

## Minnesota Public Drainage Manual – Chapter 2 – III

### Administration and Legal Issues – Types of Proceedings

#### *Summary*

Drainage proceedings authorized by [Minn. Stat. ch. 103E](#) include a variety of procedures for or related to drainage. Certain project proceedings begin with filing a petition and end with dismissal or establishment of a drainage project. Drainage repairs, on the other hand, may begin with a petition or may be initiated by the drainage authority obligated to maintain and repair that drainage system without a petition. Other proceedings relate to management of the drainage system records or the drainage system itself after it is established. Each proceeding requires the drainage authority to strictly comply with the process authorized in [Minn. Stat. ch. 103E](#). Drainage projects require varying elements to be part of the petition, petition signature requirements, filing processes, public hearing processes, and essential findings to be made by the drainage authority before the project may be established. Repairs initiated by the drainage authority and other proceedings related to the management of drainage systems must also follow the processes laid out in [Minn. Stat. ch. 103E](#). All of the proceedings authorized by Minn. Stat. ch. 103E are discussed in detail in Section III:

- New Drainage System Projects (Section III, B);
- Improvement of Drainage System (Section III, C);
- Improvement of Outlets (Section III, D);
- Laterals (Section III, E);
- Impounding, Rerouting, and Diverting Drainage System Waters (Section III, F);
- Drainage System Repairs (Section III, G);
- Reestablishment of Drainage System Records (Section III, H);
- Redetermination of Benefits and Damages (Section III, I);
- Use of the Drainage System as 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 Drainage System (Section III, M); and
- Abandonment of Drainage System (Section III, N).

#### A. General

Drainage law requires that the drainage authority make a determination that “the outlet is adequate” for all drainage projects as defined in [Minn. Stat. § 103E.005](#). As delineated earlier in this chapter, the evaluation of the adequacy of the outlet is accomplished during the preliminary survey and reported by the engineer to the drainage authority in the preliminary survey report. The requirement of the engineer to evaluate the adequacy of the outlet is found in the criteria of [Minn. Stat. § 103E.015, Subd. 1\(4\)](#) and the responsibility of the drainage authority to make a determination of adequacy is found in [Minn. Stat. § 103E.261, Subd. 5\(4\)](#). As noted previously in Section III of this chapter, the preliminary report must address “the character of the outlet and whether it is sufficient (*see Minn. Stat. § 103E.245, Subd. 4(3)*). The basis for the drainage authority’s determination is information contained in the engineer’s preliminary report, statements in the commissioner’s preliminary advisory report, and other testimony which may be presented at the preliminary hearing.

Drainage Law has no provisions for making an outlet adequacy determination for repairs to existing drainage systems. Existing drainage systems are expected to be maintained to their original hydraulic condition, with the presumption being that the current outlet was originally determined to be adequate. Therefore, any repair would merely restore the system to its original state, and restore its function as originally intended.

## B. New Drainage System Projects

To establish a new drainage system, a petition must be prepared for filing with the appropriate drainage authority.<sup>266</sup> **An example of a petition for a new drainage system is found in [Template A](#).**

### 1. Petition Requirements

A petition for a new drainage system project must contain the following elements:

1. A description of the 40-acre tracts or government lots and properties where the proposed new drainage system passes over, including names and addresses of the property owners from records in the county assessor's office;
2. A description of the starting point, the general course, and the terminus of the proposed drainage system;
3. A statement describing why the proposed drainage system is necessary;
4. A statement that the proposed drainage system will benefit and be useful to the public and will promote public health; and
5. A statement acknowledging 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.<sup>267</sup>

### 2. Signatures on Petition

A petition for a new drainage system must be signed by a majority of the owners of the property that the proposed drainage system described in the petition passes over, or by the property owners of at least 60 percent of the area that the proposed new drainage system passes over.<sup>268</sup>

Each separate parcel of property counts as one signature but the petition must be signed by all owners of the parcel to count as a signature.<sup>269</sup> The signature of each entity regardless of the number of parcels of property owned counts as one signature on the petition.<sup>270</sup>

### 3. Filing the New Drainage System Petition

The public drainage code expressly states that the petition for establishment of a new drainage system and bond are to be filed with the county auditor.<sup>271</sup> If the proposed drainage project affects land in two or more counties, the petition must be filed with the auditor of the county with the largest area of property in the proposed drainage system.<sup>272</sup>

However, if the new drainage system is located within the jurisdiction of a watershed district, the petition must be filed with the managers of the watershed district.<sup>273</sup>

For a more detailed description on determining the correct drainage authority, see Section II, Paragraph C.

Once the petition is filed with the correct drainage authority, preparations are made by the drainage authority for a preliminary hearing to review the petition. A detailed description of the preliminary hearing procedures is found in [Section IV](#) .

#### 4. Nature and Extent of the Easement Acquired

The drainage code procedures for establishing a drainage system invoke eminent domain powers.<sup>274</sup> While the drainage code does not expressly use the words “eminent domain,” when a new drainage project is established, the drainage authority acquires an easement for the purpose of constructing the drainage project and maintaining the drainage system.<sup>275</sup> The drainage code proceedings award damages to landowners for the easement occupied by the drainage system.<sup>276</sup> The order establishing the drainage project, often by reference to the engineer’s final survey report, should describe the scope of easement necessary to construct the drainage project and to maintain the drainage system in the future.

The drainage authority is mandated to maintain the drainage system once it is established.<sup>277</sup> In addition, it is mandated to maintain the grass strips,<sup>278</sup> to remove artificially created obstructions,<sup>279</sup> and to examine all systems periodically.<sup>280</sup> [Minn. Stat. § 103E.021](#), makes it mandatory on any project on which viewers are appointed to establish grass strips on either side of an open ditch, one rod wide, measured outward from the top edge of the constructed channel resulting from the proceeding, or to the crown of the leveled spoil bank, whichever is greater.<sup>281</sup> To avoid complication on questions of damages incurred in future repairs, the engineer should specify the area needed as right-of-way to accommodate both construction and future maintenance, and viewers should recommend damages specified in their report to make record that the landowner was compensated for the area necessary to construct the project, but also to access the project in the future to perform the statutorily-obligated duties to repair and maintain.

The drainage authority must pay damages for the right to restrict agricultural use of grass strip areas<sup>282</sup>, but nothing in the drainage code limits the drainage authority’s easement to work within only the one-rod grass strip area to inspect, repair, and maintain the public drainage system. Rather, the drainage authority possesses the authority to exercise easement rights, for the benefit of assessed landowners, to enter and occupy property adjacent to the drainage system as is reasonably necessary to perform its statutory obligations of maintenance and inspection.

The property interests involving a drainage easement are partly defined and regulated by the drainage code and partly by basic property law. Basic property law regarding easements makes it clear that implicit in the acquisition of a drainage easement is the associated right to maintain that easement.<sup>283</sup> Drainage easements carry with them the right to reasonable entrance of the adjoining landowner’s property to complete construction or perform repair and maintenance.<sup>284</sup> While it is said that the drainage authority loses jurisdiction over a project once the work is completed, the implied easement acquired by the establishment of the system persists.<sup>285</sup>

The drainage code provides that easements be identified in the engineer’s detailed survey report, to include the area upon which use restrictions will be placed for the establishment of grass strips.<sup>286</sup> The term right-of-way or easement, as used in the drainage code, contemplates the area physically occupied by the drainage system along with the area occupied and impacted by the original construction or subsequent improvement, including areas cleared and grubbed of trees and the area over which spoils

were spread and leveled. These rights are the same whether the drainage system is open ditch or buried tile.

When the drainage authority re-enters land to maintain or inspect the drainage system, no additional damages are paid for the basic right of entry or occupation of the original footprint of drainage system construction. The landowner may be paid damages for crop loss and diminished productivity or land value from increased overflow.<sup>287</sup> Additional easement damages may be paid when a repair extends the footprint of original construction by the flattening of side slopes, realignment or construction of a two-stage ditch.<sup>288</sup>

Where a drainage system easement and Minnesota Department of Transportation trunk highway right-of-way overlap, a permit is required before the drainage authority may enter upon trunk highway right-of-way to conduct any work on the drainage system.<sup>289</sup>

#### FOOTNOTES

<sup>266</sup> Minn. Stat. §§ 103E.212, subds. 1–3 & 103E.202, subd. 4 (2015).

<sup>267</sup> Minn. Stat. § 103E.212, subd. 3 (2015).

<sup>268</sup> Minn. Stat. § 103E.212, subd. 2 (2015).

<sup>269</sup> Minn. Stat. § 103E.202, subd. 2(b) (2015).

<sup>270</sup> Minn. Stat. § 103E.202, subd. 2(b) (2015).

<sup>271</sup> Minn. Stat. § 103E.202, subd. 4 (2015).

<sup>272</sup> Minn. Stat. § 103E.235, subd. 1 (2015).

<sup>273</sup> Minn. Stat. § 103D.625 (2015).

<sup>274</sup> See *Johnson v. Steele Cnty.*, 60 N.W.2d 32, 37 (Minn. 1953).

<sup>275</sup> See Minn. Stat. §§ 103E.315, subd. 8(1) & (2) (2015) (requiring damages to be paid for the fair market value of the property required for the channel of an open ditch, the permanent strip of perennial vegetation required under Minn. Stat. § 103E.021, and the diminished value of the farm due to severing a field by an open ditch).

<sup>276</sup> See Minn. Stat. §§ 103E.515 (2015) (requiring awarded damages to be paid “before the property is entered for construction of the drainage project.”) & 103E.315, subd. 8 (2015) (listing the extent of damages to be paid in a drainage project proceeding).

<sup>277</sup> Minn. Stat. § 103E.705, subd. 1 (2015).

<sup>278</sup> Minn. Stat. § 103E.705, subds. 1 & 2 (2015).

<sup>279</sup> Minn. Stat. § 103E.075 (2015).

<sup>280</sup> Minn. Stat. § 103E.065 (2015).

<sup>281</sup> Minn. Stat. § 103E.021 (2015).

<sup>282</sup> Minn. Stat. § 103E.315, subd. 8(1) (2015).

<sup>283</sup> See *Bruns v. Willems*, 172 N.W. 772, 774 (Minn. 1919); *Reed v. Bd. of Park Comm’n’s*, 110 N.W. 1119, 1120-21 (Minn. 1907); *St. Anthony Falls Water-Power Co. v. Minneapolis*, 43 N.W. 56, 57 (Minn. 1889); *Erickson v. Grand Marais Pub. Util. Comm’n*, 2004 WL 1445081, at \*4 (Minn. Ct. App. 1996) (citing 28A C.J.S. Easements, § 148 (1996)).

<sup>284</sup> See 25 Am. Jur. 2d, Easements and Licenses, § 73 (“In order that the owner of an easement may perform the duty of keeping it in repair, he or she has the right to enter the servient estate at all reasonable times to effect necessary repairs and maintenance.”); see also *Bruns v. Willems*, 172 N.W. 772 (Minn. 1919) (“The interest of both the servient and dominant estate must be considered in the use made of an easement.”).

<sup>285</sup> See *Reed v. Bd. of Park Comm’n’s*, 110 N.W. 119 (Minn. 1907).

<sup>286</sup> Minn. Stat. § 103E.285, subd. 6 (2015).

<sup>287</sup> Minn. Stat. § 103E.315, subd. 8(3)–(4) (2015).

<sup>288</sup> Minn. Stat. § 103E.715, subd. 6 (2015).

<sup>289</sup> Minn. Stat. § 161.45, subd. 1 (2015) (“[D]itches . . . may be constructed, placed, or maintained across or along any trunk highway, or the roadway thereof, by any person, persons, corporation, or any subdivision of the state, may be so maintained or hereafter constructed only in accordance with such rules as may be prescribed by the commissioner who shall have power to prescribe and enforce reasonable rules with reference to the placing and maintaining along, across, or in any such trunk highway of any of the utilities hereinbefore set forth.”).

## C. Improvement of Drainage System

An “improvement” means the tiling, enlarging, extending, straightening, or deepening of an established and constructed drainage system including construction of ditches to reline or replace tile and construction of tile to replace ditch.<sup>290</sup> An improvement may extend an existing drainage system up to one mile downstream.<sup>291</sup> **An example of a Petition for Improvement of a Drainage System is found in Template B.**

### 1. Petition Requirements

A petition for an improvement must contain the following elements:

1. Designate the drainage system proposed to be improved by number or another description that identifies the drainage system;
2. State the drainage system has insufficient capacity or needs enlarging or extending to furnish sufficient capacity or a better outlet;
3. Describe the starting point, general course, and terminus of any extension;
4. Describe the improvement, including the names and addresses of owners of the 40-acre tracts or government lots and property that the improvement passes over;
5. State that the proposed improvement will be of public utility and promote the public health; and
6. Contain an agreement by the petitioners that they will pay all costs and expenses that may be incurred if the improvement proceedings are dismissed.<sup>292</sup>

### 2. Signatures on Petition

A petition for an improvement must be signed by enough landowners to meet one of the following four standards:

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.<sup>293</sup>

The property area affected by the improvement can probably not be accurately determined until the improvement has been evaluated by an engineer and reviewed by the viewers as part of the improvement establishment proceedings. Thus, the test contemplated by the first and third options above present practical uncertainty to the petitioners and expose the petitioners to risk that not enough signatures have been obtained.

In the interest of certainty of jurisdiction, it is much safer to rely on the criteria set forth in the second and fourth options above. Petitioners should be capable of counting 40-acre parcels and government lots traversed by the proposed improvement project, and then determine with a fair degree of certainty whether 26 percent of the owners involved have signed the petition or whether the owners of 26 percent of the land traversed have signed the petition.

### 3. Filing an Improvement Petition

The public drainage code expressly states that the petition for an improvement and bond are to be filed with the county auditor.<sup>294</sup> If the proposed drainage project affects land in two or more counties, the petition must be filed with the auditor of the county with the largest area of property in the proposed drainage system.<sup>295</sup>

However, if a new drainage system or an improvement to an existing drainage system is located within the jurisdiction of a watershed district, the petition must be filed with the managers of the watershed district.<sup>296</sup>

For a more detailed description on determining the correct drainage authority, see **Section II, Paragraph C**.

Once the petition is filed with the correct drainage authority, preparations are made by the drainage authority for a preliminary hearing to review the petition.

A detailed description of the preliminary hearing procedures is found in **Section IV**.

### 4. Petition for Improvement of Separable Part Only of Drainage System Needing Repair (“Separable Maintenance”)

Sometimes, improvement projects eliminate the need for a repair to the portion of the existing drainage system proposed to be improved. For example, where an open channel has become partially filled with silt and debris, but the improvement project is for widening and deepening of the open channel, the previously needed repair, of course, will not be necessary.

The cost to repair all or a portion of an existing drainage system is borne by the entire system in proportion to the benefits determined when the system was established or in the most recent redetermination of benefits.<sup>297</sup> Conversely, the costs of construction of an improvement may be assessed only to the lands determined by the viewers to benefit by the proposed improvement.<sup>298</sup> Thus, Minn. Stat. 103E provides for a procedure by which the cost to improve the separable portion of the drainage system petitioned for and avoided by the improvement may be assessed against all property benefited by the entire drainage system.<sup>299</sup> This procedure is known as “separable maintenance” and is a unique procedure that may assist in reducing the improvement costs of a project.

In the detailed survey report prepared for a petition to improve a separable portion of an existing drainage system, the engineer may include a statement showing the proportionate estimated cost of the proposed improvement required to repair the separable part of the existing system and the estimated proportionate cost of the added work required for the improvement.<sup>300</sup> If a separable maintenance statement is included by the engineer, then the notice of hearing on the detailed survey report for the improvement must be given by publication and mailing to all persons owning property affected by the existing drainage system, rather than just those affected by the improvement.<sup>301</sup>

To order the repair portion of the improvement to be allocated as repair and assessed against all property benefited by the entire drainage system, the drainage authority must make a determination at the final hearing that (1) only a separable portion of the existing drainage system will be improved; and (2) that the separable portion is in need of repair.<sup>302</sup> While the public drainage code does not require that both required determinations be adopted as findings, it is good practice for the drainage authority

to formally adopt them as findings as evidence that the drainage authority did, in fact, make the required determination. The final order, however, must direct:

1. The repair portion be allocated as repairs and assessed against all property benefited by the entire drainage system, as provided by section [Minn. Stat. 103E.731](#); and
2. The balance of the cost of the improvement be assessed in addition to the repair assessment against the property benefited by the improvement.<sup>303</sup>

The separable maintenance procedures are helpful where the cost of the improvement is close to or more than the benefits of the improvement. Before a proposed improvement is established by final order of the drainage authority, the drainage authority must determine that the estimated benefits of the improvement are greater than the total estimated costs, including damages, of the improvement.<sup>304</sup> In some circumstances, it is possible that the improvement may not be ordered without separable maintenance.

**Example: Sample Ditch No. 1**

- Total Improvement Project Costs = \$930,000
- Net Benefits from Improvement = \$760,000
- Cost to Repair Separable Portion = \$320,000
- Costs Allocated to Improvement Benefits = \$610,000
- Allocation to Entire Drainage System = \$320,000

In conducting the cost-versus-benefit analysis required for the improvement under [Minn. Stat. § 103E.341, subdivision 2 \(a\)\(4\)](#), the costs allocated to improvement benefits (\$610,000) are exceeded by the net benefits of the improvement (\$760,000). \$320,000 is allocated to the entire drainage system for the repair costs avoided by the improvement. Without separable maintenance, the total improvement project costs (\$930,000) exceed the net benefits of the improvement (\$760,000) and the project would not have been permitted.

Any time an improvement is to be established, it is a good practice for the drainage authority to also conduct a redetermination of benefits for the entire system. Once established, there will be a disparity between the improvement benefits which are based on current land values and land use practices and the prior benefits determined for the remainder of the drainage system that are based on the land values and land use practices occurring at the time of the prior benefits determination. Further, the Minnesota Supreme Court has hinted that the cost-versus-benefit analysis required to approve an improvement may also be required for the allocation of separable maintenance.<sup>305</sup> If the cost-versus-benefit analysis is required, systems with old benefits may not exceed modern day repair costs allocated as separable maintenance.

*FOOTNOTES*

<sup>290</sup> Minn. Stat. § 103E.215, subd. 2 (2015).

<sup>291</sup> Minn. Stat. § 103E.215, subd. 3 (2015).

<sup>292</sup> Minn. Stat. § 103E.215, subd. 4(c) (2015).

<sup>293</sup> Minn. Stat. § 103E.215, subd. 4(a) (2015).

<sup>294</sup> Minn. Stat. § 103E.202, subd. 4 (2015).

<sup>295</sup> Minn. Stat. § 103E.235, subd. 1 (2015).

<sup>296</sup> Minn. Stat. § 103D.625, subd. 4 (2015).

<sup>297</sup> Minn. Stat. § 103E.728, subd. 1 (2015).

<sup>298</sup> See Minn. Stat. § 103E.215, subd. 5 (2015) (“The benefits and damages determined must be as a result of the proposed improvement.”).

<sup>299</sup> See Minn. Stat. § 103E.215, subd. 6 (2015).

<sup>300</sup> Minn. Stat. § 103E.215, subd. 6(a) (2015).

<sup>301</sup> Minn. Stat. § 103E.215, subd. 6(a) (2015).

<sup>302</sup> Minn. Stat. § 103E.215, subd. 6(b) (2015).

<sup>303</sup> Minn. Stat. § 103E.215, subd. 6(b) (2015).

<sup>304</sup> Minn. Stat. § 103E.341, subd. 2(a)(4) (2015).

<sup>305</sup> See *In re Improvement of Murray Cnty. Ditch No. 34*, 615 N.W.2d 40, 47, FN12 (Minn. 2000) (“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.” (citations omitted)).

## D. Improvement of Outlets

Improvement of outlet proceedings are available where an existing drainage system, watercourse, or body of water does not have the capacity to channelize upland drainage waters for a public or private proposed drainage project, or even an existing drainage system.<sup>306</sup> The proceedings may be initiated by an affected county or the owners of the overflowed property at the outlet.<sup>307</sup>

The outlet improvement may amount to little more than an extension of the system or systems contributing the overflow. It may be a system of dikes or pumps to protect from overflow surrounding lands in agricultural or other use, or it may be an impoundment that stores water that might otherwise flood adjoining lands.<sup>308</sup>

Improvement of an outlet proceeding may not be used for the improvement or enlargement of the drainage system itself. It is appropriate for work to be done downstream of the outlet of an existing system or on a system to be built. However, if deepening or widening of the existing channel or increasing the size of an existing tile is contemplated, or if it is likely that the engineer may recommend such action, then a regular improvement should be used either independently, or in combination with an improvement to an outlet petition.

**An example of a Petition for Improvement of an Outlet is found in [Template C](#).**

### 1. Petition Requirements

A petition for improvement of an outlet must contain the following elements:

1. A description of the property that has been or is likely to be overflowed, including the names and addresses of the property owners from records in the county assessor’s office;
2. A statement, in general terms by number or otherwise, of the drainage systems that have caused or are likely to cause the overflow;
3. A description of the location of the overflowed drainage system, watercourse, or body of water and the outlet;
4. A showing of the necessity of the improvement by enlarging the system or controlling the waters by off-take ditches, additional outlets, or otherwise;
5. A showing that the outlet improvement will protect the adjoining property from overflow;
6. A statement that the improvement will be of public benefit and utility and improve the public health; and

7. A statement that the petitioners will pay all costs incurred if the proceedings are dismissed or a contract for construction of the outlet improvement is not awarded.<sup>309</sup>

## 2. Petition Signatures

A petition for an improvement to an outlet must 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.<sup>310</sup>

Meeting the jurisdictional requirements for signatures on a petition for improvement of an outlet poses a risk because the number of signatures required is subject to interpretation and initially difficult to determine. Until an engineer has been appointed and has done a preliminary survey, reliable information on what is overflowed property is difficult to obtain. Even when the preliminary survey is done, the engineer may give overflow data on storms of 5-year frequency, 10-year frequency, 25-year frequency, and 50-year frequency. The meaning of “area of the overflowed property” may well depend upon which interpretation is chosen. If there is any doubt about the adequacy of the number of petitioners, the petitioners may choose to use a regular improvement proceeding petition signed by 26 percent of the owners over which the improvement passes over or the owners of 26 percent of the area over which the improvement passes.<sup>311</sup> The improvement would be designed to add capacity to the system so as to not use adjacent lands for overflow or storage of water. The number of signatures required in the improvement is more objective/less objective than the number of signatures required in the improvement of an outlet statute.

## 3. Filing an Improvement to an Outlet Petition & Jurisdiction

The public drainage code expressly states that the petition for improvement of an outlet must be filed with the county auditor or, for a drainage system in more than one county, with the auditor of the county having the largest area of property the improvement would be located on.<sup>312</sup>

However, if the improvement to an outlet is located within the jurisdiction of a watershed district, the petition must be filed with the managers of the watershed district.<sup>313</sup>

For a more detailed description on determining the correct drainage authority, see **Section II, Paragraph C**.

If the county is the petitioner, no bond is required, otherwise, a bond is required to be filed with the petition.<sup>314</sup>

The filing of a valid petition bestows upon the drainage authority jurisdiction over the petition, the improvement, the affected property, and all proceedings for the establishment and construction of the outlet improvement and the assessment of property benefited by the outlet improvement.<sup>315</sup>

Once the petition and bond, if required, are filed, preparations are made by the drainage authority for a preliminary hearing to review the petition. A detailed description of the preliminary hearing procedures is found in **Section IV**.

## FOOTNOTES

<sup>306</sup> See Minn. Stat. § 103E.221, subd. 1 (2015).

<sup>307</sup> See Minn. Stat. § 103E.221, subd. 1 (2015).

<sup>308</sup> See Minn. Stat. § 103E.011, subd. 4 (2015).

<sup>309</sup> Minn. Stat. § 103E.221, subd. 2(a) (2015).

<sup>310</sup> Minn. Stat. § 103E.221, subd. 2(a) (2015).

<sup>311</sup> See Minn. Stat. § 103E.215, subd. 4(a)(2) & (4) (2015).

<sup>312</sup> Minn. Stat. § 103E.215, subd. 4(b) (2015).

<sup>313</sup> See Minn. Stat. § 103D.625 (2015) (“Construction of new drainage systems or improvements of existing drainage systems in the watershed district must be initiated by filing a petition with the managers.”) The public drainage code defines “drainage systems” to mean “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.” Minn. Stat. § 103E.005, subd. 12 (2015).

<sup>314</sup> Minn. Stat. § 103E.221, subd. 2(b) (2015).

<sup>315</sup> Minn. Stat. § 103E.221, subd. 4 (2015).

## E. Laterals

A “lateral” means any drainage construction by branch or extension, or a system of branches and extensions; or, a drain that connects or provides an outlet to property with an established drainage system.<sup>316</sup>

While a lateral is a distinct project, in many ways, it is similar to the construction of a new drainage system project. The establishment proceedings for a lateral give the drainage authority an easement for future inspection, maintenance and repair of the lateral. For a discussion on the extent and nature of the easement acquired, see **Paragraph C(4) of this Section**. In addition, when the design of the lateral constructed is open ditch, the drainage authority must acquire and maintain one rod of perennial vegetation on both sides of the lateral, similar to the construction of a new drainage system.<sup>317</sup>

A lateral, while it is a distinct project, becomes part of the system to which it is tributary once it is constructed.<sup>318</sup> When a lateral is repaired, the cost of the repair is assessed to the entire system.<sup>319</sup> Likewise, when the outlet is repaired, the lateral is assessed its proportionate share of the costs.

**An example of a Petition for a Lateral is found in [Template D](#).**

### 1. Petition Requirements

A petition for a lateral must contain the following elements:

1. A description, in general terms, of the starting point, general course, and terminus of the proposed lateral;
2. A description of the property traversed by the lateral including the names and addresses of the property owners from records in the county assessor’s office;
3. A statement of the necessity to construct the lateral;
4. A statement that, if constructed, the lateral will be of public benefit and utility and promote the public health;
5. A request that the lateral be constructed and connected with the drainage system; and
6. A statement providing that the petitioners will pay all costs incurred if the proceedings are dismissed or if a contract for the construction of the lateral is not awarded.<sup>320</sup>

### 2. Petition Signatures

The petition for a lateral must be 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 property that the lateral passes over.<sup>321</sup>

### 3. Filing the Petition for a Lateral

The public drainage code expressly states that the petition for a lateral must be filed with the county auditor or, for a drainage system in more than one county, with the auditor of the county having the largest area of property the lateral would be located on.<sup>322</sup>

However, if the improvement to an outlet is located within the jurisdiction of a watershed district, the petition must be filed with the managers of the watershed district.<sup>323</sup>

For a more detailed description on determining the correct drainage authority, see **Section II, Paragraph C**.

Once the petition and bond for a lateral is filed, the procedures are identical to those followed for establishment of a new drainage system. A detailed description of the preliminary hearing procedures is found in **Section IV**.

### 4. Authority to Use Existing Drainage System as Outlet for Lateral

If a lateral is to drain only lands that were previously assessed benefits for the establishment of the existing system that the lateral will outlet into, then no permission to outlet into that system is required.<sup>324</sup>

If new lands will be brought into the existing system by the lateral, the lateral may not be constructed without first obtaining express authority from the drainage authority having jurisdiction over the drainage system proposed to be used as an outlet.<sup>325</sup> So as to not delay the lateral proceedings, it is recommended that a petition for authority to use the existing drainage system as an outlet be filed simultaneously with filing the petition for a lateral.

If there is doubt as to whether previously unassessed lands will be drained into the system, a determination should be made at the preliminary hearing, with consultation from the lateral drainage project engineer as to whether an outlet permit will be required. If authority is required, it is prudent to delay the engineer's final survey and the viewing until a petition for authority to use the existing system as an outlet has been filed, heard, and approved in accordance with the procedures of [Minn. Stat. § 103E.401](#). For a more detailed description of these proceedings, see **Section III, Paragraph J**.

#### FOOTNOTES

<sup>316</sup> Minn. Stat. § 103E.005, subd. 15 (2015).

<sup>317</sup> See Minn. Stat. § 103E.021, subd. 1 (2015).

<sup>318</sup> See *Schultz v. Chippewa Cnty.*, 57 N.W.2d 158, 162 (Minn. 1953).

<sup>319</sup> A "drainage system" means "a system of ditch or tile, or both, to drain property, including laterals . . . Minn. Stat. § 103E.005, subd. 12 (2015). When a lateral is repaired, the lateral is part of the drainage system, and the cost of repairing a drainage system is apportioned pro rata on all property and entities that have been assessed benefits for the drainage system. Minn. Stat. § 103E.728 (2015).

<sup>320</sup> Minn. Stat. § 103E.225, subd. 1(a) (2015).

<sup>321</sup> Minn. Stat. § 103E.225, subd. 1(a) (2015).

<sup>322</sup> Minn. Stat. § 103E.225, subd. 1(a) (2015).

<sup>323</sup> See Minn. Stat. § 103D.625 (2015) ("Construction of new drainage systems or improvements of existing drainage systems in the watershed district must be initiated by filing a petition with the managers.") The public drainage code defines "drainage systems" to mean "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." Minn. Stat. § 103E.005, subd. 12 (2015).

<sup>324</sup> See *Westphal v. Schmalz*, 169 N.W.2d 401, 403 (Minn. 1969) (holding that Minn. Stat. § 103E.401, subd. 2 grants an implicit right to a landowner “who has been assessed for the benefits of a judicial ditch system to make use of the system for continuing drainage of land for which he was assessed.”).

<sup>325</sup> Minn. Stat. § 103E.401, subd. 2 (2015).

## F. Impounding, Rerouting, and Diverting Drainage System Waters

In contrast to the other proceedings discussed in this section, which focus on moving water quickly and efficiently downstream, this proceeding provides a means to divert drainage waters and impound or pond them. These proceedings provide a mechanism for impounding, rerouting, or diverting drainage system waters for beneficial use, such as to conserve and make more adequate use of water resources or to incorporate wetland or water quality enhancing elements.<sup>326</sup> The 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.<sup>327</sup> The external funding sources may be used outside of the benefited area of a drainage system, but must still be within the watershed of the drainage system.<sup>328</sup>

One example in which these proceedings are used is to reroute a drainage system that previously drained a wetland basin the landowner now proposes to restore in order to create a wetland bank.

### 1. Petition Requirements

A petition to impound, reroute, or divert drainage system waters must contain the following elements:

1. The location of the installation, concept plans for the proposed project, and a map that identifies the areas likely to be affected by the project.<sup>329</sup>
2. Identification of the sources of funds to be used to secure the necessary land rights and to construct the project and the amount and rationale for any drainage system funds requested.<sup>330</sup>

**An example of a Petition for Impounding, Rerouting, or Diverting Drainage System Waters is found in [Template E](#).**

If required, the petitioner or the drainage authority must acquire a public waters work permit or a water use permit from the DNR Commissioner under [Minn. Stat. 103G](#). For more information on public waters work permits, see **Section I, Paragraph B, Subparagraph 4**.

### 2. Petition Signatures

Anyone can petition to impound, reroute, or divert drainage system waters for beneficial use, including a person, public or municipal corporation, governmental subdivision, the state or a department or agency of the state, the Department of Natural Resources (“DNR”) Commissioner, and the United States or any of its agencies.<sup>331</sup>

### 3. Filing the Petition and Bond

The petition for impounding, rerouting, or diverting drainage system waters must be filed with the correct drainage authority for that system.<sup>332</sup> If the drainage system is under the jurisdiction of a county drainage authority, the petition must be filed with the auditor of the county.<sup>333</sup> 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, where the primary drainage system records are kept, and a copy of the petition must be submitted to the auditor of each of the other counties

participating in the joint county drainage authority.<sup>334</sup> If the system is under the jurisdiction of a watershed district, the petition must be filed with the secretary of the district.<sup>335</sup>

For a more detailed description on determining the correct drainage authority, see **Section II, Paragraph C**.

The filing of the petition must be accompanied by a bond as described in **Section II, Paragraph I**. However, a bond is not required if the petition is filed by the state, a state agency or department, the DNR, the United States or any of its agencies, a soil and water conservation district, a watershed district, or a municipality.<sup>336</sup>

#### 4. Appointment of Engineer and Notice of Public Hearing

After the petition and bond, if required, are received, the drainage authority must appoint an engineer to investigate the effect of the proposed installation and to file a report of findings.<sup>337</sup> **An example of a resolution appointing an engineer to investigate the effect of the proposed installation and to file a report is found in Template F.** (See **Chapter 3, Section X**).

After the engineer's report is filed, notice must be given and a public hearing must be held.<sup>338</sup> The notice requirements for the hearing on a petition to impound, reroute, or divert drainage system waters are the same as the notice requirements for a preliminary hearing<sup>339</sup>—"notice by mail of the time and location of the hearing to the petitioners, owners of property, and political subdivisions likely to be affected by the proposed drainage project."<sup>340</sup> The auditor or board of managers should give notice to all persons whose property is assessed for the system waters to be impounded, rerouted, or diverted. In many cases, lands in the upper reaches of the system would not be affected by a diversion of waters at the lower end, however, the safe thing to do is to give everyone on the system notice. **An example notice of the public hearing on the petition to impound, reroute, or divert drainage system waters is found in Template G.**

For a detailed description of the notice requirements for a preliminary hearing, see **Section IV, Paragraph F, Subparagraph 1**.

#### 5. Conducting the Public Hearing

The hearing that follows the filing of the engineer's report is both a preliminary and a final hearing. In this respect, this proceeding differs dramatically from the previously discussed proceedings. There is no need for a final hearing since no privately owned lands are going to be assessed for the cost of construction and no viewers are needed.

If, after the hearing, it appears from the engineer's report and other evidence presented that the project will be of a public or private benefit and that it will not impair the utility of the drainage system or deprive affected land owners of its benefit, the drainage authority shall make an order modifying the drainage system and authorizing the project.<sup>341</sup> The order must include the following elements:

1. The amount, if any, of drainage system funds approved for the project at the discretion of the drainage authority.<sup>342</sup>

If the part of the drainage system located within the project boundaries is in need of repairs, the petitioner's engineer shall estimate the cost at the time of the petition of these separable repairs.<sup>343</sup> The drainage authority must consider the separable repair costs that will be avoided

as a result of the petitioned project, as well as any other benefits of the project to the drainage system, when determining whether or how much to contribute to the petitioned project.<sup>344</sup>

For more information on separable repair costs, see **Section III, Paragraph C, Subparagraph 4.**

2. Identification of the parties responsible for construction, operation, and maintenance of the drainage system modification.<sup>345</sup>

**An example of an order modifying the drainage system and authorizing the project is found in [Template H](#).**

## 6. Permits and Flowage Easements

Prior to installing or constructing the project, the petitioner or drainage authority shall obtain all required permits and all necessary rights-of-way and flowage easements from owners of land affected by the impoundment, reroute, or diversion.<sup>346</sup>

## FOOTNOTES

<sup>326</sup> Minn. Stat. § 103E.227, subd. 1(a) (2015).

<sup>327</sup> Minn. Stat. § 103E.011, subd. 5 (2015).

<sup>328</sup> Minn. Stat. § 103E.011, subd. 5 (2015).

<sup>329</sup> Minn. Stat. § 103E.227, subd. 1(c) (2015).

<sup>330</sup> Minn. Stat. § 103E.227, subd. 1(d) (2015).

<sup>331</sup> Minn. Stat. § 103E.227, subd. 1(a) (2015).

<sup>332</sup> See Minn. Stat. § 103E.227, subd. 1(b) (2015).

<sup>333</sup> Minn. Stat. § 103E.227, subd. 1(b) (2015).

<sup>334</sup> Minn. Stat. § 103E.227, subd. 1(b) (2015).

<sup>335</sup> Minn. Stat. § 103E.227, subd. 1(b) (2015).

<sup>336</sup> Minn. Stat. § 103E.227, subd. 2(b) (2015).

<sup>337</sup> Minn. Stat. § 103E.227, subd. 3(a) (2015).

<sup>338</sup> Minn. Stat. § 103E.227, subd. 3(b) (2015).

<sup>339</sup> Minn. Stat. § 103E

<sup>340</sup> Minn. Stat. § 103E.261, subd. 1 (2015).

<sup>341</sup> Minn. Stat. § 103E.227, subd. 3(c) (2015).

<sup>342</sup> Minn. Stat. §§ 103E.227, subd. 3(c) & subd. 5 (2015). .227, subd. 3(b) (2015).

<sup>343</sup> Minn. Stat. § 103E.227, subd. 5 (2015).

<sup>344</sup> Minn. Stat. § 103E.227, subd. 5 (2015).

<sup>345</sup> Minn. Stat. § 103E.227, subd. 5 (2015).

<sup>346</sup> Minn. Stat. § 103E.227, subd. 4 (2015).

## G. Drainage System Repairs

Once a public drainage system is established, the owners of the land who have been assessed for benefits or have recovered damages for its construction have a vested property right to have the ditch maintained in the same condition as it was when originally established.<sup>347</sup> This vested property right cannot be divested without due process of law.<sup>348</sup>

The drainage authority has an affirmative duty to maintain the drainage systems located in its jurisdiction, including the permanent strips of perennial vegetation required under [Minn. Stat. § 103E.021](#), and to provide the repairs necessary to make the drainage system efficient.<sup>349</sup> The drainage authority's obligation to maintain public drainage systems, in addition to being mandated by the public

drainage code, protects the vested property right held by landowners assessed for benefits or awarded damages. When issuing an order for repair, however, the drainage authority must also consider and weigh competing environmental and public interests in order to determine whether the repair will be of public utility, benefit, or welfare.<sup>350</sup>

The drainage authority also has an affirmative duty to have the drainage systems in its jurisdiction inspected on a regular basis by an inspection committee of the drainage authority or by a drainage inspector appointed by the drainage authority.<sup>351</sup>

Minor repairs and maintenance costing less than the greater of \$100,000 or \$1,000 per mile of open ditch in the ditch system may be completed by hired labor and equipment without advertising for bids or entering into a contract for the repair work.<sup>352</sup>

Otherwise, repairs may also be accomplished either by petition of an entity or individual interested in or affected by the drainage system,<sup>353</sup> or on the board's own volition, without a petition after review of a drainage inspection report.<sup>354</sup>

The definition of a repair, how repairs are accomplished, and how repairs are assessed are all addressed in this section.

#### 1. Definition of Repair and Determining Public Utility, Benefit, or Welfare

The statute defines "repair" as follows:

[T]o restore all or a part of a drainage system as nearly as practicable to the same hydraulic capacity as originally constructed and subsequently improved, including resloping of ditches and leveling of spoil banks if necessary to prevent further deterioration, realignment to original construction if necessary to restore the effectiveness of the drainage system, and routine operations that may be required to remove obstructions and maintain the efficiency of the drainage system. "Repair" also includes:

1. Incidental straightening of a tile system resulting from the tile-laying technology used to replace tiles; and
2. Replacement of tiles with the next larger size that is readily available, if the original size is not readily available.<sup>355</sup>

Historically, there has been a considerable amount of litigation about what is and what is not a repair.<sup>356</sup> The legislature, however, amended the repair statute in the drainage code making it clear that the scope of "repairs" is limited to restore the drainage system to the original *construction* rather than the original *purpose*.<sup>357</sup>

Additionally, "repair" is defined to include resloping of ditch banks and leveling of spoil banks, if necessary, to prevent further deterioration, and realignment to original construction, if necessary, to restore the effectiveness of the system.<sup>358</sup>

The drainage authority must also consider environmental regulations that have an impact on repairs of drainage systems. For detailed descriptions of the environmental regulations impacting repairs of drainage systems, see **Section I, Paragraph B**.

In any proceeding to repair a drainage system or do other work affecting a public drainage system, the drainage authority must give proper consideration to conservation of soil, water, wetlands, forests, wild animals, and related natural resources, and to other public interests affected, together with other material matters as provided by law in determining whether the project will be of public utility, benefit, or welfare.<sup>359</sup>

## 2. Drainage System Inspections and Maintenance

The drainage code obligates the drainage authority to have the drainage systems in its jurisdiction inspected on a “regular basis” by an inspection committee of the drainage authority or a drainage inspector appointed by the drainage authority.<sup>360</sup>

As part of the inspection, the committee or the inspector must also inspect the drainage system for violations of the one-rod perennial vegetation requirement found in [Minn. Stat. § 103E.021](#).<sup>361</sup> If, after inspection, no violation of the one-rod perennial vegetation requirement is found, the drainage authority may go five years before it is required to inspect the open ditch again.<sup>362</sup> If, however, the inspection reveals a violation of the one-rod perennial vegetation requirement, inspection is required annually until one year after the violation is corrected.<sup>363</sup> For a detailed description about compliance with the one-rod perennial vegetative strip requirement, see **Section III, Paragraph G, Subparagraph 3**.

Regular inspection by an inspection committee or the drainage inspector help identify the vast majority of minor repairs that the drainage authority authorizes and makes on its own volition. Examples of maintenance issues reported by the committee or inspector, or reported by a benefited landowner, include a beaver dam obstruction, a fallen tree, sloughing or caving in of the ditch bank, a tile collapse, a tile blowout, or inlet blockage. The drainage authority, having been made aware of the problem, may simply order it to be repaired. When the cost of maintenance or repairs to one drainage system for one year is less than the greater of \$100,000 or \$1,000 per mile, the repair may be made by the use of day labor and equipment without advertising for bids and letting a contract.<sup>364</sup> In some cases, drainage authorities have appointed a drainage inspector authorized to conduct minor maintenance requests such as those described in this paragraph on a regular basis, and without necessarily reporting each minor incident to the drainage authority.

## 3. Permanent Strip of Perennial Vegetation

Under [Minn. Stat. § 103E.021](#), the legislature has mandated that public drainage authorities order all new public drainage systems and, over time, existing public drainage systems, to plant permanent grass on the ditch’s side slopes and maintain a permanent strip of perennial vegetation along both sides of the open ditch.

Thus, in any proceeding to establish, construct, improve, or do any work affecting a public drainage system under any law that appoints viewers to assess benefits and damages, the drainage authority must order the following:

1. That the spoil banks be spread consistent with the plan and function of the drainage system;
2. That permanent grass, other than a noxious weed, be planted on the ditch side slopes; and
3. That a permanent strip of perennial vegetation approved by the drainage authority be established on each side of the ditch.<sup>365</sup>

Under section 103E.021, the following drainage work must meet the vegetative requirements above if the drainage system incorporates open ditch in its design:

- New drainage system projects;
- Improvements of drainage systems;
- Improvement of outlets;
- Laterals;
- Repair proceedings, only when the engineer determines or is made aware that property that was not assessed for benefits for construction of the drainage system has drained into the drainage system or has otherwise benefited from the drainage system and viewers are appointed to assess benefits for inclusion in the drainage system; and
- Redetermination of benefits and damages.

The public drainage code directs that preference should be given to planting native species of a local ecotype and that the approved perennial vegetation must not impede future maintenance of the ditch.<sup>366</sup> For example, although trees technically meet the definition of perennial vegetation, trees are not permitted within the permanent strip as trees impede access to the drainage system for future maintenance.

The width of permanent perennial vegetation is the greater of the distance from the top edge of the constructed channel one rod (16 ½ feet) landward or to the crown of the leveled spoil bank.<sup>367</sup> There are two exceptions - if the perennial vegetation is established through a redetermination of benefits and damages or voluntarily through the incremental implementation of vegetated buffer strips and side inlet controls under [Minn. Stat. § 103E.021, subd. 6](#), then the width of the permanent strip shall not exceed one rod (16 ½ feet) from the top edge of the constructed channel.<sup>368</sup>

The drainage system's right-of-way for the acreage and additional property required for the permanent strips must be acquired by the authority having jurisdiction.<sup>369</sup> If the permanent perennial vegetation is being established pursuant to a proceeding that requires the appointment of viewers, then the viewers must award damages in the viewers' report for the rights-of-way and additional property required for the permanent strips.<sup>370</sup> Keep in mind that improving only a portion of an existing drainage system that contains open ditch will trigger the permanent perennial vegetation requirement for the entire system because the improvement process requires the appointment of viewers to determine benefits and damages of the improvement.<sup>371</sup> The viewers, in addition to determining the benefits received by the proposed improvement, must also then award damages for the establishment of the permanent perennial vegetation to the entire system. Those landowners, although possibly not affected by the improvement, will receive notice of the final hearing because they will be listed in the viewers' report.<sup>372</sup>

Agricultural practices, other than those required for the maintenance of a permanent growth of perennial vegetation, are not permitted on any portion of the property acquired for perennial vegetation.<sup>373</sup> Where a landowner had historically cropped up to the top edge of the constructed channel, the acquisition of the permanent perennial vegetative strip damages the value of that portion of the landowner's property. However, the underlying property remains in ownership of the abutting landowner as the acquisition does not restrict all uses of the permanent strip – harvest of the vegetation from the permanent strip in a manner not harmful to the vegetation or the drainage system is the privilege of the fee owner or his or her assigns.<sup>374</sup> The drainage inspector shall establish rules for the fee

owner and assigns to harvest the vegetation.<sup>375</sup> It is not common that the viewers would recommend damages for the full agricultural value of the property established as perennial vegetation because not all uses of the property are restricted.

Notwithstanding the proceedings mentioned in this subparagraph that require implementation of a permanent vegetative buffer, drainage authorities have permissive authority to implement permanent buffer strips of perennial vegetation or side inlet controls, or both, adjacent to a public drainage ditch where necessary to control erosion and sedimentation, improve water quality, or maintain the efficiency of the drainage system.<sup>376</sup> Such projects are implemented as a repair is implemented according to [Minn. Stat. § 103E.705](#).<sup>377</sup> Rather than filing an inspection report from the inspection committee or drainage inspector, however, the drainage authority may appoint an engineer to examine the drainage system and prepare an engineer's report for the project.<sup>378</sup> The engineer's report may be helpful to the drainage authority in supporting its determination that the permanent buffer strips of perennial vegetation or side inlet controls are necessary to control erosion and sedimentation, improve water quality, or maintain the efficiency of the drainage system.

Damages must be determined by either the drainage authority or viewers appointed by the drainage authority.<sup>379</sup> A damages statement shall be prepared, including an explanation of how the damages were determined for each property affected by the project, and filed with the auditor or watershed district.<sup>380</sup> The auditor or watershed district shall prepare property owners' reports that includes:

1. The name and address of the property owner;
2. Each lot or tract and its area benefited or damaged;
3. The damage, if any, to riparian rights;
4. The amount of right-of-way acreage required; and
5. The amount that each tract or lot will be benefited or damaged.<sup>381</sup>

**An example of a property owner's report is found in [Template I](#).**

Once a damages statement is filed, the drainage authority adopts an order setting a time, not more than 30 days after the date of the order, for a hearing on the permanent perennial strip acquisition.<sup>382</sup> **An example order setting a time for the hearing on the permanent perennial strip acquisition is found in [Template J](#).**

The property owners' report and damages statement must be mailed to each owner of property affected by the proposed project within 30 days of the damages statement being filed,<sup>383</sup> and at least ten days before the hearing. The auditor or watershed district must give notice by mail of the time and location of the hearing to the owners of property and political subdivisions likely to be affected by the acquisition.<sup>384</sup> To accomplish these requirements in one mailing and meet the public drainage code's timing requirements requires coordination.

At the public hearing, to approve the acquisition and order the repairs, the drainage authority must, after hearing the evidence presented at the hearing and given by the viewers (and engineer if one is appointed), determine that the repairs are necessary for the drainage system and the costs are less than the greater of \$100,000 or \$1,000 per mile of open ditch.<sup>385</sup>

Once the permanent perennial vegetative strips are acquired, the drainage authority is obligated to inspect them for violations.<sup>386</sup> If the inspection committee or drainage inspector determines that

permanent strips of perennial vegetation are not in compliance with the public drainage code, a compliance notice must be sent to the landowner.<sup>387</sup>

If a property owner does not bring an area into compliance with this section as provided in the compliance notice, the inspection committee or drainage inspector must notify the drainage authority.<sup>388</sup> The notice must state the following:

1. The date the ditch was inspected;
2. The persons making the inspection;
3. That spoil banks are to be spread in a manner consistent with the plan and function of the drainage system and that the drainage system has acquired a permanent strip of perennial vegetation, according to [Minn. Stat. § 103E.021](#);
4. The violations of Minn. Stat. § 103E.021;
5. The measures that must be taken by the property owner to comply with Minn. Stat. § 103E.021 and the date when the property must be in compliance; and
6. That if the property owner does not comply by the date specified, the drainage authority will perform the work necessary to bring the area into compliance with Minn. Stat. § 103E.021 and charge the cost of the work to the property owner.<sup>389</sup>

**An example of a Notice of Noncompliance is found in [Template K](#).**

If a property owner does not bring an area into compliance after being notified under [Minn. Stat. § 103E.705, subd. 2](#), the drainage authority must issue an order to have the work performed to bring the property into compliance.<sup>390</sup> After the work is completed, the drainage authority must send a statement of the expenses incurred to bring the property into compliance to the auditor of the county where the property is located and to the property owner.<sup>391</sup>

The amount of the expenses to bring an area into compliance with this section is a lien in favor of the drainage authority against the property where the expenses were incurred.<sup>392</sup> The auditor must certify the expenses and enter the amount in the same manner as other drainage liens on the tax list for the following year.<sup>393</sup> The amount must be collected in the same manner as real estate taxes for the property.<sup>394</sup> The provisions of law relating to the collection of real estate taxes shall be used to enforce payment of amounts due under this section.<sup>395</sup> The auditor must include a notice of collection of compliance expenses with the tax statement.<sup>396</sup>

The amounts collected for enforcement must be deposited in the drainage system account.<sup>397</sup>

#### 4. Procedure for Repair Without Petition

For each drainage system that the board designates and requires the drainage inspector to examine, the drainage inspector shall make a drainage inspection report in writing to the board after examining a drainage system, designating portions that need repair or maintenance of the permanent strips of perennial vegetation and the location and nature of the repair or maintenance.<sup>398</sup> The drainage authority must consider the drainage inspection report at its next meeting and may repair all or any part of the drainage system.<sup>399</sup>

If the drainage authority finds that the estimated cost of repairs and maintenance of one drainage system for one year will be less than the greater of \$100,000 or \$1,000 per mile of open ditch in the

ditch system, it may have the repair work done by hired labor and equipment without advertising for bids or entering into a contract for the repair work.<sup>400</sup>

The drainage authority may give notice of and hold a hearing on the repair levy before ordering the levy of an assessment for repairs.<sup>401</sup> However, in one calendar year, the drainage authority may not levy an assessment for repairs or maintenance on one drainage system for more than 20 percent of the benefits of the drainage system, \$1,000 per mile of open ditch in the ditch system, or \$100,000, whichever is greater.<sup>402</sup> These cost limitations do not apply if:

1. A drainage system is destroyed or impaired by floods, natural disaster, or unforeseen circumstances;
2. The area where the drainage system is located has been declared a disaster area by the President of the United States and federal funds are available for repair or reconstruction; and
3. The public interests would be damaged by repair or reconstruction being delayed.<sup>403</sup>

#### 5. Procedure for Repair by Petition

A repair proceeding may be commenced by one petitioner.<sup>404</sup> The only element required for the petition is a statement that the drainage system needs repair.<sup>405</sup> **An example of a Petition for Repair is found in Template L.**

The public drainage code does not directly address the filing of a repair petition.<sup>406</sup> The code requires the auditor to present the petition to the board at its next meeting or, for a joint county drainage system, to the drainage authority within ten days after the petition is filed.<sup>407</sup> The watershed district chapter, [Minn. Stat. § 103D](#), also does not directly address the filing of petitions for repairs of drainage systems existing in the watershed district.<sup>408</sup> After a transfer of a public drainage system from a county or joint county to a watershed district is ordered, the watershed district chapter does direct that all proceedings for repair and maintenance must conform to the drainage code, except for repairs and maintenance done pursuant to the alternative powers granted to watershed districts to repair, with the concurrence of the local municipality, drainage systems located in cities or towns under section [Minn. Stat. § 103D.621, subdivision 4](#).<sup>409</sup> The petition for repair should be filed with the drainage authority presently exercising jurisdiction over the drainage system, because it is the drainage authority that is obligated to maintain and repair a drainage system. For example, if a public drainage system was constructed by a county drainage authority and the county has not yet transferred jurisdiction to the watershed district established after the drainage system was constructed, the petition for repair should be filed with the county.

For a more detailed description on determining the correct drainage authority, see **Section II, Paragraph C**.

No bond is required to accompany a repair petition; therefore, if it is determined that the petition for repair should be denied based on the engineer's report or otherwise, the drainage system pays the costs incurred.

Once a petition for repair is filed, the drainage authority shall consider the petition and make a determination as to whether the drainage system needs repair.<sup>410</sup> At the drainage authority's discretion, it may give notice and order a hearing on the petition for repair before making its determination and before appointing an engineer.<sup>411</sup>

If the drainage authority determines the system needs repair, then the drainage authority must appoint an engineer to examine the drainage system and make a repair report.<sup>412</sup> The report must show the necessary repairs, the estimated cost of the repairs, and all details, plans, and specifications necessary to prepare and award a contract for the repairs.<sup>413</sup>

#### 6. Inclusion of Property Not Assessed Benefits

During the examination of the drainage system petitioned for repair, the engineer charged with creating the repair petition may come across or be made aware of property that was not assessed for benefits in the construction of the drainage system and has been drained into the drainage system or has otherwise benefited from the drainage system. In such circumstances, the engineer must submit a map showing the following:

1. All public and private main ditches and drains that drain into the drainage system;
2. All property affected or otherwise benefited by the drainage system; and
3. The names of the property owners to the extent practicable.<sup>414</sup>

If the drainage authority determines at the hearing on the engineer's repair report that property not assessed for benefits for the construction of the drainage system has benefited by the drainage system, then the drainage authority must appoint viewers before the repair contract is awarded.<sup>415</sup> For a detailed description on the procedures for appointing viewers, see **Chapter 4, Section III**.

The viewers must determine the benefits to all property and entities benefited by the original construction of the drainage system and not assessed for benefits arising from its construction and make a viewers' repair report to the drainage authority.<sup>416</sup>

**An example of a viewer's report is found in [Template M](#).**

When the viewers' repair report is filed, the auditor must give notice of a hearing on the viewers' repair report conforming to the hearing notice required for a final hearing.<sup>417</sup> For a detailed description on hearing notices for a final hearing, see **Section V, Paragraph D, Subparagraph 1**. The final hearing notice gives the drainage authority jurisdiction over the properties described in the viewers' repair report.<sup>418</sup>

At the hearing on the viewers' repair report, the drainage authority must hear all interested parties and determine the benefits to properties and entities benefited by the original construction of the drainage system and not assessed benefits.<sup>419</sup> In the final repair order, the drainage authority will adopt and confirm the viewers' repair report, with or without modifications to the benefits determined.<sup>420</sup>

**An example of a final repair order is found in [Template N](#).**

In all future proceedings relating to the repairing, cleaning, improving, or altering of the drainage system, the property benefited in the viewers' report hearing will be part of the property benefited by the drainage system and must be assessed in the same manner provided for the assessment of property originally assessed for and included in the drainage system.<sup>421</sup>

These proceedings provide a mechanism to include property that is benefited by the drainage system in future assessments. These proceedings do not, however, provide a mechanism by which the drainage authority may credit the drainage system account for the share of the construction cost the property found to be benefited would have paid if included in the original assessment. [Minn. Stat. § 103E.401](#), prohibits a public or private drainage system from draining property not assessed for benefits from

using the established drainage system as an outlet without first obtaining express authority from the drainage authority having jurisdiction over the drainage system and paying an outlet fee.<sup>422</sup> If the property found by the engineer in his or her investigation into the engineer's repair report to be benefited by the drainage system should have petitioned to use the drainage system as an outlet, the drainage authority may want to consider staying the repair proceedings and issuing a notice of unauthorized outlet into the drainage system under [Minn. Stat. § 103E.401, subd. 7](#). For a detailed description of these proceedings, see **Section IV, Paragraph I**.

### 7. Hearing on Repair Petition

Once the repair report is filed, the auditor (or watershed district secretary) must notify the drainage authority and, in consultation with the drainage authority, must set a time, by order, not more than 30 days after the date of the order, for a hearing on the engineer's repair report.<sup>423</sup> At least 10 days before the hearing, the auditor (or the watershed district secretary) must give notice by mail of the time and location of the hearing to the petitioners, owners of property, and political subdivisions likely to be affected by the repair in the repair report.<sup>424</sup> If the engineer's report includes a map showing property found to be drained into the drainage system or otherwise benefited from the drainage system that was not assessed for benefits for construction of the drainage system, the landowners of those properties must also be notified by mail of the time and location of the hearing on the repair at least 10 days before the hearing.<sup>425</sup>

At the hearing, after the drainage authority reviews the engineer's report, the public comments, and all evidence presented, it must make a determination under one of two standards depending on how many signatures are on the repair petition.

1. If the repair petition is signed by owners of at least 26 percent of the property area affected by and assessed for the original construction of the drainage system, then the drainage authority must make the following findings to order the repair:
  - (a) That the drainage system is in need of repair so that it no longer serves its original purpose; and
  - (b) The cost of the repair will not exceed the total benefits determined in the original drainage system proceeding;<sup>426</sup> or
2. Regardless of the number of signatures on the repair petition, the drainage authority may order the repair if it determines that the repairs recommended are necessary for the best interests of the affected property owners.<sup>427</sup>

Note that if the drainage authority determines that the repairs recommended are necessary for the best interests of the affected property owners, no cost-benefit analysis is required.<sup>428</sup>

If the drainage authority determines that property not assessed for benefits for the construction of the drainage system has been benefited by the drainage system, then the drainage authority must follow the proceedings described in **Section III, Paragraph G, Subparagraph 6** prior to awarding the repair contract.

## 8. Repairs Affecting Public Waters

Before a repair is ordered, the drainage authority must notify the Commissioner of the Department of Natural Resources (“DNR”) if the repair may affect public waters.<sup>429</sup> If the Commissioner disagrees with the determination of the drainage authority of the allowable repair dimensions, the public drainage code provides that the engineer, a representative appointed by the Director of the DNR Division of Ecological and Water Resources, and a soil and water conservation district technician must jointly determine the repair depth using soil borings, field surveys, and other available data or appropriate methods.<sup>430</sup> Costs for determining the repair depth beyond the initial meeting of the three member panel must be shared equally by the Commissioner and the drainage authority.<sup>431</sup> The determined repair depth must be recommended to the drainage authority and the drainage authority may accept the joint recommendation and proceed with the repair.<sup>432</sup>

For a detailed description on how public waters and public waters wetlands impact repairs of public drainage systems, see **Section 1, Paragraph B, Subparagraph 4.**

## 9. How Repairs Are Apportioned and Assessed

All fees and costs incurred by the drainage authority for proceedings relating to repair of a drainage system, including inspections, engineering, viewing, and publications, are considered costs of the repair and must be assessed against the property and entities benefited by the drainage system.<sup>433</sup>

The costs of a repair anywhere on a drainage system are paid on a pro rata basis by all the owners of property that are benefited by and/or contribute runoff to the drainage system, in accordance with [Minn. Stats. § 103E.728 Apportioning Repair Costs](#) or [§ 103E.729 Apportioning Repair Costs; Alternative Option](#). The § 103E.728 apportionment method is based on the drainage system benefits of record, either as previously determined by viewers and approved by the drainage authority for a drainage project or as previously redetermined for the drainage system in accordance with [Minn. Stats. § 103E.351 Redetermining Benefits and Damages](#).

The alternative § 103E.729 apportionment method is based on relative runoff and relative sediment delivery from all properties contributing runoff to the drainage system. This method was added to Chapter 103E in 2019 based on recommendations of the stakeholder Drainage Work Group. Runoff and sediment delivery to a drainage system are key factors affecting the use of its hydraulic capacity, its erosion potential and associated repairs, as well as the need for sediment cleanout. This option was added to the Chapter 103E with a 5-year trial period sunset date of July 31, 2024, which can be changed by legislative process.

Under the § 103E.728 apportionment method, the cost of repairing a system must be assessed pro rata on all property assessed for benefits (with the exception of property that has agricultural practices on or otherwise violates provisions related to maintenance of the permanent strip of perennial vegetation), even though the particular repair in question may actually restore drainage to the system’s original construction for just one or a few landowners.<sup>434</sup> The public drainage system, once established, is private property commonly owned equally by all landowners assessed benefits for its construction.<sup>435</sup> Therefore, repairs are charged to the entire drainage system.

For repair costs associated with property that has agricultural practices on, or is otherwise in violation of the provisions related to maintenance of the permanent strip of perennial vegetation, the drainage authority has the option to allocate those costs against the property in violation as follows:

1. The drainage authority may, after notice and hearing, charge an additional assessment on property that has agricultural practices on or otherwise violates provisions related to the permanent strip of perennial vegetation acquired,<sup>436</sup> or
2. The drainage authority may determine the cost of the repair per mile of open ditch on the ditch system and assess a cost of 20 percent of the repair cost per open ditch multiplied by the length of open ditch in miles on the property in violation.<sup>437</sup>

After the amount of additional assessment to lands in violation of the permanent strip of perennial vegetation requirements is determined, the remainder of the repair costs must be assessed pro rata on all property assessed for benefits.<sup>438</sup>

If there is not enough money in the drainage system account to make a repair, the board must assess the costs of the repairs on all property and entities that have been assessed benefits for the drainage system.<sup>439</sup> The assessment order specifies the number of annual installments; however, if the assessments are not more than 50 percent of the original cost of the drainage system, the installments may not exceed 10.<sup>440</sup> If the assessments are greater than 50 percent of the original cost of the drainage system, the board may order the assessments to be paid in 15 or less installments.<sup>441</sup>

If the order provides for payment in installments, interest on unpaid assessments from the date of the order for assessments must be set by the board in the order at a rate not exceeding 7 percent per year and must be collected with each installment.<sup>442</sup>

If the assessment is not payable in installments, a lien does not need to be filed, and the assessment, plus interest from the date of the order to August 15 of the next calendar year, must be entered on the tax lists for the year.<sup>443</sup> The assessment and interest are due and payable with and as a part of the real estate taxes for the year.<sup>444</sup>

If an assessment is levied and payable in installments, the auditor shall file for the record in the county recorder's office a drainage lien statement.<sup>445</sup> The assessments have the legal effect of drainage liens and may be paid and enforced as drainage liens.<sup>446</sup>

## 10. Responsibility for Maintenance of Bridges and Culverts

Public highway bridges and culverts constructed on a drainage system established on or after March 25, 1947, must be maintained by the road authority responsible for maintenance of the road.<sup>447</sup>

If a drainage system has had a redetermination of benefits completed, the drainage authority may repair or rebuild existing bridges or culverts on town and home rule charter and statutory city roads constructed as part of the drainage system and may pay for those repair costs as a repair to the drainage system.<sup>448</sup>

Private bridges or culverts constructed as a part of a drainage system established by proceedings that began on or after March 25, 1947, must be maintained by the drainage authority as part of maintaining the drainage system.<sup>449</sup> For private bridges or culverts constructed as part of a drainage system established by proceedings that began before March 25, 1947, the drainage authority may, but is not required, to maintain, repair, or rebuild them and any portion of those costs may be paid for as part of the drainage system maintenance.<sup>450</sup>

## 11. Replacement of Bridges and Culverts as Part of Repair

If the engineer in a drainage system repair proceeding determines that a bridge constructed or replaced or culvert installed or replaced as part of a drainage system provides inadequate hydraulic capacity for the efficient operation of the drainage system to serve its original purpose, the engineer must make a hydraulic capacity report to the drainage authority.<sup>451</sup> The report must contain plans and specifications for the recommended replacement of bridges or culverts, the necessary details to make and award a contract, and the estimated cost.<sup>452</sup>

When the hydraulic capacity report is filed, the auditor or watershed district secretary must promptly notify the drainage authority. The drainage authority, in consultation with the auditor or watershed district secretary, must, by order, set a time not more than 30 days after the date of the order, for a hearing on the report.<sup>453</sup> **An example Order for Hearing on Hydraulic Report is found in Template O.**

At least ten days before the hearing, the auditor or watershed district secretary shall give notice by mail of the time and location of the hearing to the petitioners, owners of property, and political subdivisions likely to be affected by the repair proposed in the repair report.<sup>454</sup> The notice may be given in conjunction with and as a part of the repair report notice, but the notice must specifically state that increasing the hydraulic capacity will be considered by the drainage authority at the hearing.<sup>455</sup> **An example Notice of Hearing on Hydraulic Report is found in Template P.**

At the hearing on the hydraulic capacity report, the drainage authority must hear all interested parties.<sup>456</sup> To order that the hydraulic capacity be increased by constructing bridges or installing culverts of a sufficient capacity, the drainage authority must adopt findings that the existing bridges and culverts provide insufficient hydraulic capacity for the efficient operation of the drainage system as originally constructed or subsequently improved.<sup>457</sup> The order must include the type and plans for the replacement bridges or culverts and must direct the state, political subdivision, railroad company, or other entity to construct bridges or culverts required by the order for its road or right-of-way within a reasonable time stated in the order.<sup>458</sup> The auditor or watershed district secretary must notify the state, political subdivision, railroad company, or other entity to construct the bridges and culverts in accordance with the order.<sup>459</sup> **An example of Findings and Order Directing Construction of Bridges and Culverts is found in Template Q.**

If the work ordered is not done within the time specified by the drainage authority, the drainage authority may order the bridges and culverts built and the cost collected as an assessment for benefits.<sup>460</sup>

Highway bridges and culverts that are constructed on a drainage system established on or after March 25, 1947, must be maintained by the road authority charged with the duty of maintenance.<sup>461</sup>

In any repair proceeding, if the drainage authority finds that constructing a private road is more cost-effective or practical than constructing a bridge or culvert, the drainage authority may order a private road to be constructed instead of a bridge or culvert.<sup>462</sup> The private road must be maintained the same as a bridge or culvert across the public drainage system, but may not have a right-of-way greater than 33 feet.<sup>463</sup>

In any repair proceeding, if the drainage authority finds that repairs to a private bridge or culvert are more expensive than compensation to landowners for permanent removal of the bridge or culvert, the

drainage authority may order an amount of compensation to be paid to all landowners directly benefiting from the bridge or culvert, provided that:

1. written consent is obtained from all landowners directly benefiting from the bridge or culvert for its permanent removal;
2. all landowners directly benefiting from the bridge or culvert agree in writing to permanently waive any right to repair or reconstruction of the bridge or culvert; and
3. the compensation and cost of removing the bridge or culvert is less than the cost of repair of the bridge or culvert.<sup>464</sup>

## 12. Apportionment of Repair Costs for Joint County Drainage System

In the case of joint county drainage systems, where minor repairs have been made and paid for out of county revenue, there is to be a balancing of accounts annually.<sup>465</sup> The county auditor whose county has paid for certain repairs from drainage system funds will submit a repair cost statement to the other county or counties that shows the nature and cost of the repairs to the drainage system and must be based on the original apportionment of cost between the counties following the establishment of the drainage system.<sup>466</sup> The other county board(s) then review the costs statement and, if the repairs are approved, pay the amount stated.<sup>467</sup>

In the case of a disagreement amongst the counties as to apportionment of repair costs amongst the counties, the matter is submitted to the joint drainage authority for review.<sup>468</sup> If a county does not pay the amount of the repair cost statement, the board of an affected county may petition the joint drainage authority.<sup>469</sup> The petition must accomplish the following:

1. show the nature and necessity of the repairs made to the drainage system in the county during the period;
2. show the cost of the repairs; and
3. request the drainage authority to apportion the costs, by order, among the affected counties.<sup>470</sup>

When the petition is filed, the drainage authority shall set a time and location for a hearing to apportion costs by order and direct the auditor to give notice of the hearing to each affected county by publication and notice by mail to its auditor.<sup>471</sup>

At or prior to the hearing, the auditor of each non-petitioning county must file with the drainage authority a statement that shows the following:

1. all repairs made to the drainage system in that county, not previously reimbursed;
2. the nature and necessity of the repairs; and
3. the cost of the repairs.<sup>472</sup>

At the hearing, the drainage authority must hear all interested parties.<sup>473</sup> After the public hearing, the drainage authority must determine which repairs were necessary and reasonable and proper costs.<sup>474</sup> For the allowed repairs, the drainage authority must balance the accounts among the affected counties by charging each county with its proportionate share of the cost of all repairs made and crediting each county with the amount paid for the repairs.<sup>475</sup> A certified copy of the order must be filed by the auditor with the auditors of affected counties, and the boards shall make the required reimbursement.<sup>476</sup>

### 13. Repair Fund Accounts

The drainage authority is authorized to create a repair fund for each drainage system which is to be used only for repairs.<sup>477</sup> The drainage authority may apportion and assess an amount against all property and entities assessed for benefits in proceedings for establishment of a drainage system, including property not originally assessed and subsequently found to be benefiting according to law.<sup>478</sup> The fund may not, however, exceed 20 percent of the assessed benefits of the drainage system or \$100,000, whichever is greater.<sup>479</sup> As always, assessments are made pro rata according to the previously determined benefits.<sup>480</sup>

**An example of an order assessing benefits for the repair fund is found in [Template R](#).**

If the assessments for a repair fund are ordered by the drainage authority, the auditor must file a tabular statement with the county recorder and assessments are collected as assessments for the establishment of a new drainage system.<sup>481</sup>

**An example of a tabular statement is found in [Template S](#).**

#### FOOTNOTES

<sup>347</sup> See *Fischer v. Town of Albin*, 104 N.W.2d 32, 34 (Minn. 1960); *Oelke v. Faribault Cnty.*, 70 N.W.2d 853, 860 (Minn. 1955); *In re Petition of Jacobson*, 48 N.W.2d 441, 444 (Minn. 1951); *Lupkes v. Town of Clifton*, 196 N.W. 666, 668-69 (Minn.1924).

<sup>348</sup> See *Fischer v. Town of Albin*, 104 N.W.2d 32, 34 (Minn. 1960); *Oelke v. Faribault Cnty.*, 70 N.W.2d 853, 860 (Minn. 1955); *In re Petition of Jacobson*, 48 N.W.2d 441, 444 (Minn. 1951); *Lupkes v. Town of Clifton*, 196 N.W. 666, 668-69 (Minn.1924).

<sup>349</sup> Minn. Stat. § 103E.705, subd. 1 (2015).

<sup>350</sup> See *Slama v. Pine Cnty.*, 2008 WL 1972914 at \*3 (Minn. Ct. App. May 6, 2008) (citing Minn. Stat. ¶ 103E.015, subd. 2 (2006)).

<sup>351</sup> Minn. Stat. § 103E.705, subd. 1 (2015).

<sup>352</sup> Minn. Stat. § 103E.705, subd. 5 (2015).

<sup>353</sup> See Minn. Stat. § 103E.715, subd. 1 (2015).

<sup>354</sup> See Minn. Stat. § 103E.705, subd. 3 (2015).

<sup>355</sup> Minn. Stat. § 103E.701, subd. 1 (2015).

<sup>356</sup> See, e.g., *Taylor v. Sherburne Cnty.*, 67 N.W.2d 827, 830 (Minn. 1954) (holding that where the “work subsequently performed under the [drainage authority’s] order did not change or alter the ditch channel or damage lands not compensated for at the time the original plan therefore was authorized” was merely a repair of the ditch to the original design, and not an improvement), overruled by *Petition of Zimmer*, 359 N.W.2d 266, 271–272 (Minn. 1984).

<sup>357</sup> Minn. Stat. § 103E.701, subd. 1 (2015); See *Petition of Zimmer*, 359 N.W.2d 266, 271–272 (Minn. 1984).

<sup>358</sup> Minn. Stat. § 103E.701, subd. 1 (2015).

<sup>359</sup> Minn. Stat. § 103E.015, subd. 2 (2015); see also *Slama v. Pine Cnty.*, 2008 WL 1972914 at \*3 (Minn. Ct. App. May 6, 2008).

<sup>360</sup> Minn. Stat. § 103E.705, subd. 1 (2015).

<sup>361</sup> Minn. Stat. § 103E.705, subd. 2(a) (2015).

<sup>362</sup> See Minn. Stat. § 103E.705, subd. 1 (2015).

<sup>363</sup> See Minn. Stat. § 103E.705, subd. 1 (2015).

<sup>364</sup> Minn. Stat. § 103E.705, subd. 5 (2015).

<sup>365</sup> Minn. Stat. § 103E.021, subd. 1 (2015).

<sup>366</sup> Minn. Stat. § 103E.021, subd. 1 (2015).

<sup>367</sup> Minn. Stat. § 103E.021, subd. 1 (2015).

<sup>368</sup> See Minn. Stat. § 103E.021, subd. 1 (2015) (width of permanent perennial vegetation limited to one rod if established through redetermination of benefits); Minn. Stat. § 103E.021, subd. 6(a) (2015) (width of permanent perennial vegetation limited to one rod if established through drainage authority’s permissive incremental implementation of vegetated ditch buffer strips and side inlet controls).

<sup>369</sup> See Minn. Stat. § 103E.021, subd. 1 & subd. 6(a) (2015)

<sup>370</sup> Minn. Stat. §§ 103E.021, subd. 1 (2015) & 103E.315, subd. 8(1) (2015).  
<sup>371</sup> See Minn. Stat. §§ 103E.215, subd. 5 (2015) & 103E.305, subd. 1 (2015).  
<sup>372</sup> See Minn. Stat. § 103E.325, subd. 3 (2015).  
<sup>373</sup> Minn. Stat. § 103E.021, subd. 3 (2015).  
<sup>374</sup> Minn. Stat. § 103E.021, subd. 2 (2015).  
<sup>375</sup> Minn. Stat. § 103E.021, subd. 2 (2015).  
<sup>376</sup> Minn. Stat. § 103E.021, subd. 6(a) (2015).  
<sup>377</sup> Minn. Stat. § 103E.021, subd. 6(b) (2015).  
<sup>378</sup> Minn. Stat. § 103E.021, subd. 6(b) (2015).  
<sup>379</sup> Minn. Stat. § 103E.021, subd. 6(c) (2015).  
<sup>380</sup> Minn. Stat. § 103E.021, subd. 6(c) (2015).  
<sup>381</sup> See Minn. Stat. §§ 103E.021, subd. 6(c) and 103E.323, subd. 1(1)(2)(6)(7) & (8) (2015).  
<sup>382</sup> Minn. Stat. § 103E.021, subd. 6(d) (2015).  
<sup>383</sup> Minn. Stat. § 103E.021, subd. 6(c) (2015).  
<sup>384</sup> Minn. Stat. § 103E.021, subd. 6(d) (2015).  
<sup>385</sup> Minn. Stat. § 103E.021, subd. 6(e) (2015).  
<sup>386</sup> Minn. Stat. § 103E.705, subd. 2 (2015).  
<sup>387</sup> Minn. Stat. § 103E.705, subd. 2(a) (2015).  
<sup>388</sup> Minn. Stat. § 103E.021, subd. 4 (2015).  
<sup>389</sup> Minn. Stat. § 103E.705, subd. 2(b) (2015).  
<sup>390</sup> Minn. Stat. § 103E.021, subd. 4 (2015).  
<sup>391</sup> Minn. Stat. § 103E.021, subd. 4 (2015).  
<sup>392</sup> Minn. Stat. § 103E.021, subd. 5(a) (2015).  
<sup>393</sup> Minn. Stat. § 103E.021, subd. 5(a) (2015).  
<sup>394</sup> Minn. Stat. § 103E.021, subd. 5(a) (2015).  
<sup>395</sup> Minn. Stat. § 103E.021, subd. 5(a) (2015).  
<sup>396</sup> Minn. Stat. § 103E.021, subd. 5(a) (2015).  
<sup>397</sup> Minn. Stat. § 103E.021, subd. 5(b) (2015).  
<sup>398</sup> Minn. Stat. § 103E.705, subd. 3 (2015).  
<sup>399</sup> Minn. Stat. § 103E.705, subd. 3 (2015).  
<sup>400</sup> Minn. Stat. § 103E.705, subd. 5 (2015).  
<sup>401</sup> Minn. Stat. § 103E.705, subd. 6 (2015).  
<sup>402</sup> Minn. Stat. § 103E.705, subd. 6 (2015).  
<sup>403</sup> Minn. Stat. § 103E.705, subd. 7 (2015).  
<sup>404</sup> Minn. Stat. § 103E.715, subd. 1 (2015).  
<sup>405</sup> Minn. Stat. § 103E.715, subd. 1 (2015).  
<sup>406</sup> See Minn. Stat. § 103E.715, subd. 1 (2015).  
<sup>407</sup> Minn. Stat. § 103E.715, subd. 1 (2015).  
<sup>408</sup> See Minn. Stat. § 103D.625, subds. 3 & 4 (2015).  
<sup>409</sup> Minn. Stat. § 103D.625, subd. 3 (2015).  
<sup>410</sup> Minn. Stat. § 103E.715, subd. 2 (2015).  
<sup>411</sup> Minn. Stat. § 103E.715, subd. 2 (2015).  
<sup>412</sup> Minn. Stat. § 103E.715, subd. 2 (2015).  
<sup>413</sup> Minn. Stat. § 103E.715, subd. 2 (2015).  
<sup>414</sup> Minn. Stat. § 103E.741, subd. 1 (2015).  
<sup>415</sup> Minn. Stat. § 103E.741, subd. 2 (2015).  
<sup>416</sup> Minn. Stat. § 103E.741, subd. 2 (2015).  
<sup>417</sup> Minn. Stat. § 103E.741, subd. 2 (2015).  
<sup>418</sup> See Minn. Stat. §§ 103E.741, subd. 2 & 103E.331 (2015).  
<sup>419</sup> Minn. Stat. § 103E.741, subd. 3 (2015).

<sup>420</sup> Minn. Stat. § 103E.741, subd. 5 (2015).

<sup>421</sup> Minn. Stat. § 103E.741, subd. 5 (2015).

<sup>422</sup> Minn. Stat. § 103E.401, subds. 2 & 6 (2015).

<sup>423</sup> Minn. Stat. § 103E.715, subd. 3 (2015).

<sup>424</sup> Minn. Stat. § 103E.715, subd. 3 (2015).

<sup>425</sup> Minn. Stat. § 103E.741, subd. 1 (2015).

<sup>426</sup> Minn. Stat. § 103E.715, subd. 4(a)(2) (2015).

<sup>427</sup> Minn. Stat. § 103E.715, subd. 4(a)(1) (2015).

<sup>428</sup> Compare Minn. Stat. § 103E.715, subd. 4(a)(1), with Minn. Stat. § 103E.715, subd. 4(a)(2) (2015); *Zaluckyj v. Rice Creek Watershed Dist.*, 639 N.W.2d 70, 76 (Minn. Ct. App. 2002).

<sup>429</sup> Minn. Stat. § 103E.701, subd. 2 (2015).

<sup>430</sup> Minn. Stat. § 103E.701, subd. 2 (2015).

<sup>431</sup> Minn. Stat. § 103E.701, subd. 2 (2015).

<sup>432</sup> Minn. Stat. § 103E.701, subd. 2 (2015).

<sup>433</sup> Minn. Stat. § 103E.725 (2015).

<sup>434</sup> Minn. Stat. § 103E.728, subd. 1 (2015).

<sup>435</sup> See *Fischer v. Town of Albin*, 104 N.W.2d 32, 34 (Minn. 1960) (citing *Petition of Jacobson*, 48 N.W.2d 441, 444 (Minn. 1951)).

<sup>436</sup> Minn. Stat. § 103E.728, subd. 2(a) (2015).

<sup>437</sup> Minn. Stat. § 103E.728, subd. 2(b) (2015).

<sup>438</sup> Minn. Stat. § 103E.728, subd. 2(c) (2015).

<sup>439</sup> Minn. Stat. § 103E.731, subd. 1 (2015).

<sup>440</sup> Minn. Stat. § 103E.731, subd. 2 (2015).

<sup>441</sup> Minn. Stat. § 103E.731, subd. 2 (2015).

<sup>442</sup> Minn. Stat. § 103E.731, subd. 3 (2015).

<sup>443</sup> Minn. Stat. § 103E.731, subd. 4 (2015).

<sup>444</sup> Minn. Stat. § 103E.731, subd. 4 (2015).

<sup>445</sup> Minn. Stat. § 103E.731, subd. 4 (2015).

<sup>446</sup> Minn. Stat. § 103E.731, subd. 4 (2015).

<sup>447</sup> Minn. Stat. §§ 103E.701, subd. 4(a) and 103E.525, subd. 2 (2015).

<sup>448</sup> Minn. Stat. § 103E.701, subd. 4(c) (2015).

<sup>449</sup> Minn. Stat. § 103E.701, subd. 4(b) (2015).

<sup>450</sup> Minn. Stat. § 103E.702, subd. 4(b) (2015).

<sup>451</sup> Minn. Stat. § 103E.721, subd. 1 (2015).

<sup>452</sup> Minn. Stat. § 103E.721, subd. 1 (2015).

<sup>453</sup> Minn. Stat. § 103E.721, subd. 2 (2015).

<sup>454</sup> Minn. Stat. § 103E.721, subd. 2 (2015).

<sup>455</sup> Minn. Stat. § 103E.721, subd. 2 (2015).

<sup>456</sup> Minn. Stat. § 103E.721, subd. 3 (2015).

<sup>457</sup> Minn. Stat. § 103E.721, subd. 3 (2015).

<sup>458</sup> Minn. Stat. § 103E.721, subd. 3 (2015).

<sup>459</sup> Minn. Stat. §§ 103E.721, subd. 3 & 103E.525, subd. 3 (2015).

<sup>460</sup> Minn. Stat. §§ 103E.721, subd. 4 & 103E.525, subd. 3 (2015). If the costs are assessed pursuant to the procedures in Minn. Stat. § 103E.525, subd. 3, the road authority would be entitled to damages for the cost of construction. See *In re Matter of Red Lake Watershed Project #119*, 1997 WL 881169, at \*2 (Minn. Ct. App. May 5, 1997) (citing *In re Dreosch*, 46 N.W.2d 464 (Minn. 1951)).

<sup>461</sup> Minn. Stat. § 103E.701, subd. 4(a) (2015).

<sup>462</sup> Minn. Stat. §§ 103E.701, subd. 5 and 103E.526 (2015).

<sup>463</sup> Minn. Stat. § 103E.526 (2015).

<sup>464</sup> Minn. Stat. § 103E.701, subd. 5a (2015).

<sup>465</sup> See Minn. Stat. § 103E.711, subd. 1 (2015).

<sup>466</sup> Minn. Stat. § 103E.711, subd. 1 (2015).

<sup>467</sup> Minn. Stat. § 103E.711, subd. 1 (2015).

<sup>468</sup> See Minn. Stat. § 103E.711, subd. 2 (2015).

<sup>469</sup> Minn. Stat. § 103E.711, subd. 2(a) (2015).

<sup>470</sup> Minn. Stat. § 103E.711, subd. 2(a) (2015).  
<sup>471</sup> Minn. Stat. § 103E.711, subd. 2(b) (2015).  
<sup>472</sup> Minn. Stat. § 103E.711, subd. 2(b) (2015).  
<sup>473</sup> Minn. Stat. § 103E.711, subd. 2(c) (2015).  
<sup>474</sup> Minn. Stat. § 103E.711, subd. 2(c) (2015).  
<sup>475</sup> Minn. Stat. § 103E.711, subd. 2(c) (2015).  
<sup>476</sup> Minn. Stat. § 103E.711, subd. 2(c) (2015).  
<sup>477</sup> Minn. Stat. § 103E.735, subd. 1 (2015).  
<sup>478</sup> Minn. Stat. § 103E.735, subd. 1 (2015).  
<sup>479</sup> Minn. Stat. § 103E.735, subd. 1 (2015).  
<sup>480</sup> Minn. Stat. § 103E.735, subd. 1 (2015).  
<sup>481</sup> Minn. Stat. § 103E.735, subd. 1 (2015).

## H. Reestablishment of Drainage System Records

Lost, destroyed, incomplete, or missing drainage system records pose a challenge to the drainage authority's obligation to keep a public drainage system in repair. Therefore, the public drainage code provides a procedure by which public drainage system records can be reestablished.<sup>482</sup>

If a thorough investigation of drainage system records reveals that the records establishing the alignment, cross-section, profile, or right-of-way of a drainage system are lost, destroyed, or otherwise incomplete, the drainage authority may, by order, reestablish records that define the alignment, cross-section, profile, hydraulic structure locations, materials, dimensions, and elevations or right-of-way of the drainage system as originally constructed or subsequently improved by following the procedures described in this paragraph.<sup>483</sup> These proceedings may be initiated by the drainage authority on its own motion or by any party affected by the drainage system filing a petition.<sup>484</sup>

**A sample Petition for the Reestablishment of Drainage System Records is found in [Template T](#).**

**A sample Findings and Order Initiating the Reestablishment of Drainage System Records is found in [Template U](#).**

If the system is under the jurisdiction of a county board, the petition must be filed with the auditor.<sup>485</sup> If the system is under the jurisdiction of a joint county drainage authority, the petition must be filed with the auditor of the county with the largest area of property in the drainage system.<sup>486</sup> If the system is under the jurisdiction of a watershed district board, the petition must be filed with the secretary.<sup>487</sup>

Once the drainage authority has ordered the initiation of the procedures to reestablish drainage system records, an engineer must be appointed to investigate the drainage system and prepare a report of findings supported by existing records and evidence, including, but not limited to, applicable aerial photographs, soil borings or test pits, culvert dimensions and invert elevations, and bridge design records.<sup>488</sup> The existing and reestablished records together must define the alignment; cross-section; profile; hydraulic structure locations, materials, dimensions, and elevations; and right-of-way of the drainage system.<sup>489</sup>

After the engineer's report is complete, the drainage authority, in consultation with the auditor or secretary, shall set a time and location for a hearing on the report.<sup>490</sup> The auditor or secretary must give notice of the hearing by mail to the Commissioner of the Department of Natural Resources, the Executive Director of the Board of Water and Soil Resources, the petitioner or petitioners, and all property owners benefited or damaged by the drainage system.<sup>491</sup> The auditor or secretary shall also

publish notice in a newspaper of general circulation in the drainage system area or by publication on a web site of the drainage authority.<sup>492</sup> **A sample Notice of Hearing on Engineer’s Report to Reestablish Drainage System Records is found in [Template V](#).**

At the hearing, the drainage authority, after presenting the engineer’s report, should hear all interested parties. After the hearing, the drainage authority makes a finding of drainage system’s alignment, cross-section, profile, or right-of-way in its final order. **A sample Order Reestablishing Drainage System Records is found in [Template W](#).**

Drainage system records reestablished under these proceedings constitute official drainage system records.<sup>493</sup> A finding of drainage system right-of-way in the applicable order is a defense to a trespass claim and shall be given due weight in any subsequent court proceeding to establish the existence or nature of a property encumbrance.<sup>494</sup>

#### FOOTNOTES

<sup>482</sup> See Minn. Stat. § 103E.101, subd. 4a (2015).

<sup>483</sup> See Minn. Stat. § 103E.101, subd. 4a(a) (2015).

<sup>484</sup> Minn. Stat. § 103E.101, subd. 4a(b) (2015).

<sup>485</sup> Minn. Stat. § 103E.101, subd. 4a(b) (2015).

<sup>486</sup> Minn. Stat. § 103E.101, subd. 4a(b) (2015).

<sup>487</sup> Minn. Stat. § 103E.101, subd. 4a(b) (2015).

<sup>488</sup> Minn. Stat. § 103E.101, subd. 4a(a) (2015).

<sup>489</sup> Minn. Stat. § 103E.101, subd. 4a(a) (2015).

<sup>490</sup> Minn. Stat. § 103E.101, subd. 4a(c) (2015).

<sup>491</sup> Minn. Stat. § 103E.101, subd. 4a(c) (2015).

<sup>492</sup> Minn. Stat. § 103E.101, subd. 4a(c) (2015).

<sup>493</sup> Minn. Stat. § 103E.101, subd. 4a(d) (2015).

<sup>494</sup> Minn. Stat. § 103E.101, subd. 4a(d) (2015).

## I. Redetermination of Benefits and Damages

It is important to understand the several situations in which commencing a redetermination of benefits is important to the management and repair of existing drainage systems and to the establishment and construction of other drainage projects.

First, the most frequently urged and most compelling reason for a redetermination of benefits is that there are lands draining into the system which are not assessed for benefits. Many of the state’s drainage systems were established before 1920 when excavation was done with horse power and tile trenches were dug by hand. Viewers in those days presumably considered benefitted lands in that light. Now that technology has advanced to the use of “one pass” tiling machines, that lay plastic tile on grade with the use of laser devices, landowners have the ability to drain lands that were once thought to be out of reach of the system. Further, landowners frequently system-tile lands which were, at the time of the original establishment of the system, not considered in need of drainage. Indeed, the side-hills of agricultural properties often benefit from system tiling. For these reasons, it is exceedingly common to find unassessed lands draining into a public drainage system.

Unassessed lands can be brought into the system when an improvement or repair petition proceeding is commenced.<sup>495</sup> Doing so, however, is a patch-work remedy as the engineer or viewers may not be specifically reviewing the entire drainage system. Where there are significant unassessed lands draining into a system, a far more equitable approach is to redetermine benefits for the whole system.

Second, benefits determined many years ago, when land was selling for a small fraction of what it is selling for today in terms of today's dollar, are wholly unrealistic. That fact, in and of itself, may not be a problem unless and until there is a proposal for a major repair or a drainage project that requires a cost-benefit analysis in the assessment.

Third, when an existing system has undergone a regular improvement of less than all of the system, there is a layering of benefits. That is, those lands that are benefitted by the improvement have two sets of benefits, those of the original establishment and those of the improvement. That becomes a problem when the system is assessed for repairs. Those having two layers of benefits will pay an unfair proportion of the repair assessments. County auditors sometimes devise ways of dealing with the situation. An example of this is when the improvement is for a supplemental drain tile and the repairs are to an open channel. The auditor assesses the repairs only to the benefits related to the open ditch portion of the system. Although this seems like an equitable solution, it is not one that is expressly described in the drainage code. The drainage code on apportionment of repair costs simply states: "The cost of repairing a drainage system shall be apportioned pro rata on all property and entities that have been assessed benefits for the drainage system except as provided in this section."<sup>496</sup> There is no stated exceptions for "layered" benefits. A solution to this uncertainty is to do a redetermination of benefits after there has been an "improvement" established on a separable portion of the drainage system.

Fourth, in the case of a repair by petition, additional lands may be brought into the system that have not previously been assessed benefits.<sup>497</sup> However, this too is a patch-work approach as the newly assessed lands are going to be assessed for benefits at current land values. Other lands in the system may have been assessed for benefits at land values determined many years ago. There is no equity in that. A fairer approach is to redetermine benefits and damages on the whole system. The drainage authority may order the redetermination to be done at the same time as the improvement or repair proceedings, and the time and place of the hearings on the two separate proceedings can be combined for efficiency.

Prior to 1987, the versions of [Minn. Stat. § 103E.351](#) spoke only in terms of the redetermination of benefits.<sup>498</sup> In 1987, the legislature amended the drainage code throughout the public drainage code so that it now speaks of the redetermination of benefits *and damages*.<sup>499</sup> The legislative intent in making this amendment is obscure. There are no reported appellate cases on the subject. Hopefully, it was not the intention of the drainage code to require the system to pay for damages long ago determined and paid for at values then prevailing. The majority of damages paid, in the case of an open system, is for the right-of-way occupied by the trench and later by the grass strips. Once the right-of-way has been acquired and paid for by the system, it is difficult to understand why a landowner should have a right to be paid for it again simply because land values have risen. What if land values go down - does the system get a refund? A more reasonable interpretation of the statutory amendment is an intention to pay the landowner for damages incurred since the original establishment which have yet to be paid. As described further in this section, however, even that theory presents problems.

### 1. Initiating a Redetermination of Benefits and Damages

The drainage code does not provide a procedure for landowners to petition the drainage authority for a redetermination of benefits.<sup>500</sup> There is an informal practice wherein the drainage authority is sometimes "petitioned" for a redetermination of benefits and damages which the Minnesota Court of Appeals has, at least once, not questioned as a viable drainage proceeding.<sup>501</sup>

Otherwise, under the public drainage code, the drainage authority may undertake to redetermine benefits and damages whenever, in its judgment, it determines that the original benefits and damages determined in the drainage proceeding do not reflect reasonable present day values or that the benefitted or damaged areas have changed.<sup>502</sup> 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.<sup>503</sup>

The drainage authority may also undertake to redetermine benefits and damages if more than 50 percent of the owners of the property benefitted or damaged by a drainage proceeding petition for the correction of an error that was made at the time of the proceedings that established the system.<sup>504</sup>

**A sample Findings and Order Initiating a Redetermination of Benefits is found in [Template X](#).**

Once the drainage authority has made the initiating determination or a petition for redetermination has been filed, the drainage authority appoints three viewers to redetermine and report the benefits and damages and the benefitted and damaged areas.<sup>505</sup> For a detailed description on appointing viewers, see **Chapter 4, Section III**.

## 2. Legal Procedures

Once appointed, viewers proceed to determine the benefits and damages to all property affected by the drainage system and make a viewers' report as they would in any other proceeding for a new drainage project.<sup>506</sup>

The viewers' report is presented by filing of same with the county auditor of each affected county.<sup>507</sup> If the drainage authority is a watershed district, a copy should also be filed with the watershed district secretary. A property owners' report must then be prepared by the auditor from the viewers' report and a copy of the property owners' report is mailed to each owner of property affected by the drainage system.<sup>508</sup> The drainage code specifically refers to these as duties of the auditor; however, if the drainage authority is a watershed district, the watershed district secretary should coordinate with the auditor to ensure that property owners' reports are prepared and mailed.

The drainage authority then holds a hearing on the report. The hearing is to resemble the final hearing in an ordinary proceeding for the establishment of a new drainage system with one exception - the hearing is to be held within 30 days after the property owners' report is mailed, as opposed to 25 to 50 days after the date of the final hearing notice in a new drainage system proceeding.<sup>509</sup> **A sample Findings and Order Confirming Redetermined Benefits and Damages is found in [Template Y](#).**

An aggrieved person may appeal the redetermination of benefits and damages order in the same way that one would appeal an order establishing benefits and damages.<sup>510</sup>

Once the drainage authority has made its order redetermining benefits and damages, and all appeals are complete, the redetermined benefits completely supplant all previously determined benefits.<sup>511</sup> The same statement can probably not be made with respect to damages. If damages are determined in the redetermination process, they should be thought of as supplemental to damages previously determined and paid for, not in substitution thereof.

### 3. Assessing Costs for Redetermination of Benefits and Damages

The redetermining benefits and damages proceeding does not end in an assessment against the drainage system. However, there are costs incurred by the drainage authority in appointing viewers, preparing the property owners' report and noticing the public hearing. The drainage code does not directly address how the cost of conducting a redetermination of benefits is paid for. Consequently, it may be prudent for the drainage authority to ensure there are adequate funds in the drainage system repair fund account to cover the costs of the redetermination. Alternatively, an assessment compliant with the repair fund requirements may be levied to cover the costs of conducting the redetermination of benefits and damages.

#### FOOTNOTES

<sup>495</sup> See Minn. Stat. §§ 103E.215, subd. 5 (2015) & 103E.741 (2015).

<sup>496</sup> Minn. Stat. § 103E.728, subd. 1 (2015).

<sup>497</sup> See Minn. Stat. § 103E.741 (2015); see also [Paragraph G\(6\) of this Section](#).

<sup>498</sup> See, e.g., Minn. Stat. § 106A.351, subd. 1 (1986) (noting that reference to damages is not part of the redetermination of benefits statute in 1986: "If the drainage authority determines that the original benefits determined in a drainage proceeding do not reflect reasonable present day land values or that the benefited areas have changed or, if more than 50 percent of the property owners benefited by a drainage system petition for correction of an error that was made at the time of the proceedings that established the drainage system, the drainage authority may appoint three viewers to redetermine and report the benefits and the benefited areas.").

<sup>499</sup> 1987 Minn. Laws, ch. 239, § 83.

<sup>500</sup> See Minn. Stat. § 103E.351, subd. 1 (2015) ("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, or if more than 50 percent of the owners of property benefited or damaged by a drainage system petition for correction of an error that was made at the time of the proceedings that established the drainage system, the drainage authority may appoint three viewers to redetermine and report the benefits and damages and the benefited and damaged areas.").

<sup>501</sup> See *In re Redetermination of Benefits of Nicollet Cnty. Ditch 86A*, 488 N.W. 2d 482 (Minn. Ct. App. 1992).

<sup>502</sup> Minn. Stat. § 103E.351, subd. 1 (2015).

<sup>503</sup> See *In re Bd. of Managers of Bois de Sioux Watershed Dist.*, 818 N.W.2d 583, 587 (Minn. Ct. App. 2012) (holding that the absence of collective action by the board of a watershed district-drainage authority evidencing that a determination has been made that the original benefits and damages determined in the drainage proceeding do not reflect reasonable present day values or that the benefitted or damaged areas have changed means that the requisite determination had not been made).

<sup>504</sup> Minn. Stat. § 103E.351, subd. 1 (2015).

<sup>505</sup> Minn. Stat. § 103E.351, subd. 1 (2015).

<sup>506</sup> Minn. Stat. § 103E.351, subd. 2(a) (2015).

<sup>507</sup> Minn. Stat. § 103E.321, subd. 4 (2015).

<sup>508</sup> Minn. Stat. § 103E.351, subd. 2(b) (2015).

<sup>509</sup> See Minn. Stat. § 103E.351, subd. 2(c) (2015).

<sup>510</sup> Minn. Stat. § 103E.351, subd. 4 (2015).

<sup>511</sup> Minn. Stat. § 103E.351, subd. 3 (2015).

### J. Use of the Drainage System As Outlet

An order establishing a public drainage system is, legally, a judgment "in rem" or an adjudication of the status rights of property; additionally, the persons who are assessed for the benefits of the drainage system equally own that property right in common.<sup>512</sup> In that respect, a public drainage system is not like a road. Roads are built with public funds and may be used by anyone. Public drainage systems are, in effect, built with private funds. Public drainage systems are private property, not public property. Public

drainage systems are said to be public only because the legislature has vested in the counties and watershed districts the ability to tax, to exercise the police power, and to use the eminent domain powers for the public good, i.e., the drainage of lands to render them suitable for agricultural production or other uses. A drainage system is a special kind of property not wholly comparable with any other but, like any other property right, it is subject to reasonable regulation.

Once one understands that drainage systems are private property, then it becomes easy to understand that one may not use that property without obtaining consent and paying for the privilege. That is what is involved in the proceeding contemplated by [Minn. Stat. § 103E.401](#) and [103E.411](#).

### 1. Petition to Use Established Drainage System as Outlet

After the construction of a drainage project, neither a public drainage system nor a private drainage system that drains property which is not assessed for benefits for the established drainage system may be constructed to use the drainage system as an outlet without first obtaining express authority from the drainage authority having jurisdiction over the system to be used as an outlet.<sup>513</sup>

A person or petitioners of a proposed public drainage project seeking authority to use an established drainage system as an outlet for drainage of unassessed lands must petition the drainage authority for permission to use the existing drainage system as an outlet.<sup>514</sup> No bond is required. **A sample Petition to Use Drainage System as Outlet is found in [Template Z](#).**

If authority is being sought to outlet lands benefited by a proposed lateral or proposed new drainage system, caution should be exercised by the petitioners to obtain authority to use the existing system as an outlet before constructing the proposed drainage project. There are several reasons for this. First, an amount will be set as an outlet fee which is a cost of the proposed drainage project and assessed against land benefited by the proposed drainage project.<sup>515</sup> The outlet fee may impact the cost-benefit analysis necessary to order the establishment of the proposed drainage project. Second, it is fundamental that a lateral cannot be established without an outlet; therefore, if the proposed lateral will drain lands not assessed for benefits by the existing drainage system outlet, authority to drain into the existing drainage system must be sought before the lateral is ordered to be established.

When the petition is filed, the drainage authority, in consultation with the auditor or watershed district secretary, shall set a time and location for a hearing on the petition.<sup>516</sup>

Notice by mail and notice by publication of the hearing on the petition must be given to all persons who are assessed on the system proposed to be used as an outlet.<sup>517</sup>

The drainage code states, “At the hearing the drainage authority shall consider the capacity of the outlet drainage system.”<sup>518</sup> The drainage code does not require that an engineer be appointed to review the capacity of the outlet drainage system, but the petitioners might consider obtaining one to provide support for their petition to the drainage authority.

If express authority is given to use the drainage system as an outlet, then the order of the drainage authority must:

1. State the terms and conditions for use of the established drainage system as an outlet;
2. Set the amount to be paid as an outlet fee;
3. Describe the property to be benefited by the drainage system; and

4. State the amount of benefits to the property for the outlet.<sup>519</sup>

If the petition is for drainage through a private drainage system, the private drainage system may not be constructed to use the established drainage system until the outlet fee set in the order is paid to the drainage system account.<sup>520</sup>

If the petition is for drainage through a proposed public drainage project, then the outlet fee is a part of the cost of the proposed drainage project and is to be paid by assessment against the property benefited by the proposed drainage project and credited to the drainage system account of the established outlet.<sup>521</sup>

The property benefited is liable for assessments levied after that time in the outlet drainage system, on the basis of the benefits as if the benefits had been determined in the order establishing the outlet drainage system.<sup>522</sup> That is, the tributary system is liable for assessments levied for the repair of the outlet system. The converse is not true, unless the tributary system is a lateral.<sup>523</sup>

## 2. Drainage System as Outlet for Municipality

A municipality may petition a drainage authority to use an existing drainage system as an outlet for its municipal drainage system or overflow from the system.<sup>524</sup> The petition of the municipality must:

1. Show the necessity for the use of the drainage system as an outlet;
2. Show that the use of the drainage system will be of public benefit and utility and promote the public health;
3. Be accompanied by a plat showing the location of the drainage system and the location of the municipal drainage system; and
4. Be accompanied by specifications showing the plan of connection from the municipal drainage system to the drainage system.<sup>525</sup>

One major difference between proceedings for a proposed private or public drainage project to use an existing drainage system as an outlet and that of a municipality is that approval of the Minnesota Pollution Control Agency is required before a municipality may use a public drainage system as an outlet.<sup>526</sup> Such approval should be obtained in writing and should accompany the petition for use of the drainage system as an outlet. The municipality's petition must be filed with the auditor or the secretary of the watershed district.<sup>527</sup>

If proceedings to establish the drainage system to be used as an outlet by the municipality are pending, then notice of the municipal drainage system petition must be included in the final hearing notice for the proposed drainage project.<sup>528</sup> The municipal drainage system petition must be presented to the drainage authority at the final hearing to consider the detailed survey report and viewers' report.<sup>529</sup>

If the drainage system to be used as an outlet is established, the drainage authority in consultation with the auditor or watershed secretary, shall, by order, set a time and place for hearing on the petition.

A sample Order Setting a Time and Place for Hearing on Petition of Municipality to Use Drainage System as an Outlet is found in **Template AA**. Notice of the hearing is given by publication, but mailed notice must be given only to the auditors of the counties affected.<sup>530</sup>

A sample Notice of Hearing on Petition of Municipality to Use Drainage System as an Outlet is found in **Template AB**

At the hearing, any interested party may give evidence for or against granting the petition.<sup>531</sup> In order to authorize the municipality to use the drainage system as an outlet, the drainage authority must determine:

1. That a necessity exists for the use of the drainage system as an outlet for the municipal drainage system or the overflow from the system;
2. That use of the drainage system will be of public utility and promote the public health; and
3. That the proposed connection conforms to the requirements of the Minnesota Pollution Control Agency and provides for the construction and use of proper disposal works.<sup>532</sup>

If the drainage authority grants authority to the municipality as an outlet, the drainage authority's order must:

1. Incorporate any conditions that are necessary and proper to protect the rights of the parties and safeguard the interests of the general public;<sup>533</sup>
2. Make the municipality a party to the drainage proceedings;<sup>534</sup>
3. Determine the benefits for using the drainage system as an outlet,<sup>535</sup> and
4. Determine the amount the municipality must pay for the privilege of using the drainage system as an outlet.<sup>536</sup>

The amount determined by the drainage authority to be paid for privilege of using the drainage system as an outlet must be paid to the affected counties and credited to the account of the drainage system used as an outlet.<sup>537</sup> This is similar to the outlet fee determined for private or public drainage systems petitioning to use an existing public drainage system as an outlet as described in **Section III, Paragraph J, Subparagraph 1.**

The municipality is liable for all subsequent liens and assessments for the repair and maintenance of the drainage system in proportion to the benefits, as though the benefits were determined in the order establishing the drainage system.<sup>538</sup>

### 3. Unauthorized Outlet into Drainage System

If the drainage authority is made aware that property not assessed for benefits from a drainage system is being drained into an existing public drainage system, then the drainage authority must notify the owner where the unauthorized outlet into the drainage system is located and direct the property owner to block the outlet or otherwise make the outlet ineffective by a specified time.<sup>539</sup> **A sample Notice of Unauthorized Outlet is found in Template AC.**

The outlet must be blocked and remain ineffective until the following conditions are met:

1. An outlet fee is paid, which is determined by the drainage authority based on the benefits received by the property for the period the unauthorized outlet was operational; and
2. The drainage authority approves a petition for the outlet and establishes the outlet fee.<sup>540</sup>

For a detailed description on how to petition to use an existing public drainage system as an outlet, see **Section III, Paragraph J, Subparagraph 1.**

If a property owner does not block or make the outlet ineffective after being notified, the drainage authority must issue an order to have the work performed to bring the outlet into compliance.<sup>541</sup> After the work is completed, the drainage authority must send a statement to the auditor of the county

where the property is located and to the property owner where the unauthorized outlet is located, containing the expenses incurred to bring the outlet into compliance and the outlet fee based on the benefits received by the property during the period the unauthorized outlet was operational.<sup>542</sup>

#### FOOTNOTES

<sup>512</sup> See *Fischer v. Town of Albin*, 104 N.W.2d 32, 34 (Minn. 1960); *Oelke v. Faribault Cnty.*, 70 N.W.2d 853, 860 (Minn. 1955); *In re Petition of Jacobson*, 48 N.W.2d 441, 444 (Minn. 1951); *Lupkes v. Town of Clifton*, 196 N.W. 666, 668-69 (Minn.1924).

<sup>513</sup> Minn. Stat. § 103E.401, subd. 2 (2015).

<sup>514</sup> Minn. Stat. § 103E.401, subd. 3 (2015).

<sup>515</sup> Minn. Stat. § 103E.401, subsd. 4 & 6 (2015).

<sup>516</sup> Minn. Stat. § 103E.401, subd. 3 (2015).

<sup>517</sup> Minn. Stat. § 103E.401, subd. 3 (2015).

<sup>518</sup> Minn. Stat. § 103E.401, subd. 4 (2015).

<sup>519</sup> Minn. Stat. § 103E.401, subd. 4 (2015).

<sup>520</sup> Minn. Stat. § 103E.401, subd. 5 (2015).

<sup>521</sup> Minn. Stat. § 103E.401, subd. 6 (2015).

<sup>522</sup> Minn. Stat. § 103E.401, subd. 4 (2015).

<sup>523</sup> A “drainage system” means “a system of ditch or tile, or both, to drain property, including laterals . . . . Minn. Stat. § 103E.005, subd. 12 (2015). When a lateral is repaired, the lateral is part of the drainage system, and the cost of repairing a drainage system is apportioned pro rata on all property and entities that have been assessed benefits for the drainage system. Minn. Stat. § 103E.728 (2015).

<sup>524</sup> See Minn. Stat. § 103E.411, subd. 1 (2015).

<sup>525</sup> Minn. Stat. § 103E.411, subd. 1 (2015).

<sup>526</sup> Minn. Stat. § 103E.411, subd. 2 (2015).

<sup>527</sup> Minn. Stat. § 103E.411, subd. 3(a) (2015).

<sup>528</sup> Minn. Stat. § 103E.411, subd. 3(a) (2015).

<sup>529</sup> Minn. Stat. § 103E.411, subd. 3(a) (2015).

<sup>530</sup> Minn. Stat. § 103E.411, subd. 3(b) (2015).

<sup>531</sup> Minn. Stat. § 103E.411, subd. 4(a) (2015).

<sup>532</sup> Minn. Stat. § 103E.411, subd. 4(a)(1)-(3) (2015).

<sup>533</sup> Minn. Stat. § 103E.411, subd. 4(a) (2015).

<sup>534</sup> Minn. Stat. § 103E.411, subd. 4(b) (2015).

<sup>535</sup> Minn. Stat. § 103E.411, subd. 4(b) (2015).

<sup>536</sup> Minn. Stat. § 103E.411, subd. 5 (2015).

<sup>537</sup> Minn. Stat. § 103E.411, subd. 5 (2015).

<sup>538</sup> Minn. Stat. § 103E.411, subd. 5 (2015).

<sup>539</sup> Minn. Stat. § 103E.401, subd. 7(a) (2015).

<sup>540</sup> Minn. Stat. § 103E.401, subd. 7(a)(1) & (2) (2015).

<sup>541</sup> Minn. Stat. § 103E.401, subd. 7(b) (2015).

<sup>542</sup> Minn. Stat. § 103E.401, subd. 7(b) (2015).

#### K. Consolidation or Division of Drainage Systems

To provide a more efficient administration of the system, a drainage authority may:

1. Divide one public drainage system into two or more drainage systems;
2. Consolidate two or more drainage systems;
3. Transfer part of one drainage system to another;
4. Attach property that has been removed from one public drainage system to another public drainage system; or

5. Attach a part of a public drainage system that has been abandoned to another drainage system.<sup>543</sup>

Before the drainage authority can consolidate or divide any portion of a public drainage system, the benefited area of the drainage system must have been redetermined under [Minn. Stat. § 103E.351](#) or in connection with a drainage proceeding.<sup>544</sup> By first requiring a redetermination of benefits, the public drainage code avoids inequities in liability for future repairs.

Consolidation or division of a public drainage system are most often initiated by the drainage authority itself.<sup>545</sup> The drainage authority may be prodded by a petition, however, from any party interested in or affected by the drainage system.<sup>546</sup> **A sample Petition Initiating Consolidation or Division of Drainage System is found in [Template AD](#).**

The petition is filed with the county auditor, or with the secretary of the board of managers in the case of a watershed district system.<sup>547</sup>

When a drainage authority directs by resolution, or a petition is filed, for consolidation or division of a public drainage system, the drainage authority in consultation with the auditor or watershed district secretary sets a time and location for a hearing.<sup>548</sup> Notice of the hearing must be given by publication.<sup>549</sup>

The drainage authority may consolidate or divide drainage systems, by order, if it determines that the division of one system into two or more separate systems, the consolidation of two or more systems, the transfer of part of one system to another, or the attachment of a previously abandoned part of a system to another system, is:

Consistent with the redetermination of the benefitted areas of the drainage system;

Will provide for the efficient administration of the drainage system; and

Will be fair and equitable.<sup>550</sup>

Consolidation or division proceedings do not release any property from an existing drainage lien or assessment filed for costs incurred on account of the drainage system before the date of the consolidation or division order.<sup>551</sup> **A sample Order Consolidating or Dividing a Drainage System is found in [Template AE](#).**

#### FOOTNOTES

<sup>543</sup> Minn. Stat. § 103E.801, subd. 1 (2015).

<sup>544</sup> Minn. Stat. § 103E.801, subd. 1 (2015).

<sup>545</sup> See Minn. Stat. § 103E.801, subd. 2 (2015).

<sup>546</sup> Minn. Stat. § 103E.801, subd. 2 (2015).

<sup>547</sup> Minn. Stat. § 103E.801, subd. 2 (2015).

<sup>548</sup> Minn. Stat. § 103E.801, subd. 3(a) (2015).

<sup>549</sup> Minn. Stat. § 103E.801, subd. 3(a) (2015).

<sup>550</sup> Minn. Stat. § 103E.801, subd. 3(a) (2015).

<sup>551</sup> Minn. Stat. § 103E.801, subd. 3(b) (2015).

## L. Removal of Property from a Drainage System

If property within the benefited area of a drainage system no longer benefits from the drainage system, the owner of the benefited property may petition the drainage authority to have the property removed

from the drainage system.<sup>552</sup> The petition must be filed with the auditor for a county drainage system, the auditor of the county with the largest area of property in the drainage system for a joint county drainage system, or the secretary for a watershed district drainage system.<sup>553</sup> **A sample Petition for Removal of Property from a Drainage System is found in [Template AF](#).**

When the petition is filed, a time and location for a hearing on the petition shall be set by the drainage authority in consultation with the auditor or secretary.<sup>554</sup> Notice of the hearing must be given by mail to owners of all property benefited by the drainage system, and either in a newspaper of general circulation within the affected drainage area or by publication on a web site of the drainage authority.<sup>555</sup> **A sample Notice of Hearing on Removal of Property from a Drainage System is found in [Template AG](#).**

The drainage authority must make findings and direct, by order, that the petitioner's property be removed from the drainage system if it determines:

1. That waters from the petitioners' property have been diverted from the drainage system, or that the property cannot significantly or regularly use the drainage system;
2. That the property is not benefited by the drainage system; and
3. That removing the property from the drainage system will not prejudice the property owners and property remaining in the system.<sup>556</sup>

**A sample Order Removing Property from a Drainage System is found in [Exhibit AH](#).**

Once the property is removed from the system, it will not be liable for future repairs or improvements of the drainage system.<sup>557</sup> The order removing property from a drainage system does not discharge the property's liability for existing drainage liens or from costs incurred on account of the drainage system before the date of the order.<sup>558</sup>

#### FOOTNOTES

<sup>552</sup> See Minn. Stat. § 103E.805, subds. 1 & 3(b)(2) (2015).

<sup>553</sup> Minn. Stat. § 103E.805, subd. 2 (2015).

<sup>554</sup> Minn. Stat. § 103E.805, subd. 3(a) (2015).

<sup>555</sup> Minn. Stat. § 103E.805, subd. 3(a) (2015).

<sup>556</sup> Minn. Stat. § 103E.805, subd. 3(b)(1)-(3) (2015).

<sup>557</sup> Minn. Stat. § 103E.805, subd. 4 (2015).

<sup>558</sup> Minn. Stat. § 103E.805, subd. 5 (2015).

## M. Partial Abandonment of Drainage System

If part of a drainage system is no longer of public benefit and utility and no longer serves a substantial useful purpose to property remaining in the system, an owner of benefited property may petition the drainage authority to abandon that portion.<sup>559</sup>

The petition must be filed with the auditor for a county drainage system, the auditor of the county with the largest area of property in the drainage system for a joint county drainage system, or the secretary for a watershed district drainage system.<sup>560</sup> **A sample Petition for Partial Abandonment of a Drainage System is found in [Template AI](#).**

When the petition is filed, the drainage authority, in consultation with the auditor or the secretary, must set a time and location for a hearing on the petition.<sup>561</sup> Notice of the hearing must be given by mail to

the owners of all property benefited by the drainage system, and either in a newspaper of general circulation within the affected drainage area or by publication on a web site of the drainage authority.<sup>562</sup> **A sample Notice of Hearing on Partial Abandonment of a Drainage System is found in [Template AJ](#).**

The drainage authority must make findings and direct, by order, that part of the drainage system be abandoned if the drainage system determines that part of the drainage system:

1. Does not serve a substantial useful purpose as part of the drainage system to any property remaining in the system; and
2. Is not of a substantial public benefit and utility.<sup>563</sup>

**A sample Order for Partial Abandonment of Drainage System is found in [Template AK](#).**

The order for partial abandonment of a drainage system ends the responsibility of the drainage authority for that part of the drainage system.<sup>564</sup> A repair petition may not be accepted for the abandoned part of the drainage system.<sup>565</sup>

The order removing property from a drainage system does not discharge the property's liability for existing drainage liens or from costs incurred on account of the drainage system before the date of the order.<sup>566</sup>

#### FOOTNOTES

<sup>559</sup> Minn. Stat. § 103E.806, subd. 1 (2015).

<sup>560</sup> Minn. Stat. § 103E.806, subd. 2 (2015).

<sup>561</sup> Minn. Stat. § 103E.806, subd. 3(a) (2015).

<sup>562</sup> Minn. Stat. § 103E.806, subd. 3(a) (2015).

<sup>563</sup> Minn. Stat. § 103E.806, subd. 3(b) (2015).

<sup>564</sup> Minn. Stat. § 103E.806, subd. 4 (2015).

<sup>565</sup> Minn. Stat. § 103E.806, subd. 4 (2015).

<sup>566</sup> Minn. Stat. § 103E.806, subd. 5 (2015).

## N. Abandonment of Drainage System

If the agricultural property that used a drainage system has been generally abandoned or has ceased to function to the point that restoration is no longer feasible, the entire drainage system may be abandoned.<sup>567</sup>

Before a petition to abandon a drainage system may be filed, the period originally fixed or subsequently extended to pay the assessment of the drainage liens must have expired.<sup>568</sup>

The petition must be signed by at least 51 percent of the property owners assessed for the construction of the drainage system or by the owners of not less than 51 percent of the area of the property assessed for the drainage system.<sup>569</sup> For the purpose of the petition, the county is the resident owner of all tax-forfeited property held by the state and assessed benefits for the drainage system, and the board may execute the petition for the county as an owner.<sup>570</sup> The petition must designate the drainage system proposed to be abandoned and show that the drainage system is not of public benefit and utility because the agricultural property that used the drainage system has been generally abandoned or because the drainage system has ceased to function and its restoration is not practical.<sup>571</sup> **A sample Petition for Abandonment of Drainage System is found in [Template AL](#).**

The petition is filed with the county auditor.<sup>572</sup> However, if the county is a petitioner, then the petition must be made to the district court of the county and filed with the court administrator.<sup>573</sup> If the property assessed for the system to be abandoned is located in two or more counties, the petition is filed with the auditor of the county having the larger benefitted acreage.<sup>574</sup>

When the petition is filed, the drainage authority in consultation with the auditor, or the court administrator with the approval of the court, shall set a time and location for a hearing on the petition.<sup>575</sup> The auditor or court administrator shall give notice by publication of the time and location of the abandonment hearing to all persons interested.<sup>576</sup>

At the hearing, the drainage authority or court examines the petition and determines whether it is sufficient and hears all interested parties.<sup>577</sup>

If there is at least one objection by a property owner assessed benefits in the system to the proposed abandonment, the drainage authority or court appoints three disinterested persons as viewers to examine the property and to report to the drainage authority or the court.<sup>578</sup>

The hearing is adjourned to give the viewers time for an examination and to make a report.<sup>579</sup> The viewers must examine the property of the objecting landowner and report as soon as possible to the drainage authority or court with the description and situation of the property and whether the drainage system drains or otherwise affects the property.<sup>580</sup>

At the reconvened hearing, the drainage authority or court considers the viewers' report and all other evidence offered, and will either make a finding that:

1. The drainage system serves any useful purpose to any property or the general public and the petition is denied; or
2. The drainage system does not serve any useful purpose to any property and is not of public benefit and utility and the petition to abandon is approved.<sup>581</sup>

While the drainage code states that the drainage authority must evaluate whether the drainage system serves *any* useful purpose to *any* property, the Minnesota Supreme Court has held that the reading of this provisions cannot be literal, and the drainage authority may exercise some discretion in abandoning a drainage system that is no longer practical to restore, despite serving some useful purpose.<sup>582</sup>

Once abandoned, a repair petition for the drainage system may not be accepted, and the responsibility of the drainage authority for the maintenance for the drainage system ends.<sup>583</sup>

#### FOOTNOTES

<sup>567</sup> See Minn. Stat. § 103E.811, subd. 3 (2015).

<sup>568</sup> Minn. Stat. § 103E.811, subd. 1 (2015).

<sup>569</sup> Minn. Stat. § 103E.811, subd. 2 (2015).

<sup>570</sup> Minn. Stat. § 103E.811, subd. 2 (2015).

<sup>571</sup> Minn. Stat. § 103E.811, subd. 3 (2015).

<sup>572</sup> Minn. Stat. § 103E.811, subd. 4 (2015).

<sup>573</sup> Minn. Stat. § 103E.811, subd. 4 (2015).

<sup>574</sup> Minn. Stat. § 103E.811, subd. 4 (2015).

<sup>575</sup> Minn. Stat. § 103E.811, subd. 4 (2015).

<sup>576</sup> Minn. Stat. § 103E.811, subd. 4 (2015).

<sup>577</sup> Minn. Stat. § 103E.811, subd. 5(a) (2015).

<sup>578</sup> Minn. Stat. § 103E.811, subd. 5(b) (2015).

<sup>579</sup> Minn. Stat. § 103E.811, subd. 5(b) (2015).

<sup>580</sup> Minn. Stat. § 103E.811, subd. 5(b) (2015).

<sup>581</sup> Minn. Stat. § 103E.811, subd. 5(c) (2015).

<sup>582</sup> *In re Cnty. Ditch No. 13*, Pope Cnty., 242 N.W.2d 827, 829 (Minn. 1976).

<sup>583</sup> Minn. Stat. § 103E.811, subd. 6 (2015).