

BWSR MN Public Drainage Manual Engineers Outreach Workshop

April 27, 2017

Kale Van Bruggen, Attorney - Lead Writer Chapter 2
John Kolb, Attorney - Lead Editor Chapter 2

MPDM Chapter 2: Administrative and Legal Issues



RINKE NOONAN
attorneys at law

Chapter 2 Subcommittee Members

2

- Tom Hovey, MN DNR
- Laura Nehl-Trueman, MN DOT
- John Thompson, Faribault County Auditor
- Mark Ten Eyck, MN Center for Env't'l Advocacy
- Larry Kuseske, Sauk River Watershed District Manager
- Jean Coleman, MPCA
- Harlan Madsen, Association of Minnesota Counties
- Ron Harnack, Red River Water Management Board

Chapter 2 Structure

3

- I. Considerations Before Initiating a Project or Repair
- II. General Petition Requirements
- III. Types of Proceedings (Projects, Repairs, & Proceedings)
- IV. The Preliminary Hearing
- V. The Final Hearing
- VI. Construction of a Drainage Project
- VII. Appeals and Other Litigation
- VIII. Funding, Collection, and Payment of Drainage System Costs

Drainage Projects

4

- New Drainage System Projects ([Section III, B](#))
- Improvement of a Drainage System ([Section III, C](#))
- Improvement of Outlets ([Section III, D](#))
- Laterals ([Section III, E](#))

Right-of-Way Acquired (Section III, B.4)

- Drainage code procedures invoke eminent domain powers - when a new drainage project is established, the drainage authority acquires an easement for construction and future maintenance of the project
- Damages are awarded by the viewers for the area occupied by the project and for temporary damages for construction and future maintenance
- Engineer's report should describe the easement area needed for construction and for future maintenance
- The easement area includes the area physically occupied by the drainage system along with the area impacted by construction, including areas cleared and grubbed of trees and the area over which the spoils were spread and leveled

Drainage Repairs (Section III, G)

- Drainage systems must be inspected on a regular basis - once every 5 years if no violation of grass strip requirement; if a violation of the grass strip requirement is found, must be inspected annually until one year after violation corrected (Section III, G.2)
- Repairs can be ordered without a petition in response to inspection reports (Section III, G.4)
- An individual or entity interested in or affected by a drainage system may petition the drainage authority for a repair (Section III, G.5)

Drainage Proceedings

- Impounding, Rerouting, and Diverting Drainage System Waters ([Section III, F](#))
- Reestablishment of Drainage System Records ([Section III, H](#))
- Redetermination of Benefits and Damages ([Section III, I](#))
- Use of Drainage System as an Outlet ([Section III, J](#))
- Consolidation or Division of Drainage Systems ([Section III, K](#))
- Removal of Property from a Drainage System ([Section III, L](#))
- Partial Abandonment of a Drainage System ([Section III, M](#))
- Abandonment of a Drainage System ([Section III, N](#))

Players: Petitioners

- Environmental considerations before initiating a project ([Section I](#))
 - Swampbuster, CWA, MEPA, Public Waters & Public Waters Wetlands, WCA, Shoreland & Floodplain Management, Buffer Law, Water Quality Laws
 - Income generating alternatives to drainage projects
 - Environmental Assessment Worksheet (EAW) & Environmental Impact Statement (EIS)
- Jurisdiction over a drainage project begins with the petition
- Repairs may be petitioned by landowners or drainage authority
- General petition requirements ([Section II](#))
 - Elements of all petitions
 - Petitioner liability
 - Filing the petition
 - Petitioners' bond

Players: Drainage Authority

- Determining the appropriate drainage authority: ([Section II, C](#))
 - Type of petition filed;
 - Location of drainage system.
- County Drainage Authority
- Joint County Drainage Authority
- Watershed District
 - Minn. Stat. § 103D.625, subds. 1 & 3 - transfer of joint county or county drainage systems to watershed districts
 - Minn. Stat. § 103D.625, subd. 4 - construction of new drainage system or improvements of existing drainage systems initiated by filing petition with managers
- Water Management Authority

Players: Agencies

10

- Department of Natural Resources
 - Commissioner's Preliminary Advisory Report ([Section IV, E](#))
 - Public Waters & Public Waters Wetlands Permits ([Section I, B.4](#))
 - Commissioner's Final Advisory Report ([Section V, C](#))
- Board of Water and Soil Resources
 - Drainage authority may request additional information about potential funding or technical assistance from the executive director of the BWSR
 - Ditch buffer strip annual reporting
 - Notice for resolution or petition requesting reestablishment of drainage system records
 - Service on panel when objection filed to transfer of drainage system to water management authority

Players: Auditor or District Secretary

11

- Proper filing of a petition ([Section II, H](#))
- Monitoring proceeding costs to not exceed bond ([Section II, I.2](#))
- Engineer's oath and bond ([Section IV, C.1](#))

1. Engineer's Oath and Bond

The engineer is required to file an oath to faithfully perform the required duties in the best possible manner and must file a bond with the auditor.⁶⁰⁰ While the bond is subject to approval by the auditor or watershed district secretary, the drainage authority sets the bond amount within 10 days of appointing the engineer.⁶⁰¹ The minimum amount of the bond must be \$5,000, but the bond must have adequate surety.⁶⁰² The \$5,000 minimum bond requirement is a vestige from a time when drainage projects were small and inexpensive. Now, the risk involved is substantially higher. It is not uncommon for the drainage authority to require a minimum bond of \$100,000 for today's projects. **A sample Engineer's Bond is found in [Template B](#).**

The aggregate liability of the surety for all damages may not exceed the amount of the bond.⁶⁰³ The bond must be payable to the county where the petition is filed, or for a proposed joint county drainage project to all counties in the petition, and must be conditioned to pay any person or the drainage authority for damages and injuries resulting from negligence of the engineer while the engineer is acting in the proceedings or construction and provide that the engineer will diligently and honestly perform the engineer's duties.⁶⁰⁴

A sample Engineer's Oath is found in [Template B-2](#).

Players: Engineer

12

- Appointment of Engineer ([Section IV, C](#))
 - Order appointing engineer w/in 30 days of petition. ([Template Order](#))
- Engineer's Oath
- Engineer's Bond
 - Amount set by drainage authority within 10 days of appointment
 - Minimum of \$5,000; must have adequate surety

Engineer's Oath

13

STATE OF MINNESOTA
Before the
<DRAINAGE AUTHORITY NAME>
SITTING AS THE DRAINAGE AUTHORITY FOR
<NAME OF DRAINAGE SYSTEM>

In the Matter of:

the Petition for <Drainage Project> to
<Drainage System>

ENGINEER'S OATH

<Name of engineering firm> (Engineer), having been appointed by the <name of drainage authority> Board of <Managers/Commissioners>, drainage authority for the <name of project>, as the Drainage Engineer for the <name of project> pursuant to Minnesota Statutes Chapter 103E, does hereby swear or affirm to faithfully perform the assigned duties in the best manner possible and to diligently and honestly perform the Engineer's duties as set forth in Chapter 103E and according to the professional standards required of professional engineers.

- [Section IV, C.1](#)
- Minn. Stat. § 103E.241, subd. 2
- Engineers are required to file an oath with the auditor or watershed district secretary to faithfully perform the required duties in the best manner possible
- [Template Engineer's Oath](#)

Engineer's Bond (Section IV, C.1)

14

In the Matter of:

the Petition for <Drainage Project> to
<Drainage System>

ENGINEER'S BOND

KNOW BY ALL THESE PRESENTS, that <name of engineering firm> (Engineer), as principal and surety, is held and firmly bound to the <name of drainage authority> (Drainage Authority) in an amount equal to <amount of bond> for which the Engineer will maintain commercial general liability and professional liability coverage limits, per occurrence and per claim respectively, of not less than that amount during the entire term of the Engineer's appointment, to pay on any proven claim by any person or the Drainage Authority for damages and injuries resulting from negligence of the Engineer while the Engineer is acting in the proceedings or construction for the <name of drainage project>.

The condition of the above obligation is such: Engineer was appointed by the Drainage Authority as the Drainage Engineer for the <name of drainage project>. Minnesota Statutes Section 103E.241, subd. 2 requires the Engineer to file a bond of at least \$5,000 with the District upon appointment. The bond must be conditioned to pay any person or the Drainage Authority for damages and injuries resulting from negligence of the Engineer while the Engineer is acting in the proceedings or construction and provide that the Engineer will diligently and honestly perform the Engineer's duties. The aggregate liability of the Engineer for all proven claims shall not exceed the amount of the Engineer's bond, for which the Engineer acknowledges being held and firmly bound in the amount of \$100,000 to be underwritten by the Engineer's obligation to provide commercial general liability and professional liability insurance during the term of the Engineer's appointment.

- Bond is filed with the auditor (or watershed district secretary)
- Drainage authority sets amount within 10 days of appointment
- Minimum \$5,000 bond required
- Must have adequate surety payable to counties (or watershed district)
- Bond conditioned to pay any person or drainage authority damaged
- [Template Engineer's Bond](#)

Engineer's Compensation (Section IV, C.3)

15

- Engineer must make an expense report every two weeks until the construction contract is awarded showing all expenses, name of all engineers and employees, and time employed
- Expense report is filed with auditor (or watershed district secretary)
- Engineer is prohibited from incurring costs that exceed the petitioners' bond - Minn. Stat. § 103E.241, subd. 4
- Compensation is on a per diem basis and is set by order of the drainage authority for payment of actual and necessary expenses including the cost of the engineer's bond - Minn. Stat. § 103E.645, subd. 2

Duties of Engineer (Section IV, C.2)

16

- Assistant engineers permitted
- Drainage authority may appoint consulting engineer
- Preliminary survey:
 - Examine the petition and order
 - Make a preliminary survey of the area likely to be affected to enable the engineer to determine whether the proposed drainage project is necessary and feasible with reference to Minn. Stat. § 103E.015, subd. 1
 - Examine and gather information to determine if public waters might be substantially affected
 - If project involves open channel, examine nature and capacity of the outlet
 - Consider impact on environmental, land use, and multipurpose water management criteria in Minn. Stat. § 103E.015, subd. 1

Survey Area (Section IV, C.2)

17

- Preliminary survey is limited to area described in the petition, except the engineer may survey levels necessary to secure an outlet and determine the distance for the proper fall.
- Permission to survey additional areas requires notice to petitioners and petitioners' attorney; if there is petitioner consent, petitioners' attorney requests drainage authority convene hearing with 10 day notice of hearing to all petitioners
- Template Notice of Hearing to Survey Additional Areas
- Unanimous consent of all petitioners that are principals on the bond must be obtained at the hearing

Preliminary Survey (Section IV, D)

18

- If the proposed project is feasible and meets the criteria in Minn. Stat. § 103E.015, subd. 1, proceed with preliminary survey report:
 - elevation of outlet & controlling elevation of property likely affected
 - probable size and character of ditches and laterals
 - character of outlet and whether it is sufficient
 - probable costs of project
 - all necessary data to disclose practicability, necessity, and feasibility of the proposed drainage project
 - consideration of criteria in Minn. Stat. § 103E.015, subd. 1
 - other information ordered by the drainage authority
- Preliminary survey reported filed with auditor of each county or watershed district secretary.
- Auditor or watershed district secretary forwards copy to the Director of the Division of Ecological and Water Resources - DNR

Preliminary Hearing (Section IV, F)

19

- Engineer files report; drainage authority orders preliminary hearing within 30 days of order (Template Order)
- Notice by mail given to all landowners likely to be assessed; affected political subdivisions; and Director of the Division of Ecological and Water Resources - DNR
- Hearing Procedures:
 - Examine petition to certify legal requirements met;
 - Comments from the petitioners;
 - Engineer's presentation of report;
 - Public reading of DNR's preliminary advisory report;
 - Public comments;
 - Findings and order adopted by drainage authority board.

Preliminary Order (Section IV, H)

20

- Required determinations to advance to order for detailed survey report and appointment of viewers:
 - The proposed drainage project outlined in the petition or modified by the engineer is feasible;
 - There is necessity for the proposed drainage project;
 - The proposed drainage project will be of public benefit and promote the public health after considering criteria in Minn. Stat. § 103E.015, subd. 1;
 - The outlet is adequate.
- Template Findings and Order
- Order dismissing the petition after the preliminary hearing may be appealed; an order directing the detailed survey report and appointment of viewers may not be appealed

Players: Viewers (Chapter 4)

21

- Procedures Requiring Viewing (Section II)
- Appointment of Viewers (Section III)
- Assessment of Drainage Benefits (Section IV)
- Extent of Damages (Section V)
- Viewers' Report/Property Owners' Report (Section VI)
- Maintaining Benefits Records (Section VII)

Engineer's Detailed Survey Report

22

- Detailed description of process and report ([Chapter 3, Section IV](#))
- Survey lines of the project and “affected property” - property benefited or damaged by a drainage system or project
- Engineer's discretion - use a different starting point; realign the drain proposed in the preliminary survey; survey and recommend additional ditches and tile; utilize more desirable outlets; change the direction of flow
- May recommend the project be divided into sections and contracted separately if more economical
- Engineer files detailed survey report with auditors or watershed district secretary.
- Auditors or watershed district secretary forwards detailed survey report to Commissioner of DNR

Final Hearing (Section V, D)

23

- Engineer, viewers, and DNR Commissioner file reports; drainage authority orders final hearing not less than 25 days but not more than 50 days after order (Template Order)
- Notice of the final hearing is given by posting, publication, and mail
- Hearing Procedures:
 - Comments from the petitioners;
 - Engineer's presentation of report;
 - Public reading of DNR's final advisory report;
 - Viewer's presentation of report;
 - Public comments;
 - Findings and order adopted by drainage authority board.

Amending Engineer's Report (Section V, E)

24

- The drainage authority may make changes to the engineer's general plan in its findings and order after the final hearing
- If significant changes are recommended, the drainage authority should recess the hearing and direct the engineer (and viewers) to further investigate and file amended reports
- If the hearing is recessed to a date certain announced at the hearing, no further notice is required
- If the hearing is recessed to a date uncertain, the continued hearing must be re-noticed by posting, publication, and mail
- If the engineer's detailed survey report is amended, the report should be sent to the DNR for the opportunity to submit a revised final advisory report

Final Order (Section V, F)

25

- Required determinations to establish a drainage project:
 - The detailed survey report and viewers' report have been made and other proceedings have been completed under chapter 103E
 - The reports made or amended are complete and correct
 - The benefits and damages have been properly determined
 - The estimated benefits are greater than the total estimated costs, including damages
 - The proposed drainage project will be of public utility and benefit and will promote the public health
 - The proposed drainage project is practicable.
- Template Findings and Order
- Appeals under Minn. Stat. §§ 103E.095 and 103E.091 (Section VII)

Construction of Project (Section VI)

26

- Procedure for awarding contract governed in part by the drainage code (ch. 103E) and in part by municipal contracting laws (Minn. Stat. § 471.345) (Section VI, B)
- What happens if contract is not awarded due to bids or costs?
 - Contract may not be awarded if bids exceed est. project costs by 130%
 - Interested person may petition drainage authority to have estimated project costs or plans and specifications re-evaluated
 - Drainage authority adopts order setting a hearing on the petition
 - The hearing is noticed by publication and public comments are taken
 - Drainage authority may order the detailed survey report amended if:
 - The detailed survey report cost estimate is erroneous;
 - Plans and specifications could be changed to materially effect cost without compromising the efficiency of the system; and
 - With modification, contract would be awarded within the 130% limitation.

Closing Out the Project

27

- Hearing for Final Acceptance of the Project ([Section VI, D](#))
 - File engineer's report showing contract price, amount paid on partial payment certificates, unpaid balance, summary of work completed
 - Ten day notice by publication or mail given to all landowners
 - Public hearing is opportunity for complaints and non-contemplated damages about work completed to be addressed
 - Drainage authority should demand waivers of suppliers of materials and subcontractors that might file claims on the bond
 - Drainage authority orders payment of balance of contract if satisfied that all complaints have been resolved and all entitlements paid
 - [Template Final Acceptance Order](#)
- Engineer's final task is to revise the detailed survey report to show the drainage system as actually constructed ([Section VI, E](#))

Funding Projects & Repairs (Section VIII)

28

- Auditor creates tabular lien statement after contract awarded
- Drainage liens are recorded against benefited parcels
- When drainage liens are paid, auditor records a release of the drainage lien at the county recorder's office
- Auditors also assist with apportioning liens when parcels split
- Financing from projects:
 - Borrow funds at 7% from other system accounts or general fund
 - Sale of bonds
- Auditor maintains “drainage system repair funds” at 20% of total benefits or \$100,000, whichever is greater

Drainage Law Updates 2000

29

- 103E.011, subd. 5 created:

“Notwithstanding other provisions of this chapter, a drainage authority may accept and use funds from sources other than, or in addition to, those derived from assessments based on the benefits of the drainage system for the purposes of wetland preservation or restoration or creation of water quality improvements or flood control. The sources of funding authorized under this subdivision may also be used outside the benefited area but must be within the watershed of the drainage system.”

Cost-Versus-Benefit Analysis

30

- Must the existing benefits on a drainage system exceed the costs allocated as separable maintenance in an improvement?
- “While section 103E.215, subd. 6, does not explicitly state either way, harmonizing this section with the language in section 103E.341 requires a balancing of costs and benefits and leads us to conclude that the sections must be read together to avoid the absurdity of requiring different cost-benefit formulations for statutes within the same chapter.” - In re Improvement of Murray Cnty. Ditch 34 (Minn. 2000)
- Note: There is no cost-versus-benefit analysis required to order a repair under 103E.715, subd. 4(a)(1) - Zaluckyj v. Rice Creek Watershed District (Minn. Ct. App. 2002)

Drainage Law Updates 2002

31

- Legislature added 103E.812, which sets out procedure for transferring drainage systems to water management authority
- 103E.005, subd. 29 - “water management authority” means a county or municipality, watershed district, watershed management organization, storm water management district, lake improvement district, subordinate service district, joint powers organization or other special district organized and formed according to law for the purpose of managing storm, surface, and flood waters, or with the authority to manage storm, surface, and flood waters

Drainage Law Updates 2003

32

- Legislature creates 103E.701, subd. 5a
- Drainage authority may pay damages to landowners benefiting from a bridge or culvert instead of repairing bridge or culvert if it determines:
 - The cost to repair the bridge or culvert is more expensive than the compensation to be paid;
 - Written consent is obtained for removal from all landowners benefiting from the bridge or culvert; and
 - Those landowners waive, in writing, all rights to demand the bridge or culvert be repaired.

Drainage Law Updates 2004

33

- Two subdivisions added to 103E.081:
 - Subd. 2a - A person must not knowingly plant trees over a public drain tile, unless the person planting the trees receives permission from the drainage authority.
 - Subd. 2b - A person must not knowingly plant trees over a private drain tile that provides for the drainage of land owned or leased by another person, unless the person planting the trees receives permission from all persons who receive drainage benefits from the drain tile

Drainage Law Updates 2007

34

- 103E.021, subd. 1 amended to replace “grass” with “permanent strip of perennial vegetation”
- Subd. 6 is added to 103E.021 to allow for the incremental acquisition of permanent buffer strips of perennial vegetation or side inlet controls or both
- 103E.067 was created to require drainage authorities to submit an annual report to BWSR on the number and types of actions for which viewers were appointed, number of miles of buffer strips established under 103E.021, number of drainage system inspections completed, and the violations of 103E.021 and enforcement actions taken
- 103E.705, subd. 1 amended to add the requirement that open ditch systems be inspected once every 5 years, unless there is an 103E.021 violation, then it is to be inspected annually until one year after violation is corrected
- 103E.505, subd. 5 amended to allow contracts to be awarded based on contractor or vendor providing best value

103E.015, subd. 2 & Repairs

35

- Drainage authority must consider and weigh competing environmental and public interests in order to determine whether the repair will be of public utility, benefit, or welfare
- Drainage authority has a duty to keep a drainage system in repair, but the drainage authority has discretion to determine the manner in which the drainage system is maintained
- Slama v. Pine Cnty. (Minn. Ct. App. 2008)

Drainage Law Updates 2010

36

- 103E.227 amended:
 - “reroute” added to purposes for petition - “impound, reroute, and divert drainage system waters”
 - New clause (b) added to subdivision 1 to clarify that the petition to impound, reroute, or divert drainage system waters should be filed with the appropriate drainage authority exercising jurisdiction over that system - county, joint county (file with county that has largest area of property), or watershed district
 - Subd. 2 - SWCDs and watershed districts added to the entities exempt from the requirement that a bond be filed with the petition
 - Subd. 3(c) & 5 - drainage authority may contribute drainage system funds to the project if repair costs avoided or the project benefits the system
- Partial Abandonment procedures removed from 103E.805 into stand-alone statute, 103E.806

Initiating Redetermination of Benefits

37

- “If the drainage authority determines that the original benefits or damages determined in a drainage proceeding do not reflect reasonable present day land values or that the benefited or damaged areas have changed . . . the drainage authority may appoint three viewers to redetermine and report the benefits and damages and the benefited and damaged areas.”
- The drainage code does not expressly direct the drainage authority to adopt these determinations as findings; however, where findings are not specifically adopted, proof that these determinations have been made must exist for the drainage authority to acquire jurisdiction over the lands subject to redetermination proceedings - In re Bd. of Mgrs. of Bois de Sioux Watershed Dist. (Minn. Ct. App. 2012)

Drainage Law Updates 2013

38

- Legislature adds subd. 4a to 103E.101, creating a process for the reestablishment of drainage system records
- Legislature also added subd. 5a to address the transfer of drainage system records to a watershed district that assumes authority under 103D.625
- 103E.227, subd. 1(a) amended to add incorporation of “wetland or water quality enhancing elements as authorized by section 103E.011, subd. 5” as a specific reason to petition for impounding, rerouting, or diverting drainage system waters
- 103E.715, subd. 6 amended to allow incorporation of multi-stage ditch cross-section as a repair method

Drainage Law Updates 2014

39

- 103E.015, subd. 1 amended to require drainage authorities to consider multipurpose water management criteria before establishing a drainage project
- 103E.015, subd. 1a created to require that a drainage authority investigate the potential use of external sources of funding to facilitate purposes indicated in 103E.011, subd. 5 and alternative measures in subd. 1(2) when planning a drainage project or repair
 - Timing - prior to making order on engineer's preliminary report for a drainage project or prior to the engineer's repair report
 - Investigation shall include early coordination with SWCD and county and watershed district water planning authorities
 - Drainage authority may request additional information from the Executive Director of BWSR

Drainage Law Updates 2016

40

- 103E.315, subd. 8, clause (b) created:

“When damages are determined to acquire or otherwise provide compensation for buffer strips or alternative riparian water quality practices previously installed as required by section 103F.48, subd. 3, the viewers and drainage authority shall consider the land use prior to buffer strip or alternative practice installation in determining the fair market value of the property under paragraph (a), clause (1).”

Questions / Panel Discussion

41