

MEMORANDUM

To: **Riley-Purgatory-Bluff Creek Watershed District Board of Managers**
From: **Michael Welch**
RE: **Delegated regulatory authority**
Date: **July 7, 2023**

At the May regular meeting, the board of managers directed legal counsel to provide guidance on the legal basis for delegation of authority to the administrator to make regulatory decisions. The managers requested the analysis to inform possible adjustment of the administrator's present authority to ensure board review of determinations related to controversial or complex permits.

This memo affirms the legal basis for the well-established and pervasive practice of delegating ministerial regulatory decisions to the district administrator, whether that delegation is implemented through rules or a record decision of the managers (e.g., a resolution).

For reference in reading this memo and to consider for adoption, past resolutions delegating authority to the administrator are attached to an accompanying new draft resolution adjusting the scope of delegated authority to approve assignments and renewals (extensions) of a permit. Counsel recommends, however, that the managers condition specific permit approvals to require board consideration of assignments or renewals case by case.

Legal framework

Critical to the delegation analysis is the distinction between the board of managers' statutory power to adopt rules,¹ and the act of issuing permits under adopted rules.² The former is a quasi-legislative function, whereby RPBCWD *makes* law (in the form of rules); the latter involves the implementation of the rules, but does not entail creation or modification of rules. The statutes authorizing the board of managers to make rules and to issue permits include certain specifics regarding implementation – e.g., federal, state and local governmental bodies cannot be charged a permit fee³ – but do not prescribe a

¹ Minnesota Statutes sections 103D.341 and 103B.211, subdivision 1(a)(3).

² Minnesota Statutes section 103D.345.

³ *Id.* at subdivision 3.

structure for making compliance determinations under the rules; that is, the law does not require the managers to make all permit and permitting decisions.

While we do not have the benefit of court decisions making determinations specifically on watershed boards' ability to delegate, legal treatises and court opinions on the general principles in play provide useful guidance: As a background matter, "[t]here is a distinction between the unlawful delegation of power to make a law that involves a discretion as to what the law shall be, and the conferring of lawful authority or discretion as to a law's execution, to be exercised under and in pursuance of the law."⁴ The Minnesota Supreme Court has observed that there is a distinction "between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."⁵

The exercise of discretion in decision making also is a consideration in assessing the scope of lawful delegation: "The law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer or department or governing body in which the power is vested, and the performance merely ministerial duties by subordinates and agents. Hence, the appointment of agents to carry out the authority of the council is entirely proper"⁶ Elaborating a bit, the Minnesota Court of Appeals has determined that administrative or ministerial functions – sometimes even those that involve exercise of some measure of discretion – are delegable.⁷ Finally on the point, a lawmaking body may confer upon a board or commission or officer "a discretionary power ... to ascertain the facts, which automatically bring[] a law into operation by virtue of its own terms."⁸

The opinions and observations reviewed here reflect that the capacity to delegate is fundamental and critical to the efficient operation of local governmental bodies such as watershed districts, wherein regulatory decisions often rest on technical specifics and

⁴ 2A Eugene McQuillan, *The Law of Municipal Corporations* § 10:46 (3d ed.) (citations omitted) (hereafter "McQuillan").

⁵ *Remington Arms Co. v G.E.M. of St. Louis Inc.*, 102 N.W.2d 528, 534 (Minn. 1960) (citation omitted). See also, *City of Minneapolis v. Krebs*, 226 N.W.2d 617, 620-21 (Minn. 1975) (determining that the city did not unlawfully delegate legislative power in granting authority to the fire department to exercise discretion to determine conditions constituting violations of the city fire code).

⁶ *McQuillan* § 10:47 (citations omitted).

⁷ *West St. Paul Federation of Teachers v. Ind. School Dist. No. 197*, 713 N.W.2d 366, 376-77 (Minn. Ct. App. 2006) (determining that a teacher's union's right to accept or reject diminution in statutorily mandated benefits was not an unlawful delegation of authority to a private party).

⁸ *Krebs* at 620.

engineering determinations.⁹ Because, however, the amount of discretion exercised through delegated authority is critical to its lawfulness, RPBCWD's resolutions on the topic (attached to the draft resolution accompanying this memo) have been carefully drafted to focus on technical applications of facts to the rules – i.e., delegation of effectively ministerial duties. The administrator's authority is limited to approvals (avoiding the exercise of discretion necessary in weighing the evidence of noncompliance to support a denial) and assignments and renewals (qualification for which is a purely factual matter). The administrator is not authorized to approve variances or exceptions, which also often require exercise of discretion and judgment on nontechnical facts and arguments. There is some exercise of discretion involved in approving requests for modifications to an existing approval, but such discretion is limited to circumstances where “the changes do not constitute or cause a shortfall from compliance with all relevant RPBCWD requirements or an exacerbation of a shortfall in compliance that was the subject of a variance approved in conjunction with the original permit approval... ” – i.e., only technical alterations.

Finally and most importantly, the legal framework reviewed here does not impose any particular mandate on the board of managers. The board is not *required* to delegate authority, but has done so in recognition of the cost efficiencies gained, the technical nature of many RPBCWD regulatory decisions, and the service delegated authority provides to constituent permit applicants. The board of managers certainly may alter the universe of decisions it has delegated at any time, and the attached draft resolution is provided for consideration in that light. In other words, if the managers are not comfortable with the authority that has been delegated to the administrator, it is entirely within the board's discretion to make revisions at any time. That said, counsel's recommendation is that the managers require assignments and/or renewals of specific permits to come before the board for action, as they deem necessary, on a case-by-case basis rather than attempting to identify a category or categories of 'difficult' permits.

c/ Terry Jeffery, administrator

⁹ See *McQuillan* § 10:6 (noting “the complexities of modern life often impel legislatures to confer on executive and administrative departments the authority to make rules and regulations in order to enforce and achieve the policy intended”).

RESOLUTION NO. 2023-50

Riley-Purgatory-Bluff Creek Watershed District
Board of Managers

Adjusting delegation of authority to the administrator to
approve certain regulatory applications

Manager _____ offered the following resolution and moved its adoption, seconded by Manager _____.

Whereas Minnesota Statutes sections 103D.341 and .345 direct watershed districts to adopt rules and administer a permitting program to protect water resources and mitigate flood risk, and the Riley-Purgatory-Bluff Creek Watershed District has duly adopted rules and issues permits accordingly;

Whereas Riley-Purgatory-Bluff Creek Watershed District serves as the Local Government Unit administering the Wetland Conservation Act in certain areas of the Riley-Purgatory-Bluff Creek watersheds, and as LGU makes determinations under WCA in response to applications from property owners;

Whereas certain activities requiring an RPBCWD permit, WCA approval or procedural approval are subject to defined and specific standards, and determination of compliance does not require the exercise of the discretion reserved to the RPBCWD's board of managers;

Whereas the RPBCWD Board of Managers, recognizing that the time and resources of the board, staff and permit applicants are best served by delegating to the RPBCWD administrator the authority to approve such applications and requests has authorized the administrator to approve certain RPBCWD permit and WCA applications, as well as certain specific related regulatory requests, with limitations and conditions including that the administrator may not approve an application when:

- A variance from the RPBCWD rules is requested;
- the applicant has commenced land-disturbing activities;
- the applicant or underlying work is not proceeding in compliance with the terms or conditions of approval of the permit;
- the land-disturbing activities proposed or already conducted differ from the original proposed activities in a manner material to the determination of compliance with the RPBCWD rules;
- the administrator determines that the application involves a technical, policy or legal issue or raises public comment that warrants review of the application by the board of managers; or

- anyone requests consideration of the application by the board of managers;

Whereas the scope of the authority delegated to the administrator – and conditions and restrictions on such delegation – are detailed in the following resolutions, attached to and incorporated into this resolution:

- Resolution 2014-11, adopted November 25, 2014;
- Resolution 2015-07, adopted June 29, 2015;
- Resolution 2017-01, adopted March 15, 2017;
- Resolution 2017-10, adopted October 4, 2017, which delegated authority to approve assignment or renewal (extension) of a valid permit or approvals, so long as the application is timely submitted in accordance and compliance with RPBCWD Rule A – Procedural Requirements, section 5;
- Resolution 2019-05, adopted Jan. 9, 2019;
- Resolution 2022-089, adopted December 7, 2022;¹ and

Whereas the board of managers wishes to benefit from its experience with controversial and complicated permitting matters by refining the scope of the administrator’s delegated authority.

NOW, THEREFORE, BE IT RESOLVED THAT the RPBCWD Board of Managers modifies the authority delegated to the administrator by Resolution 2017-10 to approve assignment or renewal of valid permits or approvals as follows:

The administrator may approve a request for assignment or renewal (extension) of a valid permit or approval, so long as the application is timely submitted in accordance and compliance with RPBCWD Rule A – Procedural Requirements, section 5; there was no public comment critical of the permit or underlying project associated with the original action by RPBCWD; and there is no litigation or threat of litigation arising from the permit or underlying project.

¹ Please note that while staff has confirmed the substance of the resolutions cited here, past recordkeeping is such that resolution numbers are less certain.

The question was on the adoption of the resolution and there were ____ yeas and ____ nays as follows:

Yea Nay Abstain Absent

CRAFTON
DUEVEL
KOCH
PEDERSEN
ZIEGLER

Upon vote, the president declared the resolution _____.

July 12, 2023

* * * * *

I, Dorothy Pedersen, secretary of the Riley-Purgatory-Bluff Creek Watershed District, do hereby certify that I have compared the above resolution 23-050 with the original thereof as the same appears of record and on file with RPBCWD and find the same to be a true and correct transcription thereof.

IN TESTIMONY WHEREOF, I set my hand this ____ day of _____, 2023.

Dorothy Pedersen, Secretary

Attachments

Resolutions delegating regulatory authority to the administrator

DRAFT

Resolution no. 2019-005

**Riley-Purgatory-Bluff Creek Watershed District
Board of Managers**

Third amendment to the delegation to the administrator of
certain permit-approval authority

Manager **Crafton** offered the following resolution and moved its adoption, seconded by
Manager **Pedersen**.

WHEREAS Minnesota Statutes sections 103D.341 and 103D.345 direct watershed districts to adopt rules and administer an implementing regulatory program to protect water resources and mitigate flood risk, and the Riley-Purgatory-Bluff Creek Watershed District has duly adopted rules and issues permits accordingly;

WHEREAS certain activities requiring an RPBCWD permit and certain procedural requests from applicants and permittees are subject to defined and specific standards, and determination of compliance does not require the exercise of the discretion reserved to the RPBCWD's board of managers;

WHEREAS the board of managers, recognizing that the time and resources of the board, staff and permit applicants are best served by delegating to the RPBCWD administrator the authority to approve certain applications, and the board of managers has delegated – by resolutions 2014-11 on November 25, 2014; 2015-07 on June 29, 2015; and 2017-10 on October 4, 2017 – to the RPBCWD administrator the authority to approve permit applications for:

- single-family home projects requiring a permit under only District Rule C – Erosion, Rule D – Wetland and Creek Buffers, and Sediment Control and Rule J – Stormwater Management;
- all projects requiring a permit under only Rule C – Erosion and Sediment Control; and
- assignment or renewal of valid permits or approvals, so long as the application is timely submitted in accordance and compliance with RPBCWD Rule A – Procedural Requirements, section 5;

so long as the administrator maintains a log of applications approved pursuant to this resolution and at least quarterly provides a report to the board of managers

summarizing assignments and renewals granted by the administrator. Further, the authority is delegated contingent on the determination that if the administrator finds that the criteria for approval are not met, the application will be presented to the board of managers for consideration at its next scheduled meeting, unless the applicant withdraws the application; and

WHEREAS the board of managers finds that further efficiencies could be gained through delegation of additional authority to the administrator without diminution in the effectiveness of the RPBCWD regulatory program to protect resources and mitigate flood risk.

NOW THEREFORE BE IT RESOLVED that the board of managers delegates to the administrator the additional authority to approve:

1. Permit review period extensions.
2. An application for approval of land-disturbing activities triggering only Rule B – Floodplain Management and Drainage Alterations, provided that the proposed work amounts to less than 50 cubic yards of excavation and 5,000 square feet of disturbance.
3. An application for approval under only Rule H – Appropriation of Public Surface Waters or Rule I – Appropriation of Groundwater.
4. The administrator may not approve an application if:
 - a. The applicant or property owner has commenced regulated activity without a valid RPBCWD permit;
 - b. the administrator determines that the application involves a technical, policy or legal issue or raises public comment that warrants review of the application by the board of managers; or
 - c. anyone requests consideration of the modification application by the board of managers.
5. The administrator will add applications approved pursuant to this resolution to log of approvals issued pursuant to previously delegated authority and will quarterly provide a report to the board of managers summarizing all approvals granted by the administrator.

BE IT FURTHER RESOLVED that the board of managers authorizes the administrator to sign letters certifying and communicating regulatory actions by RPBCWD, whether taken pursuant to the authority delegated to the administrator or by separate action of the RPBCWD Board of Managers.

The question was on the adoption of the resolution and there were 5 yeas and 0 nays as follows:

	<u>Yea</u>	<u>Nay</u>	<u>Abstain</u>	<u>Absent</u>
Crafton	X			
Koch	X			
Pedersen	X			
Ward	X			
Ziegler	X			

Upon vote, the president declared the resolution adopted.

Dated: January 9, 2019.

* * * * *

I, David Ziegler, secretary of the Riley-Purgatory-Bluff Creek Watershed District, do hereby certify that I have compared the above resolution with the original thereof as the same appears of record and on file with RPBCWD and find the same to be a true and correct transcription thereof.

IN TESTIMONY WHEREOF, I set my hand this 18 day of JAN, 2019.



David Ziegler, Secretary

8. Action Items

d. Accept August Treasurer’s Report

Manager Crafton described her review and comparison of year-to-date expenses and the District’s 2017 budget and August financial report. She moved to accept the Treasurer’s Report as presented. Manager Pedersen seconded the motion. Manager Chadwick asked questions about the year to date spending for line items Permit Reviews and Inspections and Office Costs. Administrator Bleser answered his questions. Upon a vote, the motion carried 5-0.

e. Approve Paying of Bills

Manager Crafton moved to pay the bills. Manager Pedersen seconded the motion. Upon a vote, the motion carried 5-0.

- i. Manager Crafton moved to adopt recommendations 1 through 5 in the memo addressing the District’s internal controls and procedures. She read aloud the recommendations. Manager Pedersen seconded the motion. Upon a vote, the motion carried 5-0.

f. Approve Delegation Authority for Permit Transfers

Mr. Jeffery reminded the Board that staff introduced and talked about this idea in today’s workshop before the monthly meeting.

Manager Crafton moved to approve the delegation of authority for Permit Transfers. Manager Pedersen seconded the motion. President Yetka asked if the Board will see the actions in a report. Mr. Jeffery said yes. Manager Ward asked that the information just get included in the monthly staff report. The Board indicated consent to including communication about staff actions on permit transfers in the monthly staff report.

President Yetka read aloud Resolution 17-10 Delegating Certain Permit-Approval Authority to the Administrator.

Upon a roll call vote, the motion carried 5-0.

Manager	Aye	Nay	Abstain	Absent
Chadwick	X			
Crafton	X			
Pedersen	X			
Ward	X			
Yetka	X			

g. Approve Release of Plan Amendment for Lotus Internal Control Treatment and Rice Marsh Lake Internal Control Treatment

Administrator Bleser explained that these two projects have been identified in the District’s new 10-year

RESOLUTION NO. 2017- 05

**RILEY PURGATORY BLUFF CREEK WATERSHED DISTRICT
BOARD OF MANAGERS**

**RESOLUTION DELEGATING CERTAIN
PERMIT APPROVAL AUTHORITY to the PERMIT COORDINATOR**

Manager **Yetka** offered the following resolution and moved its adoption, seconded by Manager **Bisek**.

WHEREAS pursuant to Minnesota Statutes section 103D.341, the Riley Purgatory Bluff Creek Watershed District (District) reviews and issues permits for activity within the watershed that may affect water resources; and

WHEREAS permit applications may be approved by the District Board of Managers at a regular or special meeting; and

WHEREAS certain applications for a District permit are subject to defined and specific standards, and determination of compliance does not require the exercise of substantial discretion; and

WHEREAS the time and resources of the Board of Managers, staff and permit applicants are best served by delegating to the District administrator the authority to approve such applications;

WHEREAS the Board of Managers passed a resolution 2014-11 on November 25, 2014 delegating certain permit approval authority to the administrator for single-family home development or redevelopment projects requiring a permit under only District Rule C- Erosion and Sediment Control;

WHEREAS from time to time the Administrator may be absent from the office for more than five (5) working days, and the district wishes to assure continues administration of the permit program, such that the Permit Coordinator may assume the authority of the Administrator to issue permits under conditions approved by the Board of Managers.

THEREFORE BE IT RESOLVED that:

1. In the event of the absence of the administrator for more then five business days, the Permit Coordinator will have the following authority until the return of the Administrator:
 - a. The Permit Coordinator may approve permit applications for single-family home development or redevelopment projects requiring a permit under only District Rule C – Erosion and Sediment Control and Rule J – Stormwater.
 - b. The Permit Coordinator may approve permit applications for projects that require a permit under Rule C -- Erosion and Sediment Control and are exempt from the stormwater rule.

- c. The Permit Coordinator may not issue a permit if:
 - i. A variance is required;
 - ii. An exception is requested by the applicant;
 - iii. The proposed activity requires a permit that the administrator is not authorized to issue;
 - iv. The permit coordinator determines that the application involves a technical, policy or legal issue or raises public comment that warrants review by the Board of Managers; or
 - v. Anyone requests, prior to the Project Coordinator's issuance of written approval, that the Board of Managers make the determination on the application.
- d. If the Permit Coordinator finds that the criteria for permit issuance under this resolution are not met, the application will be presented to the Board of Managers for consideration at its next scheduled meeting, unless the applicant withdraws the application.
- e. The Permit Coordinator will maintain a log of permit applications approved pursuant to this resolution and will advise the Board of Managers regularly as to permitting activity conducted pursuant to this resolution.

The question was on the adoption of the resolution and there were 4 yeas, 0 nays, and 1 absent as follows:

	<u>Yea</u>	<u>Nay</u>	<u>Abstain</u>	<u>Absent</u>
BISEK	X			
CHADWICK	X			
CRAFTON				X
FORSTER	X			
YETKA	X			

Upon vote, the president declared the resolution adopted.
 Dated: August 2, 2017.

* * * * *

I, Mary Bisek, secretary of the Riley Purgatory Bluff Creek Watershed District, do hereby certify that I have compared the above resolution with the original thereof as the same appears of record and on file with the District and find the same to be a true and correct transcription thereof.

IN TESTIMONY WHEREOF, I set my hand this 2nd day of August, 2017.



 Mary Bisek, Secretary

RESOLUTION NO. 2015- 07

**RILEY PURGATORY BLUFF CREEK WATERSHED DISTRICT
BOARD OF MANAGERS**

**RESOLUTION DELEGATING CERTAIN
PERMIT APPROVAL AUTHORITY to the ADMINISTRATOR**

Manager **Crafton** offered the following resolution and moved its adoption, seconded by Manager **Yetka**.

WHEREAS pursuant to Minnesota Statutes section 103D.341, the Riley Purgatory Bluff Creek Watershed District (District) reviews and issues permits for activity within the watershed that may affect water resources; and

WHEREAS permit applications may be approved by the District Board of Managers at a regular or special meeting; and

WHEREAS certain applications for a District permit are subject to defined and specific standards, and determination of compliance does not require the exercise of substantial discretion; and

WHEREAS the time and resources of the Board of Managers, staff and permit applicants are best served by delegating to the District administrator the authority to approve such applications;

WHEREAS the Board of Managers adopted resolution no. 2014-11 on November 25, 2014, delegating authority to the District administrator to approve permit applications for single-family home development or redevelopment projects requiring a permit under only District Rule C- Erosion and Sediment Control.

THEREFORE BE IT RESOLVED that:

1. The administrator may approve a permit application for any single-family home development or redevelopment project requiring a permit under only District Rule C – Erosion and Sediment Control, Rule D Wetland and Creek Buffer, and Rule J – Stormwater Management.
2. The administrator may approve permit applications for Rule H – Appropriation of Public Surface Waters and Rule I – Appropriation of Groundwater.
3. The administrator may approve permit applications for any project that requires only a permit under Rule C– Erosion and Sediment Control.
4. The administrator may not issue a permit if:
 - a. A variance is required;

- b. An exception is requested by the applicant;
 - c. The proposed activity requires a permit that the administrator is not authorized to issue;
 - d. The administrator determines that the application involves a technical, policy or legal issue or raises public comment that warrants review by the Board of Managers; or
 - e. Anyone requests, prior to the administrator's issuance of written approval, that the Board of Managers make the determination on the application.
5. If the administrator finds that the criteria for permit issuance under this resolution are not met, the application will be presented to the Board of Managers for consideration at its next scheduled meeting, unless the applicant withdraws the application.
 6. The administrator will maintain a log of permit applications approved pursuant to this resolution and will advise the Board of Managers quarterly as to permitting activity conducted pursuant to this resolution.

The question was on the adoption of the resolution and there were 4 yeas, 0 nays and 1 absent as follows:

	<u>Yea</u>	<u>Nay</u>	<u>Abstain</u>	<u>Absent</u>
BISEK	X			
CRAFTON	X			
FORSTER	X			
WENCL				X
YETKA	X			

Upon vote, the president declared the resolution adopted.

Dated: June 29, 2015.

* * * * *

I, Ken Wencl, secretary of the Riley Purgatory Bluff Creek Watershed District, do hereby certify that I have compared the above resolution with the original thereof as the same appears of record and on file with the District and find the same to be a true and correct transcription thereof.

IN TESTIMONY WHEREOF, I set my hand this day of , 2015.

Leslie Yetka, Secretary pro-tem

RESOLUTION NO. 2014- 11

**RILEY PURGATORY BLUFF CREEK WATERSHED DISTRICT
BOARD OF MANAGERS**

**RESOLUTION DELEGATING CERTAIN
PERMIT APPROVAL AUTHORITY to the ADMINISTRATOR**

Manager Crafton offered the following resolution and moved its adoption, seconded by Manager Wencil.

WHEREAS pursuant to Minnesota Statutes section 103D.341, the Riley Purgatory Bluff Creek Watershed District (District) reviews and issues permits for activity within the watershed that may affect water resources; and

WHEREAS permit applications may be approved by the District Board of Managers at a regular or special meeting; and

WHEREAS certain applications for a District permit are subject to defined and specific standards, and determination of compliance does not require the exercise of substantial discretion; and

WHEREAS the time and resources of the Board of Managers, staff and permit applicants are best served by delegating to the District administrator the authority to approve such applications;

THEREFORE BE IT RESOLVED that:

1. The administrator may approve permit applications for single-family home development or redevelopment projects requiring a permit under only District Rule C – Erosion and Sediment Control.
2. The administrator may not issue a permit if:
 - a. A variance is required;
 - b. An exception is requested by the applicant;
 - c. The proposed activity requires a permit that the administrator is not authorized to issue;
 - d. The administrator determines that the application involves a technical, policy or legal issue or raises public comment that warrants review by the Board of Managers; or
 - e. Anyone requests, prior to the administrator's issuance of written approval, that the Board of Managers make the determination on the application.

3. If the administrator finds that the criteria for permit issuance under this resolution are not met, the application will be presented to the Board of Managers for consideration at its next scheduled meeting, unless the applicant withdraws the application.
4. The administrator will maintain a log of permit applications approved pursuant to this resolution and will advise the Board of Managers regularly as to permitting activity conducted pursuant to this resolution.

The question was on the adoption of the resolution and there were 5 yeas and 0 nays as follows:

	<u>Yea</u>	<u>Nay</u>	<u>Abstain</u>
BISEK	X		
CRAFTON	X		
FORSTER	X		
WENCL	X		
YETKA	X		

Upon vote, the president declared the resolution adopted.

Dated: November 5, 2014.

* * * * *

I, Ken Wencil, secretary of the Riley Purgatory Bluff Creek Watershed District, do hereby certify that I have compared the above resolution with the original thereof as the same appears of record and on file with the District and find the same to be a true and correct transcription thereof.

IN TESTIMONY WHEREOF, I set my hand this 25 day of November, 2014.


 Ken Wencil, Secretary