

## Proposed Amendments to MMSD Rules, Chapter 13

Rule text is in Times Roman. Proposed new text is underlined. A ~~strikethrough~~ indicates existing text proposed for removal.

Notes are in blue Arial.

1. Section 13.103(12) is amended to read:

- (12) “Regional Flood” means the peak flow and peak elevation of water with a 1% probability of occurring during any one year, considering rainfall time and intensity patterns, rainfall duration, area distribution, antecedent moisture conditions, and snow melt.

The proposed amendment adds a missing word.

2. Section 13.201 is amended to read:

### **13.201 District Flood Risk Reduction Projects~~Watercourse Jurisdiction~~**

- (1) The District may implement projects to reduce the number of structures within the regional floodplain. ~~The District may abate the regional flood along the watercourses listed in the appendix.~~

The proposed amendment explicitly identifies the purpose of District flood risk reduction projects, as established by Commission policy. Existing sub. (1) is moved to proposed sec. 13.202(1).

- (2) The District shall prepare Watercourse Management Plans for the watercourses listed in the appendices to this chapter. These plans shall identify flood risks, options for reducing these risks, and a preferred alternative. The District shall provide the initial plans and any amendments to the Commission for approval. ~~District flood abatement projects shall be limited to the reduction of regional flood risks.~~
- (3) The District shall implement flood risk reduction projects consistent with Watercourse Management Plans approved by the Commission. ~~District action to abate regional flooding does not modify or eliminate any responsibility of other governmental units for local stormwater management or surface water drainage.~~

Subsections (2) and (3) identify Watercourse Management Plans as a critical first step for implementing flood risk reduction projects. The District's practice has been to prepare these plans and provide them to the Commission for approval and amendment.

- (4) ~~The listing of a watercourse in the appendix does not, by itself, affect any riparian property interest. Riparian property owners retain all the benefits and burdens of ownership, including the duty to use their property in a manner that does not cause harm to or interfere with the rights of others.~~

Subsection (4) is moved to proposed sec. 13.206(2).

3. Section 13.202 is amended to read:

**13.202 Location of District Flood Risk Reduction Projects Adding Watercourses**

- (1) The District may reduce flood risks along watercourses listed in an appendix to this chapter, which are the watercourses under District jurisdiction for flood risk reduction. Any governmental unit may petition the Commission to take action to abate regional flooding risks along a watercourse not already listed in the appendix.

This subsection corresponds to existing sec. 13.201(1).

- (2) The petitioner shall submit its petition to the Secretary of the Commission. Any governmental unit within the District may petition the Commission to amend an appendix to this chapter to list a new watercourse.

(a) The petition shall provide maps showing the following information to the satisfaction of the District:

1. the upstream and downstream boundaries of the reach where District action is requested,
2. the watershed tributary to the reach where District action is requested,
3. municipal boundaries,
4. the best available boundaries of the regional floodplain, and
5. the location of structures within the regional floodplain. In addition to the map, the petition shall include a table identifying structures by type and street address.

(b) The petition shall demonstrate the reach where District action is requested has a tributary watershed in at least two governmental units.

(c) From the governing body of the governmental unit, the petition shall include a resolution requesting District action to reduce flood risks.

(d) The petitioner shall submit its petition to the Secretary of the Commission.

The intent is to clarify and make more precise the elements of a request for District action along a watercourse not already listed in this chapter.

- (3) ~~A petition shall identify:~~

- ~~(a) the features that create a risk of flood losses,~~
- ~~(b) the constructed features that create a risk of flood losses and the related owners or operators,~~
- ~~(c) the extent and magnitude of probable flood losses,~~
- ~~(d) the actions that would reduce flood losses, and~~
- ~~(e) an explanation for why regional action is necessary.~~

(3)(4) The District shall review any petition submitted according to sub. (2). If a petition shows significant flood risks along a watercourse with at least two tributary governmental units, then the District shall recommend the Commission amend this chapter to include the watercourse. To add a watercourse, the District shall use procedures for rule-making, according to Wis. Stat. sec. 200.45(1). If the Commission fails to act on a petition within one year of submission, then the petition is denied.

~~(5) If the Commission fails to act on a petition within one year of submission, then the petition is denied.~~

4. Section 13.203 is amended to read:

**13.203 Watercourse Maintenance when the District Does Not Own the Riparian Land Flood Abatement Projects**

This section addresses issues covered by existing sec. 13.204. General rules are not useful because every watercourse has unique conditions. These conditions, stakeholder interests, available funding, applicable law, evolving technologies, and other factors determine the available options. Watercourse Management Plans will describe and evaluate the options available for individual watercourses.

~~(1) The provisions of this section apply when the District does not own the riparian land. When planning, designing, and constructing flood abatement projects, the District shall include features or use techniques that restore stream habitat, improve water quality, protect wetlands, and enhance public access to and use of watercourses, to the maximum extent practical.~~

This subsection corresponds to existing sec. 13.204(1).

(2) Riparian landowners shall maintain their land as required by Wisconsin law. The listing of a watercourse in an appendix to this chapter does not, by itself, modify the responsibilities of riparian landowners to maintain their land. The District shall maintain land owned by others only to the extent necessary to comply with any applicable recorded easement, permit, intergovernmental cooperation agreement, or condition of a grant or other funding assistance.

~~The District shall utilize non-structural flood abatement techniques, such as conservation easements, whenever practical. The District shall manage conservation easements according to land trust practices.~~

This subsection corresponds to existing sec. 13.204(3).

- (3) ~~The District may straighten a channel, line a channel with an impervious material, or take other activities that merely accelerate flow rates only if no feasible alternative exists.~~ Along watercourses listed in an appendix, the District may remove debris if all the following conditions are present.

(a) The riparian owner requests removal.

(b) The debris would cause a significant increase in the regional flood elevation.

(c) The riparian owner does not:

1. impose unreasonable restrictions upon the manner or timing of the District's work,
2. impose fees, or
3. require a bond or insurance.

This subsection corresponds to existing sec. 13.204(4). Requests for debris removal are routine. The text is revised to be consistent with current Commission policy and District practice.

- (4) If debris creates an imminent and substantial endangerment to public safety, then the District may order the riparian owner to remove the debris. This order shall be in writing. If the riparian owner fails to remove the debris within a reasonable time, then the District may remove the debris without regard for any requirements established by the riparian owner and the District may recover the cost of removal from the riparian owner. ~~The District may not provide direct flood abatement services, such as the purchase of real property, to any property altered, built, or modified in a way that violates floodplain or shoreland zoning requirements, including pre-existing property allowed to continue as a nonconforming use. This prohibition does not apply to properties that are already included in projects planned by the District as of the date of adoption of this chapter.~~

This subsection corresponds to existing sec. 13.204(5).

- (5) ~~Specific requirements in a Commission resolution related to a particular project supersede the requirements of subs. (1) to (4).~~
- (6) ~~District action to improve a watercourse's bed or banks does not, by itself, create for the District an ownership interest in the bed or banks.~~

5. Section 13.204 is amended to read:

**13.204 Flood Risk Reduction Facilities with Supplemental Features Requested by Others**  
**~~Watercourse Maintenance when the District Does Not Own the Riparian Land~~**

Proposed sec. 13.203 now addresses watercourse maintenance. Proposed sec. 13.204 corresponds to existing sec. 13.205.

If a party other than the District has requested a purpose that supplements the flood risk reduction facilities identified in a Watercourse Management Plan, then the other party shall be responsible for maintaining these features, unless District maintenance is required to obtain an easement, permit, or funding assistance. ~~(1) The provisions of this section apply when the District does not own the riparian land.~~

A simplified approach to cost sharing is proposed in response to the District's experience. Generally, other parties are responsible for features unrelated to flood risk reduction. However, when working on land owned by others or as needed to obtain funding assistance, the District may need to maintain features beyond what is needed for flood risk reduction.

- ~~(2) District watercourse maintenance work shall be limited to watercourses listed in the appendix.~~
- ~~(3) The District shall limit its work to preventing harm from structures constructed or installed by the District and the removal of obstructions that create a threat of harm to structures, unless other work is explicitly authorized by the Commission or is specifically required by a recorded easement; a permit issued by the Department according to Wis. Stat. Chapter 30; a grant agreement; an intergovernmental cooperation agreement established according to Wis. Stat. sec. 66.0301; or an agreement with a donor of land.~~
- ~~(4) The District may remove an obstruction only if all of the following conditions are satisfied:~~
  - ~~(a) The riparian owner requests removal,~~
  - ~~(b) The obstruction would cause the regional flood to damage structures, and~~
  - ~~(c) The riparian owner does not:~~
    - ~~1. impose unreasonable restrictions upon the manner or timing of the District's work,~~
    - ~~2. impose access fees, or~~
    - ~~3. require a permit, bond, or insurance.~~

- (5) ~~If an obstruction in a watercourse creates an imminent and substantial endangerment to public safety, then the District may order the riparian owner to remove the obstruction or take other emergency action to eliminate the risk to public safety. The order shall be written, state the reasons for the order, describe the administrative procedures that are available to request modification or reversal of the order, and be hand delivered or delivered by certified mail, return receipt requested. If the recipient requests an administrative review of the order according to MMSD Rules, ch. 6, then the District shall undertake the review within the shortest reasonable time. If the riparian owner fails to remove the obstruction, then the District may remove the obstruction without regard for any requirements established by the riparian owner. If the District removes the obstruction, then the riparian owner shall reimburse the District's costs.~~
- (6) ~~Whenever practical, the District shall use maintenance techniques that minimize adverse effects upon fish or wildlife habitat.~~

6. *Section 13.205 is amended to read:*

**13.205 District Recreational Immunity at Dual Use Flood Risk Reduction Facilities**  
**Sharing for the Maintenance of Dual Use Flood Abatement Facilities**

Proposed sec. 13.204 now addresses maintenance issues. Proposed sec. 13.205 rennumbers existing sec. 13.206.

- (1) For the purposes of this section, "recreational activity" has the meaning established by Wis. Stat. sec. 895.52. If a facility constructed for regional flood abatement also provides other functions, such as sports fields, picnic areas, other public park amenities, or best management practices for stormwater quality, then the District and the governmental unit where the facility is located shall establish a maintenance cost sharing agreement. According to this agreement, the District may reimburse a portion of the governmental unit's maintenance costs.
- (2) If an owner, lessee, co-tenant, or occupant of a flood risk reduction facility constructed according to this chapter imposes a fee for a recreational activity occurring at the facility and if the District does not receive any portion of this fee, then:
- (a) any person claiming injury from a recreational activity at the facility may not attribute the fee to the District; and
  - (b) the owner, lessee, co-tenant, or occupant shall indemnify the District and hold the District harmless from all claims or liability arising from the activity, except for claims of malicious acts committed solely by the District.
- (2) ~~Governmental units are responsible for all costs unrelated to flood abatement, including, but not limited to:~~

- (a) ~~the design, construction, maintenance, or repair of recreational facilities, restrooms, fencing, board walks, trails, lighting, play grounds, turf, landscaping, and signage regarding access restrictions or hazards, including the cleaning, repairing, and restoration of these features after flooding;~~
  - (b) ~~snow removal, mosquito control, grass cutting, landscaping maintenance, litter or debris removal for aesthetic purposes, and any other tasks incidental to or necessary for the maintenance of public land or a public right of way; and~~
  - (c) ~~all costs related to storms with a recurrence interval of 2 years or less and a probability of 50% or more, including costs for removing debris and sediment from basins and other costs related to best management practices for improving stormwater quality.~~
- (3) Any written agreement with the District regarding the use of a facility shall incorporate the requirements of sub. (2). ~~The District's share of costs shall be limited to: maintaining the structural integrity and operational effectiveness of the berms, retaining walls, or other facilities constructed by the District to abate the regional flood; removing debris deposited by floods caused by storms with a recurrence interval of more than 2 years and a probability of less than 50%; and removing obstructions to inlet or outlet structures.~~
- (4) ~~The District shall share only direct actual costs. The District may not share in the general operating expenses of governmental units, such as overhead or administrative costs.~~
- (5) — (a) ~~Governmental units shall pay a minimum of 60% of the total maintenance costs, with the District paying the remainder, except as otherwise provided by par. (b).~~
- (b) ~~A governmental unit may petition the Commission for the District to pay a larger fraction of the cost. The petition shall include facts and arguments showing that costs related to regional flood abatement comprise more than 40% of the total maintenance costs. The petitioner has the burden of persuasion regarding the proposed alternative cost allocation.~~
- (6) ~~Cost sharing agreements shall use multi-year cost averaging principles, as established for this purpose by the District.~~

7. *Section 13.206 is amended to read:*

**13.206 Responsibilities of Riparian Landowners and Other Governmental Units~~District~~  
~~Recreational Immunity at Dual Use Flood Abatement Facilities~~**

Section 13.205 is proposed to address recreational immunity, instead of this section. From various existing sections, proposed sec. 13.206 consolidates requirements regarding the responsibilities of entities other than the District.

- (1) District action to reduce flood risks does not modify or eliminate any responsibility of other governmental units for local stormwater management or surface water drainage. ~~For the purposes of this section, “recreational activity” has the meaning established by Wis. Stat. sec. 895.52.~~

This subsection corresponds to existing sec. 13.201(3).

- (2) The listing of a watercourse in an appendix to this chapter does not, by itself, affect any riparian property interest. Riparian property owners retain all the benefits and burdens of ownership, including the duty to use their property in a manner that does not cause harm to or interfere with the rights of others. ~~If an owner, lessee, co-tenant, or occupant of a flood abatement facility constructed according to this chapter imposes a fee for a recreational activity occurring at the facility and if the District does not receive any portion of this fee, then:~~

- ~~(a) any person claiming injury from a recreational activity at the facility may not attribute the fee to the District; and~~
- ~~(b) the owner, lessee, co-tenant, or occupant shall indemnify the District and hold the District harmless from all claims or liability arising from the activity, except for claims of malicious acts committed solely by the District.~~

This subsection corresponds to existing sec. 13.201(4).

- (3) District action to modify a watercourse’s bed or banks does not, by itself, create for the District an ownership interest in the bed or banks. ~~Any written agreement with the District regarding the use of a facility shall incorporate the requirements of sub. (2).~~

This subsection corresponds to existing sec. 13.202(6).