the five categories of the streams broken into four priority levels plus one category indicating that the reach hasn't yet been scored.

Mr. Maxwell talked about Tier II results and displayed a table comparing Tier 1 and Tier II scores. He addressed future work including continuously updating the CRAS, getting to the reaches not yet evaluated, and developing a rotation schedule for evaluating the reaches since all the creeks won't be evaluated each year. Mr. Maxwell described how staff is installing bank pins at the water quality sites, which will provide a method for measuring and evaluating stream bank erosion. He talked about Phase II of the CRAS.

Administrator Bleser said that the draft document in the meeting packet is for the Board's review. She requested that any comments be provided to Mr. Maxwell prior to the Board's next monthly meeting. Mr. Maxwell said that the report has been presented to the CAC and the TAC. Mr. Koch said that the CAC did review the Tier 1 section but hasn't yet evaluated the Tier II section and the comparison between Tier I and Tier II, but the CAC would like to review these parts. Administrator Bleser reminded the Board that on the day that staff presented the report to the CAC, the CAC did not have a quorum and could not take action on the draft document. President Forster said that Mr. Koch's comments are valid and directed staff to make the report available and to even make a brief presentation at the next CAC meeting if possible. Administrator Bleser said that she will request that the CAC make room in its August 17th meeting agenda for this topic.

d. Wenck Update

Administrator Bleser reported on the technical memo from Wenck. She said that it is not clear cut that Lake Riley needs an alum treatment. She explained that Wenck recommends waiting for the results from the Use Attainability (UAA) Study for Lake Riley and Rice Marsh Lake. Administrator Bleser reported that Wenck would like to discuss its results with Barr Engineering Company and also with the University of Minnesota and the Department of Natural Resources, who were interested in doing an alum treatment on Lake Riley, in order to make sure that science supports this idea of doing an alum treatment to reduce phosphorous. Administrator Bleser said that Wenck would like to present to the Board in September, after holding those discussions. She announced that Wenck has determined from the sediment cores that phosphorous due to internal loads of phosphorous could be up to 26%. She said that it makes sense to wait and see what the updated UAA reports regarding internal and external phosphorous loads to the lake. President Forster directed Administrator Bleser to make this document available to the CAC. There was discussion about the UAA update.

e. Amendment to Meeting Agenda

President Forster proposed amending the meeting agenda to move item 10f – July 22 Post Variance Reconsideration Request – ahead in the agenda so it is the next item on the agenda. Manager Crafton

Final Board-Approved Minutes of 8/5/15 RPBCWD Board of Managers Monthly Meeting moved to amend the agenda per President Forster's request. Manager Yetka seconded the motion. Upon a vote, the motion carried 5-0.

f. July 22 Post Variance Reconsideration Request

Attorney Smith gave an overview of how this item will be handled. He noted that the Index of Exhibits was included with the meeting materials. He noted that additional items need to be added to the record and added to the Index of Exhibits, including:

- An email sent on Friday, July 31 to Mr. Malkerson and his colleagues to distribute the agenda for this meeting, the updated proposed resolution, and the Index of Exhibits.
- An exchange of emails today between Attorney Smith and Mr. Malkerson concerning the status of this evening's agenda hearing
- A memo received this afternoon providing the proposed settlement offer
- A longer memo that Mr. Malkerson is presenting tonight and that will be added to the record.

Attorney Smith asked Mr. Malkerson if he had anything else to be added to the record. Mr. Malkerson said not at this time.

Attorney Smith said for the record that this item in front of the Board tonight concerns the Purgatory Creek 2nd Addition in Eden Prairie and has been addressed by the RPBCWD's permit file 2015-014. He said tonight the issue specifically concerns the request submitted by Mr. Post on July 22.

Engineer Sobiech reminded the Board that at a Special Meeting of the Board on July 14, staff presented a permit application review and a recommendation for approval. He summarized that the project is a seven-lot subdivision in Eden Prairie that was originally entertained and discussed in 2000. Engineer Sobiech stated that the full project was not constructed at that point. He reported that earlier this year the applicant submitted a new permit application, with the new District rules in place, seeking permission to go ahead and construct the project.

Engineer Sobiech said that staff worked with the applicant and the applicant's engineer starting in April, with in-depth conversations with the applicant's engineer in June to discuss what was needed for the project to fully comply with the rules. Engineer Sobiech pointed out the differences in requirements today compared to 2000 such as abstraction, volume control, rate control, and water quality requirements.

Engineer Sobiech described working with the applicant's engineer in late June and early July and stated that in early July the applicant's engineer was able to present a design for the District to fully review that did achieve compliance with all of the District rules in place. He explained that this design was presented at the Board's July 14th meeting and was approved by the Board. Administrator Bleser remarked that at the July 14th meeting the review of the application was removed from the Consent Agenda because the applicant had requested that instead of a one-year permit, the permit be extended to the end of 2016. She stated that the Board approved extending the permit through December 31, 2016. Engineer Sobiech responded to questions.

Attorney Smith asked Mr. Sobiech to explain abstraction in laymen's terms. Engineer Sobiech responded that abstraction is the holding of runoff onsite and either infiltrating it or reusing it and that it is a way of controlling the volume of runoff leaving a new development and trying to minimize that increase in volume because too much volume can be detrimental to downstream resources. Attorney Smith asked if that provision is part of the District's January 1, 2014, rules. Engineer Sobiech said yes, and it was not required back in 2000.

Attorney Smith said the next order of business is distributing the memorandum from Mr. Malkerson for review. The memorandum was handed out. The Board members were given time to review it.

Attorney Smith said that the next order of business is Mr. Malkerson addressing the Board. Mr. Malkerson stated that he has been working with the clients since being informed that this item would be on the agenda today. He explained that instead of asking for a continuance, we were hoping to get everything from the consultants so that we could answer some of the questions that had been asked before and some of the statements that were set forth in the draft resolution. Mr. Malkerson said that they were not able to get all of that information from their consultants in order to present it this evening and they were working until 5:30 p.m. or 6 p.m. this evening to prepare the memo in front of the Board. He apologized for not getting the memo to the Board earlier but said there just wasn't enough time.

Mr. Malkerson said that he has the task tonight of trying to get the Board to understand in a short period of time what is set forth in the 13-page memo that took hours to write and proofread and it would take him a couple of hours to lead the Board through it all and answer any questions.

Mr. Malkerson pointed out that he was surprised by some of the things said earlier this evening. He said that it was his understanding through his client through the client's engineer that the District's engineer agreed that the existing NURP pond built years ago was more than adequate, not as it pertains to what Mr. Malkerson calls infiltration but perhaps he should be calling abstraction, to function for the purposes for which it was developed. He said that the pond was overbuilt when it was constructed and his client offered to go out and measure that NURP pond if that was necessary in order to make sure everyone agreed that was the case. Mr. Malkerson said he is hearing tonight that there isn't agreement on that. He said it is such an important part of what he and his client are asking the Board to consider that he needs to have his client tell his engineer to find out from the District's engineer the protocol to go out and measure the pond so that it is known that there is adequate capacity in that NURP pond. Mr. Malkerson said that his client believed that when they obtained permits from the District to build that NURP pond and other things years ago that they built that NURP pond in order to provide all the water treatment, quality and quantity, not only for the seven lots adjacent to it but also for the seven lots in the 2nd Addition. He said that this is such an integral part of this issue that he needs to ask for a continuance so that he can get that clarified and straight. Mr. Malkerson said this would allow the Board the opportunity to read through the presentation as set forth in the memo handed out tonight and to ask questions. He said he has submitted a proposed settlement for the District's consideration and perhaps that would eliminate the need for the parties to meet again.

President Forster said he finds himself incredulous that regarding a permit issued in 2000 and on which it clearly stated work was to be completed by September 30, 2000, how someone could come along approximately fifteen years later thinking that the permit is still good. He commented that if the work wasn't going to get done by that time, why didn't they call the District Engineer. President Forster said that the District bent over backward in May, June, and July to accommodate the applicant's requests and then the District was served with suit.

Mr. Malkerson responded to President Forster's remarks. He explained how under Minnesota law, appeals need to be done within 30 days or the right to contest the validity of action is waived. Mr. Malkerson said that because of the procedural situation, if they didn't bring that suit they would not have been able to bring it later and it is possible that any other applications of a similar nature that they submitted to the District might be precluded because they didn't bring this suit within 30 days. He apologized that they found themselves in that predicament and stated that they didn't want to find themselves in that predicament.

Mr. Malkerson told the Board that regarding the permit issued in 2000, at that time his client was not a sophisticated developer. He said that when he asked his client that question, his client responded that he believed he had a right to continue to do the work until it was done. Mr. Malkerson said his client had spent all sorts of money, something like 84% or 86% of the entire cost, as detailed in the memo handed out tonight, to implement the permit that was issued.

Mr. Malkerson explained that in his letter he stated that he believes the District did not have the authority to set expiration dates. He referred to case law that he believes is applicable here. He said that he believes that they have a right to have that extended, that it never expired, but they asked the District to extend it. Mr. Malkerson also raised the issue of vested rights. He said that as he just noted, he believes his clients spent 86% of everything that needed to be spent under that permit, and he believes that under Minnesota law, they have vested rights. Mr. Malkerson said that whether or not the District grants the extension, it can make a finding that they have vested rights and have a right to proceed.

Mr. Malkerson stated that they asked for a variance to the rules that went into effect January 1, 2015. He remarked that he wishes the managers would have sent out a notice to people who had permits to notify them about the rule change so they would have had a chance to do something. Mr. Malkerson said that he doesn't think this happened, but if it did, to certainly let him know. He commented that they needed to apply for the permit showing full compliance because the courts say they have to exhaust administrative remedies and to set a baseline as to what it would take from the District's perspective to be in compliance and what that cost would be. Mr. Malkerson explained that they have now set that baseline.

Mr. Malkerson stated that they have come back to ask the District to reconsider its prior denials of the request for the extension, the finding of vested rights, and the variances, so they won't have to continue in this litigation. He stated that we are offering as part of that compromise that they would provide all of the infiltration/abstraction necessary to comply with 25% of the current requirements and waive all claims as to any and all actions prior thereto. Mr. Malkerson said he makes this as part of an amendment to the application and to settlement, so he doesn't ask that the Board discuss it here. He said that in closing, back to the NURP pond situation, he asks that the Board table the item to the Board's meeting in September or some other Board meeting.

Administrator Bleser said that on July 13 of this year she had an email exchange with Mr. Post that is not on the list of exhibits. She explained that the email was regarding whether permit application 2015-014 would be on the meeting agenda for the Board's July 14th special meeting. Administrator Bleser said that she had responded via email to Mr. Post that yes, his permit would be on the July 14th meeting agenda. She explained that she had emailed out a preliminary agenda and Engineer Sobiech's review of the permit. Administrator Bleser read aloud from a copy of the email exchange regarding Mr. Post's request to extend the completion date to next year since he may have lost the contractor for this year. She said that she responded that she would make note of this request in his application and that the permit when issued is valid for one year. Administrator Bleser read that she asked if he would be more comfortable if the District would issue the permit until December 2016 and to please let her know. She said that he responded yes. Administrator Bleser said she doesn't understand why he would ask for an extension to a permit when the whole time he was thinking about going a whole different way. She said that she is confused by Mr. Post's comments and she will forward these emails to the District's legal counsel so they will be submitted as part of the exhibits.

Mr. Malkerson said that it is his clients' duty under the law to establish a baseline in these permit-type cases. He said they needed to determine what the worst-case scenario is for them. Mr. Malkerson said that as part of the legal requirement to exhaust administrative rights/procedural duties, they are back asking for

the Board to approve something for Mr. Post that is not as onerous and is what they hope will be an acceptable compromise so they do not need to proceed with this matter.

Manager Yetka said that she was trying to find a parallel scenario in which a 2000 permit would still be valid 15 years later. Mr. Malkerson said that there could perhaps be some parallels, but everything is more fact-specific. He said that the facts need to be looked at, how the change in law was drafted, what notice was given, and facts of that sort. Mr. Malkerson explained that if one looks at the cases in Minnesota there are many cases where the courts have said no, you don't have vested rights and there are many cases where the courts say you have vested rights. He made additional points about vested rights and case law.

President Forster asked Attorney Smith for a recommendation on how to proceed.

Attorney Smith recommended that the Board deal with the request for a continuance because if the Board grants a continuance then this matter is done for the evening. He said that if the Board denies the request for a continuance then the Board can deal with the underlying request. He stated that his sense is that Mr. Malkerson asked for a continuance for two reasons: 1. To allow more time to read the materials that have been submitted; and, 2. To allow time for the applicant's engineer to investigate the current capacity of the downstream pond.

Attorney Smith said that it is his sense that the Board through this exchange has had an adequate opportunity to review the materials Mr. Malkerson submitted and the arguments he is making. He remarked that as to the downstream pond, he thinks that what he has heard from the District Engineer and what the record presents in this case is that the current rules require onsite treatment if it can be feasibly done. Attorney Smith noted that the applicant submitted an application that did comply with those rules, so the current capacity of the downstream pond in that sense doesn't bear on the permit that the District granted. Attorney Smith reminded the Board that the applicant is asking that the downstream pond be a substitute and that they be relieved of most of the onsite requirements, if not all of them. He said if the Board is inclined to indulge them in that argument, then maybe the Board wants to grant a continuance and let that pond be measured to consider how it could be used. Attorney Smith stated that it is his sense that this issue has been fully aired in this record and the District's legal counsel is prepared to proceed if the Board is prepared to proceed.

Manager Chadwick asked about language that would be used if the Board were to grant a continuance. Mr. Malkerson said that Attorney Smith could propose language.

Attorney Smith said that if the Board were to go that route, he thinks that the Board could grant an extension to a date certain, something like October 30th; otherwise, if the Board would like to proceed, the District's Legal Counsel is prepared to do so. He added that because the applicant has filed an action in district court and the watershed law provides that the review of permit decisions is to be done on a declaratory judgement action based on the record that is made before the Board of Managers, he thinks that there is some benefit to the District to complete this process of compiling the record and considering that July 22nd request and making a clear record and dealing with that now. Attorney Smith explained that it is his sense that it would be beneficial but ultimately it is for the Board to decide.

Mr. Malkerson said he sent Mr. Smith emails asking for clarification on this draft resolution as to where it says, "insert." He stated that Mr. Smith said to him this evening that what he meant by that is that they would be inserting later things out of this meeting. Mr. Malkerson said that he thinks a fairer way to do this is for the Board to listen to the tape of this meeting, then insert what is appropriate, and then put the resolution on the Board's next meeting for action. Attorney Smith responded that he is prepared to read that language aloud when the meeting gets to that point.

Attorney Smith said that the first action would be for the Board to consider the request for continuance and the Board would either approve or deny. He reiterated that the District's Legal Counsel is prepared to proceed tonight. He emphasized that it is the Board's decision and restated that he thinks that Mr. Malkerson requested a continuance for two reasons: 1. To give the Board more time to review the materials and consider what he submitted. Attorney Smith said his response to that is that he believes the Board has had adequate time to review that this evening and there was a back and forth discussion. 2. So that more precise measurements can be made of the current capacity of the downstream pond. Attorney Smith said that the downstream pond is only relevant if the Board is inclined to go back and make the 2000 permit effective. Mr. Malkerson responded that this was an unfair statement and that he objects to that statement. He said that the NURP pond and how it functions is very relevant today so for the record he objects to Attorney Smith's statement and he renews his request. Attorney Smith responded that this is duly noted and he stills stands by his recommendation.

Manager Crafton said that from her standpoint, neither one of the two reasons for a continuance hold and she moved to deny the continuance. Manager Bisek seconded the motion. Manager Yetka asked for a clarification on this motion. Attorney Smith responded that Mr. Malkerson has asked for more time before the Board acts on the July 22nd request for a variance or to acknowledge their vested rights under the 2000 permit and to extend the 2000 permit. Mr. Malkerson said that also he made an offer in his memo as part of an amended variance to provide infiltration, or whatever is the appropriate language, of 25% of what the rule requires in addition to showing the NURP pond.

Manager Yetka asked Attorney Smith to talk about practical difficulty and whether it applies here to this variance request. Attorney Smith said that the District's rule has a set of requirements and criteria. He stated that they are addressed in the draft resolution and they have been discussed before by the Board. Attorney Smith explained that in order to consider a variance request there are practical difficulty criteria that get to the standards for a variance. He said that as the Board considers the variance request as one of several requests that Mr. Malkerson just reviewed that are a combination of the July 22 documents and the documents submitted this evening, the Board's criteria for a variance are relevant to that request.

Manager Yetka asked Attorney Smith to explain vested rights. Attorney Smith said that in summary, when an applicant for a land-use permit obtains that permit and expends money and effort and undergoes enough activity such that it is unfair and inequitable to deprive the applicant of the right to complete that project, the applicant has a vested right reflected in that permit. Mr. Malkerson said that it is hard to hear what Attorney Smith is saying.

Manager Yetka asked about the idea of having to comply with the storm water requirement by doing infiltration onsite and whether to our knowledge would that be an encumbrance to that ability of this applicant to build on his land, would it be a financial hardship that he incurs so that he can't develop his property. Mr. Malkerson said yes, this has been laid out before and tonight in much more detail and the number is in excess of \$400,000 in additional expense between the loss in value of the lots according to his client and based upon the broker's opinion letter that is attached to the submittal. He asked that the Board take time to go through this, read the broker's letter, and go through all of the charts before voting.

Attorney Smith reminded the Board that the motion in front of it is to deny the continuance.

Upon call of roll, the motion carried 3-1. [Manager Chadwick abstained from vote];

Manager	Aye	Nay
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Bisek	X	
Crafton	X	
Forster		X
Yetka	X	

Due to the level of noise in the building, President Forster called for a recess until 9:05 p.m. At 9:05 p.m. President Forster reconvened the meeting, noting that the Board would return to the Post Variance Reconsideration Request after dealing with several other items on the agenda.

5. Hearing and Discussion of Matters of General Public Interest

No items of general public interest were raised.

6. Citizen Advisory Committee (CAC)

CAC Advisor Dorothy Pederson said she had four things to report. She stated that the CAC will be looking at and discussing the cost share evaluation check list. Manager Yetka provided contact information to Ms. Pederson regarding getting a copy of the check list that a nearby watershed uses to evaluate cost share applications. Ms. Pederson reported that the CAC has had a lot of discussion about why there isn't some sort of lake review project like there is for the creeks. She said that there are members of the CAC who think the District lacks a planned and follow-through way to address issues. Ms. Pederson explained that it is her understanding that help will be coming from District staff to help create a lake matrix so the CAC can understand the acreage of the lakes, which ones face AIS issues, and other such information. Administrator Bleser commented that some of the components Ms. Pederson is referring to are in tables in the District's 10-year plan and those tables could be the foundation of discussion.

Ms. Pederson stated that the CAC would like clarification on the real role of the CAC. She explained that some of the CAC members think the CAC should have a broader focus. Ms. Pederson noted that she has tried to get from the Minnesota Board of Water and Soil Resources more information about the role of the CAC. She said that she is bringing this to the Board because she believes the Board will be hearing more on this topic and likely the Board will need to consider and address this topic, perhaps in the refresh of the 10-year plan. Ms. Pederson reported that in general the CAC understands it has an advisory role but there are CAC members who would like to see that role expand. Ms. Pederson said that the CAC talked about the Riley Creek project and the CAC would like to be kept informed about when the project will happen.

7. July 22 Post Variance Reconsideration Request (Continued)

Attorney Smith stated that he would like to return to the draft resolution that was included in the meeting materials. He emphasized that the resolution is a draft and is a guide to aid the Board as it decides how to resolve the requests that have been presented to the Board. Attorney Smith said that the Board should feel free to edit the resolution. He explained that it was prepared based on staff recommendation and pointed out that the Board has the authority to grant the relief requested by Post Development and the Board should continue to consider that as an option as this resolution is reviewed.

Attorney Smith walked the group through the resolution “Purgatory Creek 2nd Addition, Eden Prairie MN Permit No. 2015-014,” reading aloud from the resolution and reiterating the list of additional documents that have been entered into the record. Attorney Smith requested the addition to the resolution, at the place identified for an insert on page 4 of the draft resolution, of the following to summarize this evening’s proceedings:

- That additional documents were entered into the record, specifically the ones he just listed from July 13, July 31, and August 5.
- That the District Engineer Mr. Sobiech reviewed the permit application process, the issuance of the permit to the applicant on July 14 in compliance with District rules, and he also explained that the discussion with the applicant’s engineer confirmed that it was more feasible to meet the abstraction or volume control requirements, increased water quality requirements, and rate control in the 2015 rules onsite rather than with the downstream pond.
- That Mr. Malkerson appeared and reviewed the arguments in his memorandum of August 5, 2015, including the concern that his client had expended \$148,214 of the total of \$173,462 to be spent in conformance with prior permits.
- That Post Development believed it had a vested right in the ability to complete their project under the permit granted in 2000, but nevertheless they would offer a compromise if the Board would grant a variance to 25% of the infiltration required by the current rules.
- That Mr. Malkerson also requested a continuance based on the need for more time for the District to consider his submission and for the opportunity to confirm the current capacity of the downstream pond. Attorney Smith noted that the Board denied that request by a vote of 3 to 1 with one abstention.

Attorney Smith proceeded to walk the group through the conclusions contained in the resolution, reading aloud from the resolution.

Mr. Malkerson stated that he objects again to adoption of these findings for the reasons set forth in his memo that he distributed this evening. He added that he would like to see the additional ones that Attorney Smith read aloud based upon notes that he has written this evening. Mr. Malkerson said that quite frankly as he has said several times this evening that he could not hear a lot of what was being discussed on matters that relate to these findings and he would like the opportunity to listen to the tape, see the minutes, and see what he missed because he couldn’t hear because of the activities of next door. Mr. Malkerson stated that Attorney Smith probably would tell the Board that there are a lot of cases in this country that say it is an automatic denial of procedural due process when a hearing such as this is held in a room where you can’t hear half of what is being said- that is basic due process law. He said that he fully expects that the Board will go ahead and adopt this resolution, but for the record he is making his objections and he will be asking the district court to allow him to introduce evidence of everything else that was not clearly understood by the people out here in the audience and will hopefully be set forth in the tape of this meeting.

Manager Yetka asked what resolution number is this resolution. Administrator Bleser looked to find the resolution number. Manager Bisek asked Attorney Smith his opinion on whether there is a problem with moving forward with the resolution due to the fact that there was noise during this meeting. Attorney Smith replied that he thinks that everyone acknowledges that there is challenging noise coming from next door. He said the key question from a legal perspective is was there a full and fair opportunity for Mr. Malkerson to be heard to present his client’s concerns and did he have a full, meaningful opportunity to participate in the hearing and did the Board hear his arguments. Attorney Smith said that he thinks that despite the noise challenges, the Board did pause when needed and we did repeat matters when needed, so we made several accommodations to address the

situation. Mr. Malkerson responded that Attorney Smith is very smart and articulate but totally biased and his statement was not a fair statement of the acoustics here and what people couldn't hear. He said that people out here couldn't hear half of what was being said and that can't be danced around with pretty lawyer words and he thanked the Board for allowing him to state that for the record.

Administrator Bleser said that she does not have the resolution number. Attorney Smith said that the number can be inserted when it is known.

Manager Crafton move to approve the resolution. Manager Yetka seconded the motion.

Upon call of roll, the motion carried 4-0. [Manager Chadwick abstained from vote].

Manager	Aye	Nay
Bisek	X	
Crafton	X	
Forster	X	
Yetka	X	

Attorney Smith announced that staff will finalize the resolution and send it to Mr. Malkerson and it will be made part of the record along with the updated Index of Exhibits.

8. Treasurer's Report

Manager Crafton moved to accept the Treasurer's Report as submitted. Manager Bisek seconded the motion. Upon a vote, the motion carried 5-0.

Manager Crafton moved to approve paying the bills. Manager Bisek seconded the motion. Upon a vote, the motion carried 5-0.

9. Engineer's Report

President Forster commented on an article in today's paper regarding how the City of Bloomington is considering closing down Hyland Greens and he asked how this would affect the permit that the District issued for that piece of property. Engineer Sobiech said that the permit was issued to the City and this matter won't affect that permit but if the property were to be redeveloped then the City would need to go through the permit process again.

Manager Crafton moved to accept the Engineer's Report. Manager Yetka seconded the motion. Upon a vote, the motion carried 5-0.

10. Administrator's Report

Manager Crafton had a question about the budget figures listed for the Master Water Stewards program. Administrator Bleser clarified that the total figure should be \$2,300. Manager Yetka commented that staff member Michelle Jordan did a great job at the NEMO Workshop on the Water.

Manager Crafton moved to accept the Administrator's Report. Manager Bisek seconded the motion. Upon a vote,

11. Board Action

a. Consent Items: 1 –III: Consent Permit 2015-038 Improvements for Field 8 at Miller Park, Consent Permit 2015-039 Miracle Field, Consent Permit 2015-010 Children’s Learning Adventure: Applicant requested second review extension

Manager Crafton moved to approve the Consent Items. Manager Yetka seconded the vote. Upon a vote, the motion carried 5-0.

b. Permit 2015-013 Lake Susan Spent Lime Treatment System with Variance Request

Manager Crafton moved to approve permit 2015-013 with the variance request. Manager Bisek seconded the motion and commented that she thinks the variance is well-founded. Upon a vote, the motion carried 5-0.

c. LMCIT

Attorney Smith reminded the Board that it has its insurance through the League of Minnesota Cities Insurance Trust (LMCIT). He explained that part of that annual coverage renewal includes a requirement from the trust that the Board act on a consideration of whether or not to waive the monetary limits on municipal court liability. Attorney Smith provided more details and noted that each year the Board has typically acted to not waive those monetary limits. He stated that his recommendation is that the Board not waive the monetary limits.

Manager Crafton moved to not waive the monetary limits. Manager Chadwick seconded the motion. Upon a vote, the motion carried 5-0.

Manager Chadwick had a question about the bond required of the managers upon taking office and asked for assurance that such bond is taken care of by the watershed district through its insurance program. Attorney Smith said that he can send him and all of the managers a copy of that document.

d. CH2M Hill

President Forster reported that he received a letter from the president of CH2M Hill that basically said that CH2M Hill is not paying. Attorney Smith provided background on this issue and recommended on how the Board could proceed. He said that his recommendation due to the number of defects in the work and the Board’s responsibility to the taxpayers that the District does not walk away from this issue. Attorney Smith recommended staff and legal counsel prepare and send to CH2M Hill a more detailed letter from legal counsel that more carefully itemizes examples of the mistakes the District found in CH2M Hill.

Manager Bisek asked if there is some type of professional Board that oversees engineering firms. Attorney Smith said that there is a state board that oversees professional engineers, architects, and landscape architects and has a set of rules on broad professional standards. He said that we could review those and consider it and highlight it in the letter. There was discussion. Engineer Sobiech commented that staff already has documented most of the errors found in the model. Manager Chadwick recommended that staff look at the contract with CH2M Hill regarding an arbitration agreement. Attorney Smith said that the contract does not have such language but this letter to CH2M Hill might propose arbitration.

Manager Yetka moved to direct the District Legal Counsel to draft a letter in terms of what has been discussed here and to the degree of information discussed. Manager Crafton seconded the motion.

Manager Chadwick asked if staff had an idea of the cost of this work including the coordination between legal counsel and the District engineer. Attorney Smith estimated that it would take five to ten hours of their time. Upon a vote, the motion carried 5-0.

e. Cost-share Agreements

i. Severson-Wagner Wetland Prairie Restoration

Ms. Jordan reminded the Board that it saw this application last month and sent it to the CAC for a recommendation along with asking the CAC for a recommendation on how to handle multiple applications from one applicant. Ms. Jordan reported that there was a CAC motion to approve recommending the Board accept one application per household per year but the motion did not carry and did generate a lot of discussion. She reported that the CAC decided not to take action regarding a recommendation until after there are guidelines about cost shares. The Board had a brief discussion.

Manager Crafton moved to table this agreement until the Board's September meeting. Manager Bisek seconded the motion. Upon a vote, the motion carried 5-0. The Board directed Ms. Jordan to follow up with the homeowner.

ii. Palmquist & Hildreth

Ms. Jordan described the project, the site visit, and the submitted project application. She reported that she and the CAC recommend approval of this project. The Board discussed the project. Manager Yetka raised her concern about long-term maintenance of the plantings and about long-term maintenance planning in these types of projects in general. Manager Crafton moved to approve this cost-share grant for this project. Manager Bisek seconded the motion. Upon a vote, the motion carried 5-0.

iii. City of Eden Prairie

Administrator Bleser reminded the Board that last month it conducted a permit review for the City of Eden Prairie and the Board had raised the question of why the City of Eden Prairie hasn't applied for a cost-share grant since the project would qualify for a cost-share. She said she communicated this to the City of Eden Prairie, which then submitted a cost-share application. Administrator Bleser reported that the City applied for \$25,000 in funding but noted that the District's cost-share grants only go up to \$20,000.

She said that she is not asking tonight for Board action to approve the cost-share project because the District's cost-share program rules require this application go to a public hearing. She recommends that the District hold the public hearing at the Board's September 2nd meeting.

Administrator Bleser summarized the project, explaining that the project will stabilize the creek in that area of Eden Prairie, thereby reducing the amount of sediment and phosphorous entering the creek. She explained that the total estimated project cost is \$127,000 and this cost-share would be for \$20,000. She pointed out that this would be the program's first City application. There was a brief discussion about the reason for the public hearing. Administrator Bleser stated that if there are no Board objections, the District will hold a public hearing on this cost-share at the same meeting that the District is holding a public hearing on its budget. No objections or concerns were raised.

f. TMDL - MPCA

Administrator Bleser reported that the Minnesota Pollution Control Agency (MPCA) has asked the District to consider being a contractor to the MPCA for TMDL studies on Lake Riley, Lotus Lake, Lake Susan, Highland Lake, Starring Lake, and Lake Lucy in addition to Riley Creek for total suspended solids, Bluff Creek for total phosphorous, and Purgatory Creek for total suspended solids.

Administrator Bleser explained that the MPCA has said it would provide funds to the District in the amount of \$7,000 per lake and an amount to-be-determined for creeks. She stated that regarding the Bluff Creek TMDL for total phosphorous she is not sure where the MPCA is in terms of standards for that and she would like to discuss the project more with the MPCA because she is not comfortable with it at this point. She said she would like to know if the Board is willing to assume that leadership role by performing the TMDLs in the watershed instead of having the MPCA contract with a third-party to perform them. Administrator Bleser said she would rather the District take the leadership role instead of a third party.

Manager Bisek asked about staff time and the additional money and whether the District has the capacity to take on the role. Administrator Bleser responded that a lot of the foundation of the District's UAAs can be used in the TMDL. She said that the \$7,000 gets the District close to the cost for transposing the UAA data and adding information required for the TMDL, but it does not cover the public component. Administrator Bleser relayed that the MPCA has said that having a Technical Advisory Committee involved satisfies the public component; however, it does not involve the District's stakeholder involvement. She said that the MPCA is looking for high-level TMDLs.

Engineer Sobiech commented that one of the tasks in taking the UAA information and translating it into the TMDL is developing waste load allocations, which is assigning pollutant load reduction requirements for various MS4s in the watershed for each water body. He said that the best way to do this process is to have a lot of interaction with those MS4s because ultimately they are the ones who need to live with the end product. Administrator Bleser added that the TAC said it has no issues with the District taking on this leadership role. She reported that the City of Eden Prairie communicated that the District needs to have public involvement in the process. Staff responded to questions.

Manager Chadwick asked if there are any other parties who could participate in the cost. Administrator Bleser said she could ask the cities, especially considering Eden Prairie's comments about including more public involvement beyond the involvement of the TAC, which in itself would satisfy the MPCA's public involvement requirement.

Manager Crafton moved to direct Administrator Bleser to contact the MPCA for more information on the Bluff Creek TMDL, costs, and to develop a work plan. Manager Yetka seconded the motion. Administrator Bleser said she will bring back to the Board the number regarding the funding for creeks. Upon a vote, the motion carried 5-0.

g. Chaska Local Water Management Plan

President Forster stated that Administrator Bleser had provided a draft letter to the Board for review and that he has one edit to the letter on page one to spell "suite" correctly. Administrator Bleser said that she has been in communication with the City of Chaska about its plan and the District's concerns with the draft plan. Administrator Bleser reported on the revisions the City of Chaska has made in response to the District's comments. She announced that the District's comment No. 13 was not addressed. She read aloud from the revised section of the City's plan and explained that the plan lacks the procedure to determine who is the most restrictive governing entity. She said that the Board could approve the plan as it is presented or could approve the plan conditional on the amending the local water management plan to

incorporate into the implementation section that the City will enter a memorandum of agreement with the District to delineate the regulatory areas in which the parties will exercise regulatory authority in accordance to the paragraph that Administrator Bleser previously read aloud and that the City enter into a memorandum of agreement in accordance with Minnesota Statute R8410.0160 specifically delineates regulatory areas in which the parties will exercise regulatory authority in accordance with Section 3.3.7 and reserve the review of variance from city ordinances where applicable for RPBCWD.

Administrator Bleser said that the question comes up when in the case that the City of Chaska approves a variance for something like a storm water rule that is similar to the RPBCWD's storm water rule, does the RPBCWD Board want to see the variance or does the Board let the City of Chaska perform the variance. She noted that this circumstance and question will come up again. Administrator Bleser reported that the City of Eden Prairie has specifically asked this question, if a city has rules that are similar to the District's rules such as because the city has taken on the District's rules, and a variance request is submitted to the city, does the RPBCWD Board want to see that variance.

Attorney Smith said that from a legal perspective, the District does have the authority even after approving a city's local water plan and entering into a cooperative agreement with that city that the city is going to take over a permitting function to require that variances come back to the District for its review. He recommended that the Board carefully consider this. There was discussion about variance requests that come into cities and options for the Board to consider. Attorney Smith stated that the Board might consider starting out with a position that all variances need to come in front of the District Board. Administrator Bleser asked if Legal Counsel would draft a letter saying that at this time the Board would like to review variances. Attorney Smith suggested that the District start out by taking the position that all variances have to come to the Board. He said that Legal Counsel has provided a memo to Administrator Bleser about the authority for that.

Attorney Smith asked Administrator Bleser if she is asking the Board either to approve Chaska's local water plan tonight. She said she is asking for the Board to approve her sending a letter to the City of Chaska communicating the District's approval of the local water plan with the condition she described previously or to direct her to communicate further with the City of Chaska about these items and bring the plan back in front of the Board at a later meeting. There was discussion. Administrator Bleser said she is hearing that the Board is directing staff with the advice of Legal Counsel to work with the City of Chaska on the outstanding comment and to bring an update and possibly a recommendation to approve the plan to the Board at its September 2 meeting. The Board agreed.

h. Closed Session – Purgatory Creek Estates 2nd Litigation

Attorney Smith recommended that the Board move into closed session. Manager Yetka moved that Board move into closed session. Manager Chadwick seconded the motion. Upon a vote, the motion carried 5-0. At 10:46 p.m. the meeting moved into closed session.

12. Manager's Discussion

a. Upcoming Meeting

13. Upcoming Events

- RPBCWD Public Hearing & Regular Board Meeting, September 2, 2015, 7:00 p.m., District Office
- Clean Water Summit, September 15, 2015, University of Minnesota Arboretum, all-day

14. Adjourn

Manager Crafton moved to adjourn the meeting. Manager Chadwick seconded the motion. Upon a vote, the motion carried 5-0. The meeting adjourned at 11:08 p.m.

Respectfully submitted,

Leslie Yetka, Secretary