

Minnesota Public Drainage Manual

Chapter 2 – II. Administration and legal issues - General petition requirements

Summary

Drainage projects represent the combined use of governmental police power authorized by the legislature: taxation (special assessments) and the power of eminent domain either to protect public health, promote the public welfare, or to reclaim waste lands and make them suitable for agricultural uses. Therefore, the proceedings authorized by the legislature in statute must be strictly complied with in order for the drainage authority to establish and maintain jurisdiction over the proceedings. ([Section II, A](#))

The legal concept of jurisdiction is built on having the statutorily authorized body conduct the proceedings and ultimately, make the decision using the process required by the legislature in [Minn. Stat. 103E](#). It is necessary to determine the type of drainage authority that has jurisdiction to receive a petition for a project, repair, or other proceeding. The type of petition being filed and location of the public drainage system identified in the petition will determine the proper drainage authority, which may be one of several different governing entities:

- County Drainage Authority ([Section II, C.1](#));
- Joint County Drainage Authority ([Section II, C.2](#));
- Watershed District Drainage Authority ([Section II, C.3](#)); or
- Water Management Authority ([Section II, B.3.\(iii\)](#)).

Drainage projects, repairs, and other types of procedures related to management of drainage systems are typically initiated by a petition or by action of the responsible governing drainage authority. [Minn. Stat. 103E](#) defines “proceeding” to mean a procedure under Chapter 103E for or related to drainage that begins with filing a petition and ends by dismissal or establishment of a drainage project. The term “drainage project” means a new drainage system, an improvement of a drainage system, an improvement of an outlet, or a lateral. For this reason, drainage projects are initiated by a petition. Repairs may also be initiated by a petition, but are technically not drainage proceedings because repair procedures do not end by establishing a drainage project.

Preparation of a petition for filing with the drainage authority requires careful consideration of the following concepts:

- Determining which governing entity is the correct drainage authority to receive the petition ([Section II, C](#));
- Adequately describing the land crossed or affected by the proposed drainage project ([Section II, D.2](#));
- Correctly counting signatures to determine if the statutorily mandated number of petitioners have signed the petition ([Section II, D.3](#))
- Public benefit, use, utility, and promotion of public health ([Section II, D.4](#));

- Acknowledgement of petitioners obligation to pay costs of dismissed proceedings ([Section II, D.5](#))
- Duration of jurisdiction held by the drainage authority over a drainage system after project is established ([Section II, F](#));
- How to construct outlets out of state and to authorize outlets from out of state into Minnesota ([Section II, G](#));
- Proper filling of a petition ([Section II, H](#)); and
- Bond requirements ([Section II, I](#)).

Petitions must be signed by a requisite number of owners or the requisite percent of property area the drainage project passes over or affects. Therefore, petitions must adequately describe the 40-acre tracts or governmental lots that the drainage passes over, or by property owners that equate a requisite percentage of the total property area affected by the petition ([Minn. Stat. § 103E.202, subd. 2 \(2015\)](#)) so that the signatures can be properly counted. ([Section II, D. 2](#)) The number of signatures required on a petition depends on the type of drainage project or proceeding petitioned ([Section II, D.3](#)).

Petitions for drainage projects must always state that the proposed project will benefit the public, will be useful to the public, or be of public utility, and will promote the public health. See [Section II, D.4](#) for statutory references and extended discussion.

In addition, the petitioners must acknowledge their obligation to pay all costs of dismissed proceedings by affirmatively and expressly stating the obligation in the petition. ([Section II, D.5](#))

By signing a petition for a drainage project or proceeding, a petitioner becomes liable for all costs incurred if the drainage project is not established or the proceeding is dismissed (e.g., engineering fees, attorney's fees, county auditor's fees). Once a petition has been filed, no petitioner may withdraw from it unless written consent of all other petitioners is filed with the auditor. ([Section II, E](#))

The drainage authority's jurisdiction over a project is valid only to the extent of the work that is called for in the petition. Once a drainage system is established, the drainage authority does not retain jurisdiction over the system in perpetuity except for those proceedings specifically authorized in [Minn. Stat. 103E](#). ([Section II, F](#))

Limited authority is granted to the drainage authority to join with the board or tribunal of an adjoining state or Canada that has jurisdiction to plan and construct drainage systems when such cooperation is needed to establish a project within the boundaries of Minnesota. Similarly, other states desiring to outlet drainage into a Minnesota public drainage system must seek express authority from the appropriate drainage authority. ([Section II, G](#))

Once a petition is prepared, the petition must be filed with the proper drainage authority in order to establish jurisdiction over the proceedings. The appropriate drainage authority to receive a petition depends on whether the proposed or existing drainage system is within a watershed district, one county, or in two or more counties. ([Section II, H](#))

Some projects require one or more of the petitioners to file a bond payable to the drainage authority where the petition is filed in order to assure the drainage authority that petitioners will pay the costs incurred for a proposed project that is either dismissed or is not constructed. The bond must have adequate surety and be approved by the drainage authority attorney. As the proposed drainage project

proceeds, the costs incurred in furtherance of the project may not exceed the amount of the petitioners' bond and the drainage authority may not pay a claim for expenses greater than the amount of the bond unless an additional bond is filed. The types of projects that require a bond are summarized in [Appendix 2A](#) and are further described in [Section III, I](#).

A. Jurisdiction

Drainage proceedings involve elements of eminent domain (taking of private property for public use), the power to tax, and the police powers.¹⁶³ The drainage authority's power to engage in drainage proceedings is strictly derived from the legislature. Drainage proceedings are entirely statutory and must be strictly complied with for the drainage authority to maintain jurisdiction.¹⁶⁴ Therefore, this section closely follows statutory requirements related to jurisdiction and petition requirements.

The concept of jurisdiction in drainage proceedings involves jurisdiction in rem, meaning jurisdiction "over the thing."¹⁶⁵ This is to be distinguished from jurisdiction "over the person," as in a civil action. Drainage proceedings determine legal rights of the land, not the person. Therefore, the drainage authority's jurisdiction is unaffected by transfers of property between persons.¹⁶⁶

Unless the drainage authority acquires jurisdiction over the land to be traversed with the open ditch or drain tile, the drainage authority has no power to enter upon the land, to disturb the land, nor to levy taxes on it.¹⁶⁷ The nature and extent of the easement acquired by a drainage authority when jurisdiction is established and a project is constructed is addressed in [Section III, Paragraph B, Subparagraph 4](#).

FOOTNOTES

¹⁶³ *Nostdal v. Watonwan Cnty.*, 22 N.W.2d 461, 466 (Minn. 1946).

¹⁶⁴ *State v. Oldre*, 229 N.W. 878, 879 (Minn. 1930); *In re Bd. of Managers of Bois de Sioux Watershed Dist.*, 818 N.W.2d 583, 586–87 (Minn. Ct. App. 2012).

¹⁶⁵ See, e.g., *In re Judicial Ditch No. 9 (Big Stone Cnty.)*, 208 N.W. 417 (Minn. 1926) (noting that a proceeding for a drainage improvement project requires jurisdiction in rem, not jurisdiction over a person); *In rem* jurisdiction refers to a governing body's power "over a thing so that its judgment is valid as against the rights of every person in the thing." *Black's Law Dictionary* 854 (6th ed. 1990).

¹⁶⁶ *In re Judicial Ditch No. 4 (Lac Qui Parle Cnty.)*, 200 N.W. 471, 472 (Minn. 1924).

¹⁶⁷ *Fischer v. Town of Albin*, 104 N.W.2d 32, 34 (Minn. 1960); *Petition of Jacobson*, 48 N.W.2d 441, 444 (Minn. 1951).

B. Determining the Correct Drainage Authority

The legal concept of jurisdiction is built on having a statutorily authorized body adopt findings and make decisions. Determining what drainage authority has jurisdiction over a petition for a drainage project or repair is crucial.¹⁶⁸ Determining the proper drainage authority depends on two equal factors:

1. The type of petition being filed; and
2. The location of the public drainage system.

1. County Drainage Authority

In the case of a drainage project or repair for a system that is physically located within a single county, benefits a watershed within a single county, and where no watershed district has been organized, the drainage authority for the drainage project or repair is the county board of commissioners.¹⁶⁹ The county

board has authority to conduct drainage work and to levy assessments, charges or other taxes only within the geographic limits of the county.¹⁷⁰

2. Joint County Drainage Authority

In the case of a drainage project involving a drainage system located in two or more counties, or which benefits a watershed in two or more counties, the drainage authority is a joint county drainage authority, consisting of representatives from each of the county boards.¹⁷¹ When a petition for a proposed joint county drainage project is filed, the board where the petition is filed shall notify the board of each county where property is affected by the drainage system and request the boards to meet jointly and consider the petition. The boards shall select five of their members at the joint meeting to serve as the joint county drainage authority.¹⁷²

A joint county drainage authority consists of five county commissioners, at least one from each county where property is affected by the drainage system.¹⁷³ The statute provides no other guidance on how the joint county drainage authority is to be established. It is common practice, where only two counties are involved, to have three members from the county where the petition is filed (the county with the largest area of property in the drainage system) and two members from the other county.

The statute also provides little direction on the requirement that the county boards “meet jointly,” which for some county drainage authorities has raised practical application issues. It is not uncommon for a county to have joint county drainage systems with more than one of its neighboring counties. Some of the issues that arise for which there is no statutory or case law guidance are:

- Must the members meet in person, or can they meet through an electronic format, or meet as independent county boards and then ratify each other’s actions?
- If a drainage project proceeding takes longer than one year, do the boards have to meet jointly and create a new joint board every time, or can the boards, after establishment of the first joint board, annually re-appoint the board from their current members?
- Can the individual boards designate the district from which their representative on the joint board will serve no matter if the commissioner from that district changes during the process?
- Is it wise to appoint a commissioner from a district other than where the property affected by the proposed system is located, so as to avoid conflicts? Or is it wise to appoint the commissioner from the district where property is affected so as to involve the official elected by the people in that district? If so, how do you then address potential conflicts of interest?

The joint county drainage authority is duly established when: a petition for a proposed joint county drainage project is filed in the county with the largest area of property in the system; the county boards of each county affected have met jointly and have considered the petition and have found it to meet statutory requirements; and the affected county boards have appointed five commissioners, as appropriate, from their members to serve on the joint county drainage authority.

3. Watershed District Drainage Authority

i. Obtaining Jurisdiction as Drainage Authority

Whether a watershed district is the proper drainage authority with jurisdiction over a drainage project or repair proceeding is dependent upon three factors:

- Whether the drainage system exists, or is proposed to be constructed, within the boundaries of an established watershed district;
- The type of project under petition; and
- Whether the joint county or county drainage authority has transferred authority over the drainage system to the watershed district.

When a watershed district is established, it has no jurisdiction as the drainage authority over existing public drainage systems until the respective joint county or county boards transfer to the watershed district all or certain joint county or county drainage systems within the watershed district, or as described below for improvement of existing drainage systems in the watershed district.¹⁷⁴ A transfer may be initiated by the county or joint county drainage authority, a petition from a person interested in the drainage system, or the managers of the watershed district. The respective county or joint county board may transfer their authority over a drainage system to a watershed district board of managers only by resolution and after a public hearing.¹⁷⁵

Exercising its authority as a watershed district and not as a drainage authority, the board of managers may construct, clean, repair, alter, abandon, consolidate, reclaim, or change the course or terminus of any public ditch, drain, sewer, river, watercourse, natural or artificial, within the watershed district.¹⁷⁶ Any such action on a public drainage system must be done in a manner consistent with the public drainage code to protect the property rights of the landowners assessed benefits and awarded damages on the drainage system.

If a joint county or county drainage authority has transferred a drainage system to a watershed district, then petitions for drainage projects involving the system (improvement of the drainage system, improvement of an outlet, or a lateral) and petitions for repairs must be filed with the watershed district.¹⁷⁷ The proceedings for petitions to improve, or repair existing drainage systems must conform to the drainage code, except for repairs that are performed pursuant to [Minn. Stat. § 103D.621, subd. 4.](#)¹⁷⁸

A watershed district does have jurisdiction over all new drainage systems and improvements to existing systems within its boundaries, but must proceed according to the procedures under [Minn. Stat. § 103E.](#)¹⁷⁹ Jurisdiction over a petition for the construction of new drainage systems, the improvement of existing drainage systems, or the improvement of the outlet of an existing drainage system in the watershed district is established by the filing of a petition with the board of managers of the watershed district.¹⁸⁰ While the statute does not address an officer of the watershed district with whom to file the petition as it does for the county, presumably one would file the petition with the secretary of the board of managers.

By definition, construction of a lateral is construction of a “drainage project”.¹⁸¹ A lateral connects property in the vicinity of an existing drainage system with the existing drainage system as an outlet.¹⁸² Once the lateral is constructed, it is a part of the ditch or tile referred to as the “drainage system.”¹⁸³ A petition for a lateral to an existing drainage system under the jurisdiction of a joint county or county drainage authority must be filed with the applicable county. Or, if the existing drainage system has already been transferred to the watershed district as drainage authority, the petition for a lateral must be filed with the watershed district board of managers.¹⁸⁴

When a county or joint county drainage authority retains jurisdiction over an existing system except a portion that has been partially improved by drainage proceedings before a watershed district, the

watershed district is responsible for maintenance and repair of the portion for which it has jurisdiction.¹⁸⁵ Assessments for repair of an improvement must be based on the benefits determined for the improvement.¹⁸⁶

To simplify drainage system administration, transfer of an entire drainage system to the watershed district is an option that should be considered by the county or joint county drainage authority when the district acquires jurisdiction over a drainage system improvement.

ii. Petitions for Drainage Projects

The same format of petition filed with a county or joint county drainage authority is useable for drainage projects where the drainage authority is a watershed district. [Minn. Stat. 103D](#)—the chapter governing watershed districts generally—permits the use of a watershed district project petition for “construction, maintenance, repair, or improvement of a watershed district for a purpose for which the watershed district is established.”¹⁸⁷ This could include for repair of drainage systems under the jurisdiction of the watershed district or for the construction of new drainage systems or improvements within the boundaries of the watershed district. However, this conflicts with the text of [Minn. Stat. § 103D.625, subds. 3 & 4](#), which states that after the transfer of a drainage system to a watershed district is ordered, all proceedings for construction of new systems, and repair of existing systems (except for repairs done pursuant to [Minn. Stat. 103D.621, subd. 4](#)), are to conform to the drainage code.¹⁸⁸ Therefore, it is recommended that drafters of petitions for drainage projects and repairs strictly follow the petition requirements of the drainage code.

4. Water Management Authority

A water management authority is not a drainage authority under the drainage code; rather, it is a separate entity that has been transferred management authority over all or a portion of a drainage system based on independent authority conferred upon that entity.¹⁸⁹

Once the period fixed (or subsequently extended) to pay the assessment of drainage liens expires, all or part of a drainage system may be transferred from the jurisdiction of a drainage authority to a water management authority.¹⁹⁰ A water management authority may be a county or municipality, a watershed district, a watershed management organization, a storm water management district, a lake improvement district, a subordinate service district, a 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.¹⁹¹

After a drainage system or a portion of a drainage system is transferred to a water management authority, the drainage system is no longer regulated under the drainage code.¹⁹² If only a portion of a drainage system is transferred, the remainder of the drainage system remains with the joint county, county, or watershed district drainage authority. In the latter case, the water management authority may be assessed for improvements under section [Minn. Stat. § 103E.215](#) or repairs under sections [Minn. Stat. § 103E.701](#), [Minn. Stat. § 103E.705](#), and [Minn. Stat. § 103E.711](#) in the manner provided under sections [Minn. Stat. § 103E.315](#) and [Minn. Stat. § 103E.601](#), [Minn. Stat. § 103E.611](#), and [Minn. Stat. § 103E.615](#).¹⁹³

FOOTNOTES

¹⁸⁸ “Drainage Project” is defined in [Minn. Stat. § 103E.005, subd. 11](#) (2015).

¹⁸⁹ [Minn. Stat. § 103E.202, subd. 4](#) (2015).

¹⁷⁰ *Swift v. Boyle*, 481 N.W.2d 74, 78–9 (Minn. Ct. App. 1992) (holding that a single county ditch authority may not assess drainage outlet benefits to lands in another county).

¹⁷¹ Minn. Stat. § 103E.235 (2015).

¹⁷² Minn. Stat. § 103E.235, subd. 2 (2015).

¹⁷³ Minn. Stat. § 103E.235, subd. 2 (2015).

¹⁷⁴ Minn. Stat. § 103D.625, subd. 1 (2015).

¹⁷⁵ Minn. Stat. § 103D.625 (2015).

¹⁷⁶ Minn. Stat. § 103D.335, subd. 8 (2015).

¹⁷⁷ Minn. Stat. § 103D.625, subs. 1 & 3 (2015). Minn. Stat., Chapter 103E and 103D provide different definitions of the term “project.” Compare Minn. Stat. § 103E.005, subd. 11 (“‘Drainage project’ means a new drainage system, an improvement of a drainage system, an improvement of an outlet, or a lateral.”), with Minn. Stat. § 103D.011, subd. 21 (“‘Project’ means planning and development, construction, maintenance, repair, or improvement of a watershed district for a purpose for which the watershed district is established.”). In this section of the manual, “project” refers to the definition provided in the drainage code, under Minn. Stat. § 103E.005, subd. 11 (2015).

¹⁷⁸ Minn. Stat. § 103D.625, subs. 3 & 4 (2015).

¹⁷⁹ Minn. Stat. § 103D.625, subs. 3 & 4 (2015).

¹⁸⁰ Minn. Stat. § 103D.625, subd. 4 (2015).

¹⁸¹ See Minn. Stat. § 103E.005, subd. 11 (2015) (defining “drainage project” to mean “a new drainage system, an improvement of a drainage system, an improvement of an outlet, or a lateral.”); and § 103E.005, subd. 12 (2015) (defining “drainage system” to mean “a system of ditch or tile, or both, to drain property, including laterals . . .”).

¹⁸² Minn. Stat. § 103E.005, subd. 15 and § 103E.225, subd. 1 (2015).

¹⁸³ See Minn. Stat. § 103E.005, subd. 12 (2015) (“‘Drainage system means a system of ditch or tile, or both, to drain property, including laterals, improvements, and improvements of outlets, established and constructed by a drainage authority. ‘Drainage system’ includes the improvement of a natural waterway used in the construction of a drainage system and any part of a flood control plan proposed by the United States or its agencies in the drainage system.”).

¹⁸⁴ Minn. Stat. § 103D.625, subd. 4 (2015).

¹⁸⁵ Minn. Stat. § 103D.625, subd. 2 (2015).

¹⁸⁶ Minn. Stat. § 103E.215, subd. 5 (2015); See Minn. Stat. § 103D.625, subd. 3 (2015) (“After the transfer is ordered, all proceedings for repair and maintenance must conform to chapter 103E, except for repairs and maintenance done pursuant to section 103D.621, subdivision 4.”).

¹⁸⁷ Minn. Stat. §§ 103D.705 & 103D.011, subd. 21 (2015).

¹⁸⁸ Minn. Stat. § 103D.625, subd. 3 (2015).

¹⁸⁹ Minn. Stat. § 103E.812 (2015).

¹⁹⁰ Minn. Stat. § 103E.812, subd. 1 (2015).

¹⁹¹ Minn. Stat. § 103E.005, subd. 29 (2015).

¹⁹² Minn. Stat. § 103E.812, subd. 8 (2015).

¹⁹³ Minn. Stat. § 103E.812, subd. 8 (2015).

C. Requirements of a Petition Adequate to Confer Jurisdiction

1. General Petition Requirements

A petition that meets the statutory requirements is essential to the establishment of jurisdiction in a drainage proceeding. Every type of drainage proceeding petition must include certain elements, which are discussed in the following sections. Elements that are specific to a certain type of drainage proceeding are discussed in [Section III](#).

2. Adequate Land Descriptions

Petitions must be signed by a requisite number of owners of 40-acre tracts or government lots and property that the drainage project passes over, or by property owners that equate a requisite percentage of the total property area affected by the petition.¹⁹⁴ Therefore, petitions for some projects must specifically describe the land in terms of 40-acre tracts or government lots. This assists the county auditor, drainage authority, and county or drainage authority attorney in determining whether the number of petitioners is adequate.

Petitioners for the following drainage projects should specifically describe the 40-acre tracts or government lots over which the drainage project passes or which are affected by the drainage project:

- Construction of new drainage systems;
- Improvement of established and constructed drainage systems;
- Improvement of an existing drainage system as an outlet; and
- Construction of a lateral to an existing drainage system.

Except for petitions for an improvement, the law does not require the petition to describe the property affected by the proposed project.¹⁹⁵ A summary of the drainage code requirements for adequate land descriptions is found in Appendix 2A.

One method of meeting the requisite number of signatures on a petition for improvement of a drainage system is to have the petition signed by the owners of at least 26 percent of the property area affected by the proposed improvement.¹⁹⁶ This is problematic in that when a petition is proposed it is sometimes difficult, if not impossible, to know what property will be affected. That determination is not made until the final hearing. Further, the term “affected” is defined to mean “benefited or damaged by a drainage system or project”¹⁹⁷ and is often susceptible to varying interpretation. It is recommended that the property affected test not be used by petitioners unless it is clear that the whole system will be affected by the proposed improvement.

For each 40 acre tract or government lot described in the petition, the petition must also include the names and addresses of the property owners most currently on record with the county assessor’s office.

3. Counting Signatures

When counting signatures on a petition, one really counts 40-acre tracts or government lots. Each tract or government lot counts as only one signature no matter how many co-owners exist for the tract or government lot.¹⁹⁸ All co-owners of a tract or government lot must sign the petition in order to have a valid signature as a fractional owner cannot bind the entire property. Together, all co-owner signatures are counted as one signature.¹⁹⁹

If a proposed drainage project passes over highway property, the Commissioner of Transportation or a political subdivision with jurisdiction over the highway may be a signatory on the petition.²⁰⁰

The drainage code requirements for counting signatures are summarized in [Appendix 2A](#) and more specifically discussed in this subsection.

The requisite number of signatures on a petition depends on the type of drainage proceeding being petitioned:

- **NEW DRAINAGE SYSTEM PROJECTS:** For petitions to establish a new drainage system, the percentage of owners who must sign the petition is measured strictly by the “passes over” test.²⁰¹ The concept of “property affected” by the new drainage system has no bearing on the validity of the petition.

To reach the requisite percentage of petitioners, one must count the total number of owners of property which the proposed system passes over or the total number of parcels that the proposed system passes over. Jurisdiction through the requisite number of petitioners can be achieved in two ways: (1) by signatures of a majority of the total number of owners of property that the proposed drainage system passes over; or (2) by signatures of owners of property that comprise at least 60 percent of the area the proposed drainage system passes over.²⁰²

In all other proceedings under the drainage code, the test for the percentage of owners who must have signed the petition is 26 percent. Twenty-six percent of what? In each case, the petitioners must check the statute.

- **IMPROVEMENT OF DRAINAGE SYSTEM:** For petitions to improve drainage systems, the 26 percent test is applied 4 different ways:
 1. At least 26 percent of the owners of the property affected by the proposed improvement;
 2. At least 26 percent of the owners of property that the proposed improvement passes over;
 3. The owners of at least 26 percent of the property area affected by the proposed improvement; or
 4. The owners of at least 26 percent of the property area that the proposed improvement passes over.²⁰³

“Affected” is defined by the public drainage code as meaning “benefited or damaged by a drainage system project.”²⁰⁴ The petitioners generally do not know at the time they file the petition what area will be “affected” by the improvement unless the proposed improvement will affect the entire system; consequently, the first and third tests above are not very useable. The second and fourth tests above are workable and are most often used to meet the jurisdictional requirement for signatures on an improvement petition.

- **IMPROVEMENT OF OUTLETS:** Petitions for an improvement of a drainage system as an outlet may be signed by the board of an affected county, by at least 26 percent of the owners of adjoining overflowed property, or by the owners of at least 26 percent of the area of the overflowed property.²⁰⁵

Calculating the area of “overflowed property” is a nebulous test because the statute does not specify how far downstream one may go in calculating that area, or how frequently the area must overflow to fall within the statute’s meaning. The vagueness of “overflowed property” and the possibility that one could get into an argument about whether the drainage authority has jurisdiction decreases the use of this type of drainage proceeding. An alternative to this proceeding is the more familiar improvement proceeding, which allows the extension up to one mile of an existing system to a more adequate outlet.²⁰

The petition must describe the property that “has been or is *likely*²⁰⁷ to be overflowed,” including the names and addresses of the property owners from the records in the county assessor’s office.²⁰⁸

- **LATERAL:** Persons that own property in the vicinity of an existing drainage system may petition for a lateral that connects their property with the drainage system if the petition is signed by at least 26 percent of the owners of the property or by the owners of at least 26 percent of the area of the property that the lateral passes over.²⁰⁹
- **IMPOUNDING, REROUTING, AND DIVERTING DRAINAGE SYSTEM WATERS:** Any person, public or municipal corporation, governmental subdivision, the state or a department or agency of the state, the commissioner of natural resources, and the United States or any of its agencies, may petition to impound, reroute, or divert drainage system waters for beneficial use.²¹⁰ Therefore, the petitioner may be one person.

Likely, such an individual would be a person who is assessed for benefits, one who owns the property upon which the diverted water will be ponded, or an agency of the state or federal government. The statute, however, does not specify what relationship, if any at all, the petitioner must have to the drainage system.

- **REPAIRS:** While most repairs are performed without a petition, a petition process does exist under [Minn. Stat. § 103E.715](#). Repairs by petition require only one petitioner, who must be an individual or an entity interested in or affected by a drainage system.²¹¹

4. Public Benefit, Use, Utility, and Promotion of Public Health

Petitions for drainage projects must always state that the proposed drainage system will be of public benefit, will be useful to the public or be of public utility, and will promote the public health.²¹²

An act done in the interest of the public welfare or for public benefit is defined by the drainage code as:

"an act or thing that tends to improve or benefit the general public, either as a whole or as to any particular community or part, including works contemplated by this chapter, that drain or protect roads from overflow, protect property from overflow, or reclaim and render property suitable for cultivation that is normally wetland needing drainage or subject to overflow."²¹³

“Public health” is defined to include:

"an act or thing that tends to improve the general sanitary condition of the community by drainage, relieving low wetland or stagnant and unhealthful conditions, or preventing the overflow of any property that produces or tends to produce unhealthful conditions."²¹⁴

It is not always intuitive how a public drainage project can promote the public health or be of public benefit or utility. By these definitions, however, the legislature has provided that the construction of drainage projects can provide benefits to the public, namely through flood control, reclaiming wetland for cultivation, and removal of unhealthful conditions.²¹⁵ Approval of the petition and establishment of jurisdiction requires the drainage authority to make a finding that the system or project will be of public benefit, will be useful to the public, and will promote the public health. Facts specifically related to the

proposed drainage project supporting the findings add value to the administrative record for any judicial review challenging jurisdiction.

5. Petitioners' Obligation to Pay Costs of Dismissed Proceedings

Petitions for drainage projects, including establishment and construction of new drainage systems, improvements to drainage systems, improvements to outlets of a drainage system, and laterals require the petition to state that the petitioners will pay all costs of the proceedings if the proceedings are dismissed or the contract for the construction of the proposed drainage system is not awarded.²¹⁶ Petitions for impounding, rerouting, or diverting drainage system waters and petitions for repair do not require the petitioners to state their obligation to pay costs of dismissed proceedings.²¹⁷

Bonding requirements are an additional cost that may apply to petitioners. Requirements for filing a bond with drainage project petitions are discussed in [Section II, Paragraph I: Bond Must Accompany the Petition](#).

FOOTNOTES

¹⁹⁴ Minn. Stat. § 103E.202, subd. 2 (2015).

¹⁹⁵ Compare Minn. Stat. § 103E.212, subd. 2 (2015), and Minn. Stat. § 103E.221, subd. 2 (2015), and Minn. Stat. § 103E.225, subd. 1 (2015), with Minn. Stat. § 103E.215, subd. 4 (2015).

¹⁹⁶ Minn. Stat. § 103E.215, subd. 4(a)(3) (2015).

¹⁹⁷ Minn. Stat. § 103E.005, subd. 2 (2015).

¹⁹⁸ Minn. Stat. § 103E.202, subd. 2(b) (2015).

¹⁹⁹ Minn. Stat. § 103E.202, subd. 2(b) (2015).

²⁰⁰ Minn. Stat. § 103E.202, subd. 2(a) (2015).

²⁰¹ Minn. Stat. § 103E.212, subd. 2 (2015).

²⁰² Minn. Stat. § 103E.212, subd. 2 (2015).

²⁰³ Minn. Stat. § 103E.215, subd. 4(a) (2015).

²⁰⁴ Minn. Stat. § 103E.005, subd. 2 (2015).

²⁰⁵ Minn. Stat. § 103E.221, subd. 2(a) (2015).

²⁰⁶ Minn. Stat. § 103E.215, subd. 3 (2015).

²⁰⁷ Note that while the statute requires the petition to describe the property that “is likely to be overflowed,” the statute specifies that the requisite number of signatures is met if the owners of at least 26 percent “of the area of the overflowed property” sign the petition. Compare Minn. Stat. § 103E.221, subd. 2(a)(1), with Minn. Stat. § 103E.221, subd. 2(a) (2015).

²⁰⁸ Minn. Stat. § 103E.221, subd. 2(a)(1) (2015).

²⁰⁹ Minn. Stat. § 103E.225, subd. 1(a) (2015).

²¹⁰ Minn. Stat. § 103E.227, subd. 1 (2015).

²¹¹ Minn. Stat. § 103E.715, subd. 1 (2015).

²¹² See Minn. Stat. §§ 103E.212, subd. 3(4) (describing petition requirements for a new drainage system); 103E.215, subd. 4(c)(5) (describing petition requirements for improvement to a drainage system); 103E.221, subd. 2(a)(6) (describing petition requirements for improvement of an outlet); 103E.225, subd. 1(a)(4) (describing petition requirements for a lateral) (2015).

²¹³ Minn. Stat. § 103E.005, subd. 27 (2015).

²¹⁴ Minn. Stat. § 103E.005, subd. 25 (2015).

²¹⁵ See *Titrud v. Achterkirch*, 213 N.W.2d 408, 412 (Minn. 1973).

²¹⁶ See Minn. Stat. §§ 103E.212, subd. 3(5); 103E.215, subd. 4(c)(6); 103E.221, subd. 2(a)(7); and 103E.225, subd. 1(a)(6) (2015).

²¹⁷ Compare Minn. Stat. §§ 103E.212, subd. 3(5) (2015) (new drainage systems); 103E.215, subd. 4(c)(6) (2015)

(improvements); 103E.221, subd. 2(a)(7) (2015) (improvement of outlets); and 103E.225, subd. 1(a)(6) (2015) (laterals) (stating that the petition for each respective project must state that the petitioners will pay all costs incurred if the proceedings are dismissed or if a contract for the construction of the project is not awarded), with 103E.227, subd. 1 (2015) (impounding, rerouting, and diverting drainage system waters) and 103E.715, subd. 1 (2015) (repair petition) (stating the requirements for a petition, which do not include the statement that petitioners will pay all costs incurred if the proceedings are dismissed or if a contract for the construction of the project is not awarded).

D. Petitioner Liability

1. Generally

The act of signing a petition that proposes a drainage project should not be taken lightly. Often it is done without counsel. A petitioner becomes involved, typically, by a neighbor or friend who has had an attorney prepare a petition proposing a project. The project proponent(s) takes the petition to friends and neighbors, describes orally the proposed project, and asks for support for the project.

Petitioners often sign because they do not wish to offend the proponents. Petitioners frequently hold the vague, but unarticulated notion that if the project turns out to be too expensive, they can withdraw their support as a petitioner. This is not true.

Here follows a discussion of what it means to be a petitioner on a drainage project.

2. Who Can Be a Petitioner?

First of all, the petitioner must own land over which the proposed project will pass, as the project is described in the petition.²¹⁸ This is significant in that often times the proposed course of the project is altered by the drainage authority during the pendency of the proceedings. If it turns out that the project as finally established does not pass over the petitioner's land because of such a change, that fact, in and of itself, does not entitle the petitioner to withdraw, except with the written consent of all other petitioners on the filed petition.²¹⁹ Such consent is almost never forthcoming.

3. Joint and Several Liability of Petitioners

Joint and several liability means that each petitioner who signs the petition is liable for all of the costs incurred if for one reason or another the project is not established. Costs consist of engineering fees submitted by the project engineer, attorney's fees submitted by the petitioners' attorney, and county auditor's fees.²²⁰ If the project is established, those costs are absorbed by the system as part of the cost of construction of the project. All persons assessed benefits help pay for the costs in that case. If the petition is dismissed or a contract is not let, then ultimately the petitioners are responsible to pay the costs from their own resources.

4. Individuals or Entities Signing the Petition and Liability

Each separate parcel qualifies as one signature. All co-owners of a particular parcel must sign to qualify it as a signatory parcel. No owner's signature counts unless all owners of that parcel have signed the petition. A petitioner may be a signatory petitioner on more than one parcel if the form of ownership is different and each parcel will be counted if it otherwise qualifies and if all of the owners have signed the petition. For example, a person may be a petitioner on one parcel as sole owner, on another as a corporate officer, on another as a co-owner, and on still another as a partner. Each parcel will be counted as a signatory parcel. Spouse's signatures are not required unless they have an actual

ownership interest.²²¹ Each petitioner bears joint and several responsibility to pay all of the costs no matter how small the ownership interest.

Inequities result when petitioners die during the pendency of the proceedings without a probate estate or their estate is closed prior to the time when it is determined that the deceased petitioner is (was) liable for costs. Similar results ensue when the petitioner, during the pendency of the drainage proceedings, files a Chapter 7 petition in bankruptcy. Such petitioner's obligation to the drainage authority is dischargeable in bankruptcy.²²² In such cases, the remaining petitioners will simply have to pick up the costs. If they do not, the drainage authority may obtain a judgment for the unpaid costs, with interest, against all of the living petitioners who have not filed for relief in Chapter 7 bankruptcy.

A petitioner who contemplates not paying the costs by letting the bonding company pay them should reconsider. When the county auditor or drainage authority attorney notifies the bonding company that there has been a default, the bonding company will usually pay the remaining costs. The bonding company will then proceed against its principals (the petitioner(s)-one or more, who signed the bond as principal guarantors of the petitioners' obligation to pay the costs). The principals are bound to indemnify (to pay back) all of the money that the bonding company paid to the drainage authority. The principals, however, have a claim for contribution against each of the other petitioners whether or not they are also principals. This is so, because when one undertakes to sign the petition as a petitioner, one agrees to pay all costs incurred if the proceedings are dismissed or if a contract for the construction is not awarded.²²³

5. Withdrawal of Petitioner.

The drainage code specifically prohibits a petitioner from withdrawing his or her name from the petition except with the written consent of all other petitioners on the filed petition.²²⁴

The limitation on withdrawals is qualified to apply only on petitions for drainage projects and petitions for repair.²²⁵ Therefore, petitioners on non-repair drainage proceedings, such as on a petition for redetermination of benefits, may withdraw from the petition without the written consent of all other petitioners.²²⁶ This creates an added liability risk to non-repair drainage proceeding petitioners for two reasons: First, there is seemingly nothing that might prevent petitioners from withdrawing their signature at any point in the proceedings, thereby putting into jeopardy the requisite number of signatures needed on a petition for a proceeding; (2) if the drainage proceeding is dismissed, the costs of the proceeding may potentially be spread out over a smaller pool of remaining petitioners than originally anticipated by those who do not withdraw.

6. Failure of the Petition

If a project fails, county auditors divide the total costs by the number of petitioners when seeking to collect costs from petitioners. Each petitioner is asked to pay that amount. There is no authority for this method of collection in the drainage code, but normally it works. If the petitioners do not pay, the auditor or county attorney may notify the bonding company of a default. The bonding company then pays that amount which the recalcitrant petitioners fail to pay. It then has the right of indemnification against the principals, some or all of whom are petitioners. In such case, the principals pay not only their own proportionate share of the costs but someone else's as well.

FOOTNOTES

²¹⁸ Minn. Stat. § 103E.202, subd. 2 (2015).

²¹⁹ Minn. Stat. § 103E.202 subd. 3 (2015).

²²⁰ Counties may establish by resolution an auditor's fee schedule. An example of such a schedule recommended by Region VII of the county Auditor's Association (south central Minnesota) is provided in Appendix 2C to this chapter.

²²¹ Minn. Stat. § 103E.202, subd. 2. These requirements regarding petitioners were new in 1987. Laws, 1987 c. 239 § 33.

²²² 11 U.S.C. § 727.

²²³ M.S. § 103E.212 (5).

²²⁴ Minn. Stat. § 103E.202, subd. 3 (2014).

²²⁵ Minn. Stat. § 103E.202, subd. 1 (2014).

²²⁶ See *In re Redetermination of Benefits of Nicollet Cnty. Ditch No. 86A*, 488 N.W.2d 482, 487 (Minn. Ct. App. 1992).

E. Duration of Jurisdiction

Once jurisdiction of a drainage authority over a drainage project is established, it does not last forever unless specifically authorized in [Minn. Stat. 103E](#). The drainage authority's jurisdiction over a project is valid only to the extent of the work that was called for in the petition. If work not called for in the petition is proposed, jurisdiction must be procedurally re-established, starting with a new petition.²²⁷

An example of jurisdiction that is continuing and established by statute is the jurisdiction to inspect and perform future maintenance and repairs. This jurisdiction permanently resides with the drainage authority.²²⁸ After the construction of a drainage system has been completed, the drainage authority shall maintain the drainage system that is located within its jurisdiction and provide the repairs necessary to make the drainage system efficient.²²⁹ The drainage authority must have the drainage system inspected on a regular basis by an inspection committee of the drainage authority or a drainage inspector appointed by the drainage authority.²³⁰

Certain aspects of jurisdiction become final after the preliminary hearing. The order adopted after the preliminary hearing modifies the petition and must be considered with the petition.²³¹ The findings and order of the drainage authority at the preliminary hearing are conclusive only for the signatures and legal requirements of the petition, the nature and extent of the proposed plan, and the need for a detailed survey, and only for the persons or parties shown by the preliminary survey report as likely to be affected by the proposed drainage project.²³² The preliminary hearing order is not appealable, because it is not a "final order" of the drainage authority. Under [Minn. Stat. 103E](#), jurisdiction becomes final over all property described in the detailed survey report and viewers' report, of the persons and municipalities named in the reports, and of persons having an interest in a mortgage, lien, or encumbrance against property described in the reports only after the final hearing notice is given.²³³

The only order that is appealable is the final order dismissing or establishing the drainage project.²³⁴ The question of jurisdiction, though, is always open for litigation on appeal. It is central to the drainage authority's ability to make a final order. Thus, the statutory language that certain things become final at certain points in the proceedings, should be regarded as procedural rules only. Jurisdiction can always be litigated.²³⁵

With regard to an improvement of an outlet, there is statutory language to the effect that, after the petition is filed, the drainage authority has jurisdiction of the petition, the improvement, the affected

property, and all proceedings for the establishment and construction of the outlet improvement and assessment of property benefitted by the outlet improvement.²³⁶ No comparable language is found elsewhere in [Minn. Stat. 103E](#). The drainage authority could not possibly have jurisdiction to proceed until it has been determined that the petition is adequate. Adequacy of the petition is not determined until the preliminary hearing and even then is appealable in an appeal from the final order.

FOOTNOTES

²²⁷ *Johnson v. Steele Cnty.*, 60 N.W.2d 32, 37 (Minn. 1953) (citing *State ex rel. Peterson v. Bentley*, 12 N.W.2d 347, 351 (Minn. 1943)).

²²⁸ See Minn. Stat. § 103E.705 (2015).

²²⁹ Minn. Stat. § 103E.705, subd. 1 (2015).

²³⁰ *Blaine v. City of Sartell*, 865 N.W.2d 723, 732 (Minn. Ct. App. 2015).

²³¹ Minn. Stat. § 103E.261, subd. 7(a).

²³² Minn. Stat. § 103E.261, subd. 7(b) (2015).

²³³ Minn. Stat. § 103E.331 (2015).

²³⁴ Minn. Stat. § 103E.095, subd. 1 (2015); *State ex rel. Mosloski v. Martin Cnty.*, 80 N.W.2d 637, 639 (Minn. 1957).

²³⁵ *Oelke v. Cnty. of Faribault*, 70 N.W.2d 853, 858–89 (Minn. 1955).

²³⁶ Minn. Stat. § 103E.221, subd. 4 (2015).

F. Outlets Out-of-State and Outlets into Minnesota

Drainage authorities have no jurisdiction to do work outside the boundaries of the State of Minnesota, except to the limited extent authorized by [Minn. Stat. § 103E.031](#). If it is necessary to construct a drainage project at or near the boundary between Minnesota and another state or Canada and the work cannot be accomplished in a proper manner without extending the project into the adjoining state or Canada, then the drainage authority may join with the board or tribunal of the adjoining State or Canada that has jurisdiction to plan and construct public drainage systems.²³⁷

The statute authorizes entering into negotiated contracts or arrangements with the board or tribunal of the adjoining state or Canada to construct the drainage project.²³⁸ If during any drainage proceeding at the hearing on the detailed survey report and viewers' report the drainage authority determines that a proper outlet for that drainage system does not exist except through property in an adjoining state or country, the drainage authority may adjourn the hearing and require the auditor to procure an option for the acquisition of the needed right-of-way at an expense not exceeding the estimated cost specified in the detailed survey report.²³⁹ Once the option is purchased, then the final order establishing the drainage project may be made.²⁴⁰ After the final order is adopted, the option shall be exercised and the cost of the right-of-way shall be paid as part of the cost of the drainage project.²⁴¹

When other states need an outlet into Minnesota, the Minnesota drainage authority is in a position to demand contribution from that other state for the cost of the original construction and for maintaining the remaining drainage system in Minnesota. This can be accomplished by negotiation and contract. Such a contract, to be valid, must have the approval of both drainage authorities obtained during a hearing. Proceedings in Minnesota should be conducted in accordance with [Minn. Stat. § 103E.401](#) for the procurement of outlets. There are no reported appellate cases on the subject, but following [Minn. Stat. § 103E.401](#) would seem to comply with constitutional procedural due process requirements.

FOOTNOTES

²³⁷ Minn. Stat. § 103E.031 (2015).

²³⁸ Minn. Stat. § 103E.031 (2015).

²³⁹ Minn. Stat. § 103E.405 (2015).

²⁴⁰ Minn. Stat. § 103E.405 (2015).

²⁴¹ Minn. Stat. § 103E.405 (2015).

G. Proper Filing of a Petition

While the act of filing a petition appears simple (and is usually noncontroversial), it is emphasized here because it is one of the elements of jurisdiction.

If a petition is filed in the wrong office, any proceeding commenced thereunder must be dismissed.²⁴²

1. Drainage System Within Watershed District or One County

A petition for a project where the drainage authority is a watershed district is filed with the board of managers (e.g. with the secretary of the board of managers if there is one).²⁴³ Upon filing, counsel or the petitioner should obtain a filing stamp with the date of filing affixed or secure other proof of filing on a copy of the petition. The date of filing starts the hearing clock running and also distinguishes it from any other petition.²⁴⁴

In the case of a petition on all other projects subject strictly to the drainage code (where the joint county board or the county board is the drainage authority), the petition is filed in the office of the county auditor.²⁴⁵

2. Drainage System Outside Watershed District in Two or More Counties

[Minn. Stat. § 103E.235](#) designates the auditor of the county with the largest area of property in the drainage system as the county auditor responsible for designating a joint county drainage system with a number for the establishment and construction of new drainage systems.

A petition for an improvement to an existing drainage system is to be filed with the auditor of the county having the largest area of property on which the improvement will be located.²⁴⁶ For example, in the case of a joint county system with the largest area of land located in County A (and the records maintained in the office of the auditor of County A), and if the improvement work is to be done principally in County B, one would file the petition for improvement in County B.

For a petition for improvement of an outlet where the improvement or the overflowed property is located in more than one county, there is yet another method. In this case, one files in the county which has the largest acreage of overflowed property.²⁴⁷ Thus, if all or the majority of the overflowed property is in County B, though the majority of the system is in County A (and the records are maintained in the auditor's office of County A), one would, nonetheless, file in County B.²⁴⁸

In the case of a lateral, the petition is filed in the office of the auditor of the county with the largest property area to be passed over by the lateral.²⁴⁹ Again, the lateral petition might not be filed in a county having the largest area of property in the system.

A petition for impounding, rerouting, or diverting of drainage system waters is directed to the drainage authority where the system is located and provides specific instructions as to where to file.²⁵⁰ If the drainage system is under the jurisdiction of a joint county drainage authority, the petition must be filed

with the county having the largest area of property in the drainage system and where the primary drainage system records are kept.²⁵¹ A copy of the petition must be submitted to the auditor of each of the other counties participating in the joint county drainage authority.²⁵²

FOOTNOTES

²⁴² *State v. Watts*, 133 N.W. 971, 972 (Minn. 1911).

²⁴³ Minn. Stat. § 103D.625, subd. 4 (2015).

²⁴⁴ Minn. Stat. § 103E.238 (2015) (obligating the drainage authority attorney to review the petition and bond within 30 days after it is filed).

²⁴⁵ Minn. Stat. § 103E.202, subd. 4 (2015).

²⁴⁶ Minn. Stat. § 103E.215, subd. 4(b) (2015).

²⁴⁷ See Minn. Stat. § 103E.221, subd. 3 (2015) (“If part of the improvement or the overflowed property is located in more than one county, the petition must be filed with the auditor of the county with the greatest affected area.”).

²⁴⁸ See Minn. Stat. § 103E.221, subd. 3 (2015).

²⁴⁹ Minn. Stat. § 103E.225, subd. 1(a) (2015).

²⁵⁰ Minn. Stat. § 103E.227, subd. 1(b) (2015).

²⁵¹ Minn. Stat. § 103E.227, subd. 1(b) (2015).

²⁵² Minn. Stat. § 103E.227, subd. 1(b) (2015).

H. Bond Must Accompany the Petition

The types of projects which require a bond are summarized in [Appendix 2A](#) and are further described in this section.

Petitions filed under [Minn. Stat. 103E](#) must be accompanied by a bond of at least \$10,000 that is payable to the county where the petition is filed and all of the counties who are members of the joint county drainage authority.²⁵³ Even if all of the work proposed is to be done within the boundaries of one county, the bond must be payable to all of the counties who are part of the joint county drainage authority.²⁵⁴ If the petition is for a project in a watershed district, the minimum face amount of the bond remains at \$2,000.²⁵⁵ There is no obvious reason for the disparity in the original amount of the bond to be filed between the Watershed Act and the drainage code. It may be prudent practice for the watershed district, sitting as a drainage authority, to require at least a \$10,000 bond, following the drainage code.

The purpose of the bond is to assure the drainage authority that petitioners will pay the costs incurred by the drainage authority for a proposed project that is either dismissed or, for one reason or another, is not constructed because no construction contract is let. The public drainage code states that the bond must have adequate surety and be approved by the county attorney where the petition is filed.²⁵⁶ A surety is a person who takes responsibility for another’s performance of an undertaking or money given to support an undertaking that someone will perform a duty or the payment of debts. Some drainage authority attorneys have approved cash deposits, irrevocable letters of credit, or other devices that serve as a bond. The key inquiry is whether the device used provides adequate surety or assurance that the costs will be paid from the bond if the proceedings are dismissed.

A surety bond may be provided by any one or more of the petitioners. In so doing, they are the principal obligors on the bond. The surety, which is usually an insurance company or surety company with publicly disclosed financial information licensed by the state Department of Commerce, serves as a guarantor that the petitioner or petitioners signing as principals will pay the costs to the drainage

authority if the other petitioners do not. The surety company has a right to seek indemnity under most, if not all, surety bonds against its principals. Principals who end up having to reimburse the bonding company have the right to sue the other petitioners for contribution towards the payment of any judgment that may be obtained by the bonding company against its principals.

Bonding companies charge a fee for serving as sureties. A corporate surety bond is a financial assurance to the drainage authority that the costs will be paid. It provides no other financial protection or insurance. The surety company assesses its risk at the beginning, collects its fee, and remains obligated until either the project is established, or, if it is not established, the costs are paid.

No bond is required for petitions to impound, reroute, or divert drainage system waters that are filed by the State of Minnesota, one of its agencies or departments, the commissioner of natural resources, the United States, an agency of the United States, a soil and water conservation district, a watershed district, or a municipality.²⁵⁷

1. Drainage Authority Advances Costs

When a petition and a bond for a new drainage system are filed, there are initially no funds on hand with the drainage authority to fund the proceedings. Petitioners are not required to pay in any funds in advance to pay for the anticipated costs. Therefore, the county, joint counties, or watershed district advances the costs.²⁵⁸

If the project is for a regular improvement or improvement of an outlet, there may be excess funds on hand in the drainage system's account which can be advanced to pay the costs. All of the expenses, including legal fees, project engineer's fees, and auditor's fees, are billed periodically to the drainage authority, and are paid to the vendors of those services by the drainage authority with borrowed funds.²⁵⁹

If there is interest accrued on borrowed funds, it is collectible at the same rate as district court judgments earn—an amount which varies from time to time and is established annually by the state court administrator and announced through the district court administrators in each county. Interest is based on the secondary market yield of one-year United States Treasury Bills.²⁶⁰ [Minn. Stat. § 103E.655, subd. 2](#) requires interest to be charged and computed at the same rate per year charged on drainage liens and assessments. [Minn. Stat. § 103E.611, subd. 2](#) calculates the interest rate on drainage liens using the rate referred to in [Minn. Stat. § 549.09](#).

2. Costs Must Not Exceed the Face Value of the Bond

County auditors and watershed boards of managers are mandated by statute not to allow the expenditure of costs in excess of the face amount of the bond and any supplements to the bond on file.²⁶¹ The county auditors and the board of managers are mandated to require the filing of an additional surety bond if the costs incurred or to be incurred will exceed the bond(s) already on file. This requires vigilance on the part of the auditor or the secretary of the board of managers since they are not always aware of what costs have been incurred or are to be incurred.

[Minn. Stat. § 103E.241, subd. 4](#) requires the engineer to make a detailed expense report every two weeks after the beginning of the engineer's work until the construction contract is awarded. The engineer is required by the drainage code to file the detailed expense report with the auditor "as soon as

possible.”²⁶² The engineer also has a proscriptive responsibility to not incur expenses greater than the petitioner’s bond.²⁶³

The auditor or the secretary of the board of managers should be in a position to know about costs for which billings have been submitted because of the engineer’s reporting requirements. However, if the petitioners’ attorney and/or engineer are slow in submitting billings to the drainage authority, the auditor or secretary of the board of managers may be in a position of having violated the statute by having allowed the incurrence of costs in excess of the surety bond on file. The engineer and the petitioners’ attorney are in the best position to know what costs have been incurred and are to be incurred. The drainage authority should require the petitioners’ attorney to keep the drainage authority current on the costs incurred or to be incurred on at least a bi-weekly basis.

3. Surety Liability

The surety is liable only for the face amount of the bond(s) provided by it. If costs unpaid exceed the bond, the drainage authority may be in the difficult, and potentially unpopular, position of having to sue the petitioners if they refuse to pay.

4. Personal-Sureties

A practice exists in some counties wherein the petitioners are allowed to serve as their own sureties (a.k.a. “personal surety”). On such an instrument, the petitioners, or some of them, serve as principals, and the same persons, or some of them, serve as sureties. The idea of having a bond with adequate surety is to obtain the guarantee of the financial strength of somebody who is not already obligated. Without underwriting review, it is difficult for an auditor or board secretary to evaluate the ability of an individual to serve as a personal surety. Auditors and secretaries using a personal surety bond should discontinue the practice.

Corporate surety bonds, cash deposits, or irrevocable letters of credit should be required in all cases. The cost of providing a surety bond is a valid expense, chargeable against the system, whether or not the project is established.²⁶⁴

5. The Role of the Drainage Authority’s Attorney

The drainage code requires that the county attorney review each petition and surety bond filed.²⁶⁵ There is no similar provision in [Minn. Stat. § 103D](#) with respect to watershed districts; however, review of the petition and surety bond by an attorney is advisable. [Minn. Stat. § 388.09](#) permits a county to employ an attorney to advise the board or its members in relation to an action or in relation to any other matter affecting the interests of the county.

In order to facilitate the review process, a drainage authority should require its attorney to sign each petition and bond thus indicating that the petition and bond have been reviewed and were found to be facially satisfactory. The petition and bond are then referred back to the drainage authority or, if unsatisfactory, they are referred back to the petitioners. Petition forms should make provisions for such review sign off by the drainage authority’s attorney. The drainage authority’s attorney should not approve a bond upon which the petitioners themselves serve as sureties.

FOOTNOTES

²⁵³ Minn. Stat. § 103E.202, subd. 5 (2015).

²⁵⁴ Minn. Stat. § 103E.202, subd. 5 (2015).

²⁵⁵ Minn. Stat. § 103D.705, subd. 3(a) (2015).

²⁵⁶ Minn. Stat. § 103E.202, subd. 5 (2015).

²⁵⁷ Minn. Stat. § 103E.227, subd. 2(b) (2015).

²⁵⁸ Minn. Stat. § 103E.655, subd. 2 (2015).

²⁵⁹ Minn. Stat. § 103E.655, subd. 2 (2015).

²⁶⁰ Minn. Stat. § 549.09, subd. 1 (2015).

²⁶¹ Minn. Stat. §§ 103E.202, subd. 6 & 103D.705, subd. 3(c) & (d) (2015).

²⁶² Minn. Stat. § 103E.241, subd. 4 (2015).

²⁶³ Minn. Stat. § 103E.241, subd. 4 (2015).

²⁶⁴ Op. Atty. Gen., 38-B, July 11, 1956.

²⁶⁵ Minn. Stat. § 103E.238 (2015).