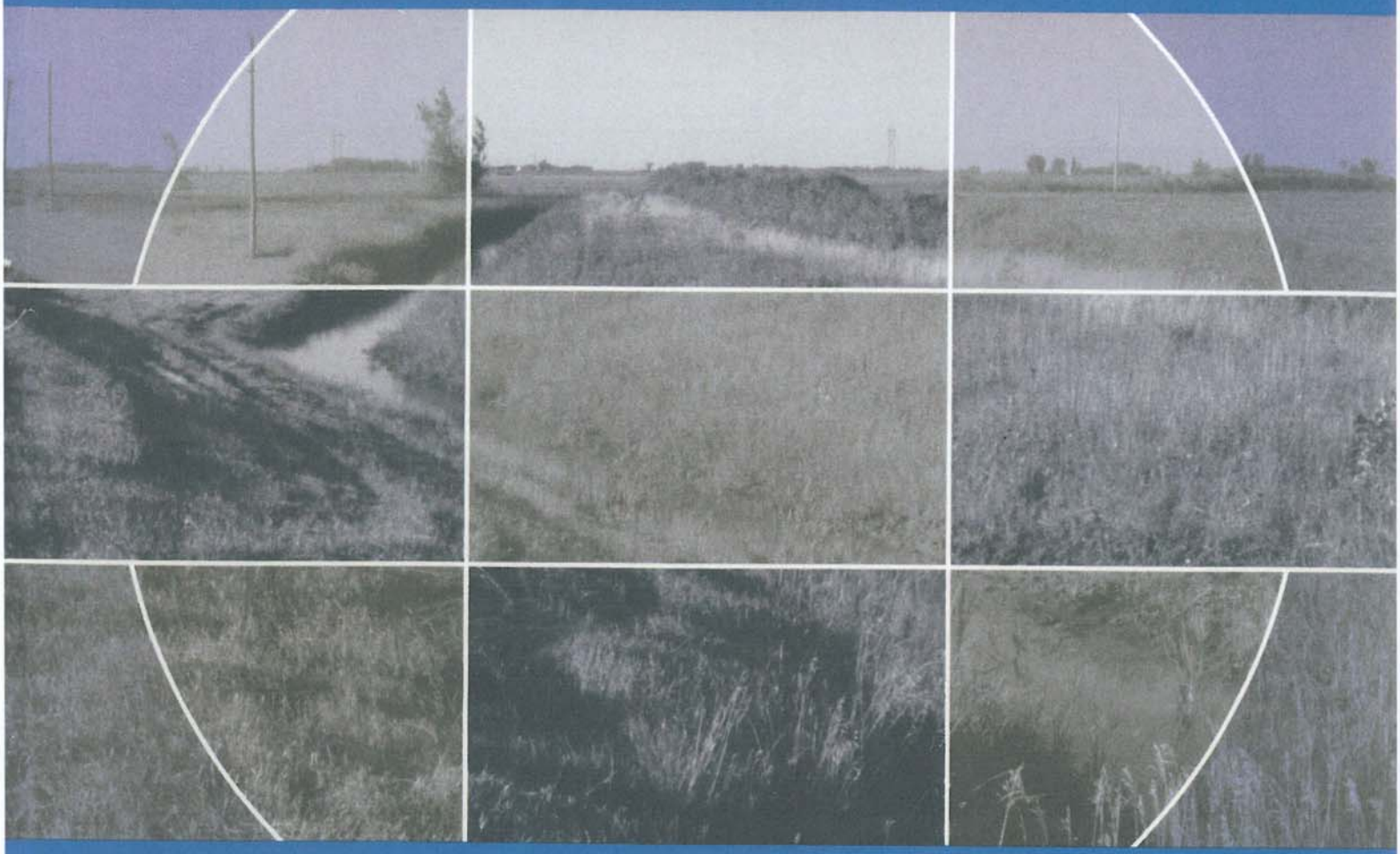

Understanding Minnesota Public Drainage Law

2002 Overview For Decision-makers

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INTRODUCTION

Under Minnesota public drainage law, a broad spectrum of individuals are involved in drainage proceedings on a regular basis. These include: county commissioners, watershed district managers, viewers, engineers, county attorneys, county auditors, petitioners' attorneys, county and watershed district administrators, interested landowners, and state and federal agencies.

The Minnesota Public Drainage Manual (MPDM) was published in September 1991, in an effort to provide a procedural reference source with statewide acceptance and application. A project funded by the U.S. Environmental Protection Agency and the Minnesota Department of Natural Resources (DNR), the MPDM provides an in-depth presentation of Minnesota drainage laws and issues.

This overview booklet, by contrast, has been written to offer a brief summary of key information. Readers of this booklet are encouraged to familiarize themselves with the MPDM, and, more importantly, with the controlling provisions of Minnesota Statutes, especially if they are involved in decisions regarding any aspect of drainage. Copies of the MPDM should be available at county auditors offices, SWCD offices, and watershed district offices.

The information in this booklet is intended to be a general overview of certain areas of Minnesota public drainage law. It is not intended to cover all aspects or all requirements of the various drainage procedures.

All references are to Minnesota Statutes as they stood in 2002. Readers are cautioned, however, to obtain legal advice for specific guidance in dealing with drainage procedures, drainage issues and drainage law, and to check for changes in the law after the date of this publication.

This booklet was published by the Association Minnesota Counties (AMC). The information contained herein does not necessarily represent the views of the AMC, the State of Minnesota, or of the agencies and individuals who were involved in its development.

THIS BOOKLET IS INTENDED TO BE A *GENERAL OVERVIEW* OF CERTAIN AREAS OF MINNESOTA PUBLIC DRAINAGE LAW.

BACKGROUND AND HISTORY

When the United States was settled, there were approximately ten million acres of vegetated wetlands — or "swamp lands" as they were called — in the area that eventually became the state of Minnesota. They covered about one-fifth of the state's total land area.

The Swamp Lands Acts of 1850 and 1860 granted 65 million acres of United States swamp lands to 15 western states, including Minnesota. The grant was intended to ensure that wetlands would be drained, as they were considered to have no value in their natural, marshy condition.

Settlement in Minnesota moved north and west from the Mississippi River in the 1850s. Except for small scale private party and railroad bed drainage, there was not much actual drainage activity.

The first comprehensive public drainage act in Minnesota was passed in 1887. This act provided for a petition process, overview by county commissioners, and the appointment of viewers to survey, locate and prepare a report on the proposed drainage ditch. If the report conformed to the statute, the commissioners could establish the ditch. The act also provided for the payment of damages from the county treasury, the letting of a contract for construction, and the assessment of benefits against the lands to be benefited by its construction. This early drainage law established a process that is remarkably similar to the approach still followed in Minnesota drainage law today.

WITH THE SUPPORT OF THE PUBLIC, THE STATE ENCOURAGED DRAINAGE OF LAND TO ENHANCE ITS TAXABLE VALUE AND PRODUCTIVITY.

In 1893, the Red River Drainage Commission was formed to deal with ditches tributary to the Red River. Four years later, in 1897, a three-member Drainage Board of Commissioners was established by the legislature and appointed by the governor. This marked the beginning of state drainage activity.

From 1900 through 1915, there was a proliferation of drainage activity in Minnesota. The State Drainage Commission was formed and it began the construction of drainage systems close to larger trade centers and the railroads. Roads were under construction, and road ditches provided drainage for these new transportation arteries. The state commission conducted regular inspections to ensure that counties fulfilled their duty to repair and maintain the state-funded drainage systems. With the support of the public, the state encouraged drainage of land to enhance its taxable value and productivity.

Around 1916, drainage activity decreased for a number of reasons, including World War I federal policies, a ten-year drought, floods, agricultural depression, tile failures and a change in public and political attitudes toward drainage. The severe flooding of 1918 and 1919 caused the legislature to authorize the establishment of drainage and flood control districts and drainage and conservancy districts. After the end of WWI, land values and agricultural commodity prices rose, but due to high costs, drainage work was primarily limited to improvements and repairs of existing projects. With the advent of the agricultural depression in the mid-1920s, farm prices declined. The drought of the 1930s began, drainage activities again decreased, and existing systems fell into disrepair.

By 1938, normal rainfall returned, and the demand for drainage increased as agricultural prices rose. The existing systems were in poor condition, and the 1945 legislature enacted a bill addressing repairs and improvements. The increasingly confusing drainage laws led the 1947 legislature to authorize district courts and county boards to establish drainage systems after receiving a valid petition. State and township drainage authority was eliminated.

Agricultural prosperity continued during the 1950s, existing drainage systems were repaired and improved, and new systems constructed. Federal programs aided this effort. Drainage by the use of drain tile became widespread.

During this time period, conservationists and sporting interests began to voice concerns about the increasing loss of potholes which were key to waterfowl production. The state established authority to purchase wetlands, and a commission was appointed to study conservation and flood control. The State Water Resources Board was created in 1955, and the creation of watershed districts was authorized. Once established, watershed districts could take over drainage systems within their boundaries. County boards were required to evaluate the effects on the environment and natural resources when considering a drainage project, and the number of petitioners required to initiate a project was increased.

By the late '60s and early '70s, public policy had shifted toward an emphasis on conservation. Questions were raised about whether drainage was always in the public interest. Drainage authorities and the commissioner of natural resources were required to evaluate environmental and conservation effects before a drainage project could be established. District courts were no longer involved in drainage decisions, and, in 1979, a state Water Bank Program was created to pay landowners for not draining private wetlands.

The federal government began reflecting the changing attitudes toward drainage and wetlands. It passed the National Environmental Policy Act (NEPA) in 1969 to prevent or lessen damage to the environment and to increase understanding of ecological systems and natural resources. The 1972 Clean Water Act extended the authority of the U.S. Army Corps of Engineers to regulate the discharge of certain substances into wetlands.

In 1985, the U.S. Congress passed the Food Security Act, commonly known as the 1985 Farm Bill. This significant legislation established the conservation reserve program to encourage retirement of cropland prone to erosion. A "sodbuster" provision in the bill requires landowners to have an approved conservation plan before planting annual crops on highly erodible land. A "swampbuster" provision prohibits producing crops on newly converted wetlands. December 23, 1985 was established as the key date for determining "previously converted" wetlands. The act denies farm program benefits to anyone who produces an agricultural commodity on a converted wetland. The 1990 and 1996 Farm Bills included even more restrictions by denying farm program benefits to anyone who converts a wetland, whether or not a commodity has been produced on it.

Between 1970 and 1990, Minnesota drainage law continued to evolve. The involvement of the commissioner of natural resources was added to the required procedures for consideration of drainage projects, and one-rod grass strips adjacent to ditch slopes were required when initiating improvements, redetermination of benefits, or new ditch proceedings. Requirements also were increased for communication and disclosure of proceedings to affected parties.

Minnesota's Wetland Conservation Act of 1991 established a "no net loss" approach to wetlands. The law states that it is in the public interest to achieve no net loss in quantity and quality of wetlands, and that the state's wetland base should be increased by restoring and enhancing diminished or drained wetlands. It also mandates avoidance of direct or indirect impacts from activities that destroy or diminish wetlands.

Today the state laws concerning drainage are found in Minn. Stat. ch. 103E, called the "drainage code".

BY THE LATE '60S AND EARLY '70S, PUBLIC POLICY HAD SHIFTED TOWARD AN EMPHASIS ON CONSERVATION.

JURISDICTION

In a drainage proceeding, the establishment of jurisdiction is absolutely essential. Unless the drainage authority acquires jurisdiction over the land to be crossed by an open ditch or drain tile, the drainage authority has no power to enter the land, disturb the land, or levy taxes on the land. Jurisdiction involves a legal body that has been given certain authority to act.

Drainage systems in Minnesota may be under the jurisdiction of one of several drainage authorities. The most common are:

- A county board of commissioners
- A joint county drainage authority
- A watershed district board of managers

When a drainage system is located within one county, the jurisdictional authority is the *county board of commissioners*. These systems are the most common in Minnesota. The county board is authorized to do work only within the boundaries of the county.

DRAINAGE SYSTEMS IN MINNESOTA MAY BE UNDER THE JURISDICTION OF ONE OF SEVERAL DRAINAGE AUTHORITIES.

When a drainage system crosses over county lines, it is under the jurisdiction of a *joint county drainage authority*. Joint county ditch systems may be located in two or more counties. A joint county drainage authority is composed of five county commissioners, with at least one member from each county where property is affected by the drainage system.

When there is an organized *watershed district*, it becomes the drainage authority for a system in one of two ways:

- It automatically has jurisdiction over new drainage systems and over systems for which an improvement has been petitioned and subsequently ordered by the county board or joint county drainage authority. When there is an organized watershed district, it is the *only* drainage authority for improvement projects.
- The watershed district has jurisdiction for repairs on an existing public drainage system when the county or counties that are completely or partly within the district have transferred the system to the watershed district. A county can transfer jurisdiction by passing a resolution and after a public hearing.

The *transfer of jurisdictional authority* from the county to the watershed district happens quite often, for political and practical reasons. Watershed district boundaries are drawn based on a drainage basin's topography, not political boundaries. In addition, the watershed district's managers are appointed by the county board, not elected like county commissioners.

Once jurisdiction is determined, the paperwork involved in a drainage project proceeding is handled by the county auditor, if the drainage authority is a county, or by the secretary of the board of managers, if the drainage authority is a watershed district.

TYPES OF DRAINAGE PROJECTS

Under Minnesota drainage law there are, in general, three major categories of public drainage projects: *New Systems*, which means a system of ditch or tile, or both, to drain property; *Repairs*, including routine maintenance and more major repair projects; and *Improvements*, including improvement of the system by deepening or widening, outlet improvement, and the addition of laterals.

In addition, there are several other specialized proceedings, including redetermination of benefits, use of the drainage system as an outlet, and consolidation, division, abandonment and transfer.

Specific requirements must be met in undertaking each of these different activities, so it is important to be clear about the type of work and purpose of the proceeding that is needed.

NEW DRAINAGE SYSTEMS

In recent years, due to pressure to preserve wetlands, fewer *new systems* have been built. When they are established, they often are additions to existing systems. However, with increased drainage technology and increasing commodity values, there may be an increase in requests for new systems.

The maintenance of existing wetlands and/or wetland values are major factors in determining the viability of proposals for new systems. The availability of wetland banking credits when wetlands are impacted, or the avoidance of impacts on wetlands in the drainage pattern, are also key factors. See MPDM 2.41 - 2.44

IN GENERAL, THE THREE CATEGORIES OF DRAINAGE PROJECTS ARE NEW SYSTEMS, REPAIRS AND IMPROVEMENTS.

REPAIRS

Repairs – may consist of minor work such as spraying for weeds and brush, removal of isolated silt deposits, bridge or culvert cleaning, removal of vegetation, debris and other obstructions. Repairs also may involve more extensive cleaning of the ditch bottom of silt deposits to the grade line and bottom width as originally constructed or subsequently improved, and could include fixing isolated side slope damage due to sloughing, fixing damage to culverts and structures, and removing large trees from the channel. These minor repairs do not increase channel design capacity. Ditches should be inspected and maintained annually.

Petitioned Repairs – A petition for repair is required from affected landowners when the anticipated repair cost exceeds $50,000 or $1,000 per mile of ditch, or land will incur damages or receive benefits that were not identified in the original ditch proceedings.

A petition may request repairs that cover most of the drainage system, and involve cleaning the ditch to the grade line and bottom width as originally constructed, or subsequently improved, including re-sloping of the ditch side slopes and leveling the spoil banks, to prevent further deterioration. It also may include realignment to the original construction to restore the effectiveness of the system, and routine operations that remove obstructions and maintain efficiency.

These repairs are not intended to significantly increase the hydraulic efficiency or capacity of the ditch, or to extend and improve drainage benefits to new land. If the repaired channel is well-maintained on an annual basis, another major repair should not be required.

IMPROVEMENTS

An *improvement* project involves the enlarging, extending, straightening, or deepening of an established and previously constructed system. Generally, an improvement project provides for the upgrading and enhancement of the existing system's hydraulic capacity and drainage ability. An existing drainage system may only be extended downstream to a more adequate outlet, and then only for one mile. Extensions in an upstream direction from the existing system are called *laterals*.

THE PETITION PROCESS

Most drainage procedures begin with a petition. This is a complicated area of Minnesota drainage law, because different types of drainage projects have different petition requirements.

Petitions are required in the following types of drainage projects:

- New systems
- Improvements
- Improvements of outlet
- Laterals
- Impounding and diversion of drainage system waters
- Repairs that meet certain criteria for cost (MPDM 2.54)
- Use of system as outlet
- Transfer of a system
- Abandonment of system

These projects may be initiated by petition of an interested party/parties, or by the drainage authority itself:

- Redetermination of benefits
- Consolidation or division of system
- Repairs/maintenance expected to cost less than $50,000 or $1,000 per mile, in one year
- Transfer of a system

THE ACT OF SIGNING A PETITION THAT PROPOSES A DRAINAGE PROJECT SHOULD NOT BE TAKEN LIGHTLY.

PETITIONER LIABILITY

The act of signing a petition that proposes a drainage project should not be taken lightly. Often it is done without legal counsel, at the request of a friend or neighbor. Petition-signers sometimes think they can easily withdraw their support if the proposed project turns out to be too expensive. This is not true. Signing a petition is a serious commitment, which should be carefully considered.

▶ **Who can sign a petition?** A petitioner must own property affected by the proposed project, or land over which the proposed project will pass, as the project is described in the petition. However, if the project is altered by the drainage authority during proceedings and consequently does not pass over the petitioner's land, the petitioner is not automatically allowed to withdraw. He or she can only withdraw with the written consent of *all* other petitioners on the filed petition.

The requirements for signers of petitions vary according to the type of project. These requirements are listed, by project type, in the chart on pages 7– 8.

▶ **Joint and separate liability of petitioners** Each petitioner who signs the petition is liable for all of the costs incurred if, for one reason or another, the project is not established. Costs include engineering fees, attorney's fees of the petitioners' attorney, and county auditor's fees. If the project is established, those costs are absorbed by the system as part of the cost of construction of the project. All persons assessed benefits then help pay for the costs. *If, however, the petition is dismissed, or a contract is not let, then the petitioners are responsible to pay the costs.*

▶ **Who must sign the petition and what is their liability?** Each separate parcel qualifies as one signature. All co-owners of a particular parcel that the project passes over must sign to qualify it as a signatory parcel. No owner's signature counts unless all owners of that parcel have signed. Each petitioner bears joint and separate responsibility to pay all of the costs no matter how small the ownership interest. More information on liability and possible complications is found in MPDM 2.18 - 2.19.

▶ **Failure of the petition** If a project fails, county auditors typically divide the total costs by the number of petitioners when collecting costs. Each petitioner is asked to pay that amount. If the petitioners do not pay, the auditor or county attorney may notify the bondholder of a default. The bondholder then pays the amount which the petitioners failed to pay, and it then has the right of indemnification against the principals, some of whom are petitioners. In such case, the principals pay not only their own proportionate share of the costs, but someone else's as well.

Petitioners should read MPDM 2.42 for a list of nine criteria the drainage authority considers before establishing a project. They also should read Minn. Stat. § 103E.015.

LEGAL REQUIREMENTS FOR EACH TYPE OF PROJECT PETITION

Project	Number or Percentage of Signatures	Where Filed	Bond Required
New Drainage System	▶ Majority of landowners of property that drainage system passes over *OR* ▶ Property owners owning at least 60 percent of area proposed system passes over	1. County Auditor (if more than one county, then auditor of county with greater area that project passes over) 2. Managers of watershed district, if area is in a watershed district	At least $10,000
Improvement of Drainage System	▶ At least 26 percent of owners of property affected by the proposed improvement *OR* ▶ At least 26 percent of owners of the property that the proposed improvement passes over *OR* ▶ Owners of at least 26 percent of the property area affected by the proposed improvement *OR* ▶ Owners of at least 26 percent of the property area that the proposed improvement passes over	1. County Auditor (if joint counties, then auditor of county with greater area that project passes over) 2. Managers of watershed district, if area is in a watershed district	At least $10,000
Improvement of Outlets	▶ By Board of affected county *OR* ▶ By at least 26 percent of owners of adjoining overflowed property *OR* ▶ By owners of at least 26 percent of area of the overflowed property	1. County Auditor (if more than one county, then auditor of county with greatest affected area) 2. Managers of watershed district, if area is within a watershed district	At least $10,000
Laterals	▶ At least 26 percent of the owners of property *OR* ▶ By the owners of at least 26 percent of the area of the property that the lateral passes over	1. County Auditor 2. Auditor of the county with the largest property area to be passed over by the lateral 3. Managers of the watershed district, if area is within a watershed district	At least $10,000

IF A PROJECT FAILS, COUNTY AUDITORS DIVIDE TOTAL COSTS BY THE NUMBER OF PETITIONERS.

LEGAL REQUIREMENTS FOR EACH TYPE OF PROJECT PETITION (CONT.)

Project	Number or Percentage of Signatures	Where Filed	Bond Required
Impounding and Diversion of Drainage System Waters	A person, public or municipal corporation, governmental subdivision, state or a dept. or agency of state, Comm. of Natural Resources, the United States or any of its agencies	Petition to drainage authority	$10,000 bond, except no bond required for petition by state, state agency or dept., Comm. of Nat. Resources, the United States or any of its agencies or a municipality
Redetermination of Benefits	▶ Drainage authority *OR* ▶ More than 50 percent of owners benefited or damaged by drainage system	Petition to drainage authority	None
Use of Drainage System as Outlet	A person	Petition to drainage authority	None
Repair of Drainage System by Petition	Individual or any entity interested in/affected by the drainage system	County Auditor	None
Consolidation or Division of Drainage System	Any person interested in/affected by the drainage system	1. County Auditor 2. Secretary of watershed management board if project is under jurisdiction of watershed district	None
Abandonment of Drainage System	▶ At least 51 percent of 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	County Auditor	None
Transfer of Drainage System	▶ At least 51 percent of 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 *OR* ▶ A city or water management authority (in the seven-county metro area) may petition for drainage systems within its boundaries	County Auditor or Court Administrator if the County Board is the petitioner or the secretary of the watershed management board if the drainage system is under the jurisdiction of a watershed district	None

A PETITIONER CAN ONLY WITHDRAW WITH WRITTEN CONSENT OF ALL OTHER PETITIONERS.

DRAINAGE PROJECT PROCEDURES

The procedures to be followed in considering a proposed drainage project vary among the different types of projects. In general, the more complicated the project, the more requirements there are that must be met throughout the decision-making process. Also, most drainage projects should include compliance with requirements of the Wetland Conservation Act.

Although there are few *new systems* being established today, that type of project requires the full range of drainage procedure steps. Thus, it provides a good example for a walk-through of the various steps involved in drainage proceedings. Following the description of new systems procedures, there is a summary of required procedures for repairs, improvements, and other drainage projects.

NEW SYSTEMS

▶ The Petition

1) Must describe the 40-acre tracts or property the proposed system passes over. Must include names and addresses of property owners.
2) Must describe the starting point, course and ending point of the system.
3) Must state why the drainage system is necessary.
4) Must state it will benefit and be useful to the public and promote public health.
5) Must state that petitioners will pay all costs of proceedings if the system is not established or a construction contract is not awarded.
6) Must be signed by a majority of the owners of the land the proposed system passes over, or by the owners of at least 60 percent of the area it would pass over.

(See MPDM 2.41 - 2.42 for more information.)

▶ The Bond

A surety bond for $10,000 must be filed with a petition presented to the drainage authority. The bond must be increased if the proceedings costs exceed the original bond amount.

▶ Legal Review of Petition

The petition is submitted to the drainage authority's attorney for review. The attorney has 30 days to review the petition, return it to the petitioners if it is inadequate, or pass it on to the drainage authority if it is deemed adequate.

▶ Appointment of Engineer

1) If the county attorney or the watershed district legal counsel determines that the petition appears to meet legal requirements, the drainage authority must, within 30 days, appoint an engineer to conduct a preliminary survey and cost analysis and prepare a report on the project.
2) The engineer is required to file an oath to guarantee performance and to file a minimum $5,000 bond with the auditor, as an assurance of fidelity and a guarantee of competence. The bond is approved by the county auditor or the secretary of the watershed district.
3) The acquisition of required right-of-way, adequate to accommodate the channel, ditch or tile and the required grass strips, is one of the areas considered in the engineer's report. (See MPDM 2.43 - 2.44 for a discussion of easement and right-of-way in drainage projects.)

THE DRAINAGE AUTHORITY CONSIDERS ENGINEERING, SOCIAL, ECONOMIC AND ENVIRONMENTAL ISSUES WHEN EVALUATING PROJECT IMPACTS.

- **Early Environmental Review**
  1) The drainage authority is required to consider nine criteria in evaluating project impacts, including engineering, social, economic and environmental issues. See MPDM 3.3 - 3.5, and Minn. Stat. § 103E.015. The engineer appointed by the drainage authority should assess the project impacts in light of these criteria and contact responsible federal, state and local fisheries, wildlife, wetland and water management personnel as soon as possible. Environmental agencies should be kept involved throughout the project development.
  2) The commissioner of the DNR is required to review the engineer's preliminary report and provide advisory comments on it.
- **Preliminary Hearing**
  1) When the engineer's report is filed, the county auditor or secretary of the watershed district board of managers notifies the drainage authority and obtains a resolution and order for a hearing. The hearing must be held within 30 days of the date of the order. Notice for the preliminary public hearing must be mailed to the petitioners, to the landowners of all land likely to be assessed, and to political subdivisions likely to be affected. It should be sent to the area hydrologist, Division of Waters, DNR. Although not required, it may be a good idea to publish the notice in a legal newspaper in the area.
  2) The preliminary engineer's report is presented at the public hearing. If the report causes the drainage authority to find the project not to be feasible, then the drainage authority moves to dismiss. The drainage authority's legal counsel should then be instructed to prepare the findings and an order of dismissal, to be presented at a regular open meeting of the drainage authority.
  3) If the drainage authority finds the project to be feasible, it appoints three viewers and directs the engineer to prepare a detailed study and final report. Legal counsel then is directed to prepare findings and an order to be presented at an open meeting of the drainage authority.
  4) A helpful description of the preliminary public hearing is found in MPDM 2.76 - 2.79.

ENVIRONMENTAL AGENCIES SHOULD BE KEPT INVOLVED THROUGHOUT THE PROCESS.

- **Viewers' Study and Report**
  1) The viewers determine the benefits and damages that would result from construction of the proposed project.
  2) The viewers' report lists facts and findings, including a property description, landowners' names and addresses, damages and benefits to the land, changes to wetlands, and the amount of right-of-way acreage required. See MPDM 4.24 - 4.25.
  3) The viewers' report should be filed with the auditor of each county affected by the proposed project, or with the watershed district.
- **Property Owners Report**

The auditor or watershed district secretary must complete the property owners report within 30 days of receiving the viewers' report. The auditor or secretary must mail a copy to each owner of property affected, or if the report is very large, a benefit/damage statement and property description may be mailed, and the complete report made available at the auditor's or secretary's office and at the final hearing.

▶ Final Engineer's Report/DNR Commissioner's Final Advisory Report

1) The engineer conducts a detailed survey and prepares a detailed report. A soil survey may be done at the request of the drainage authority or the commissioner, or if the engineer determines it to be necessary. The final report must include: a map of the project and scaled drawings of the location of each drain and the outlet; a description of the type of drainage system, the watershed and subwatersheds affected; existing highway bridges and culverts; all property affected and names of owners; public roads and railways affected; lake basins, wetlands or public waters bodies affected; the area to be acquired to maintain a grass strip. See MPDM, Chapter 3.

   The engineer files the final report with the auditor or secretary, who then should send two copies to the area hydrologist, Division of Waters, Department of Natural Resources. The engineer also must file copies of the final report with the auditors of all counties affected by the proposed project.

2) Within 30 days of receiving the final engineer's report, the commissioner must make a final advisory report to the drainage authority. This document is usually signed by the area hydrologist of the DNR Division of Waters. This advisory report must state whether:
   - the engineer's final report is incomplete, or unacceptable under law
   - or the report/project is approved as acceptable
   - or the plan is not approved and changes are requested
   - or the project is not of public benefit, with specific reasons provided
   - or a soil survey is needed.

The advisory report should be carefully considered by the engineer and drainage authority to help avoid later appeal, lawsuits, or permit denial.

A DRAINAGE AUTHORITY MUST DISMISS A PROJECT PROCEEDING FOR ONE OR MORE OF SEVERAL REASONS.

▶ Final Public Hearing

1) When the engineer has filed the final engineer's report, the viewers have filed the viewers' report, and the Department of Natural Resources has filed a final advisory report, the drainage authority sets the time, place and location for the final hearing through an order. The hearing is set not less than 25 days, or more than 50 days, after the date of the final hearing notice.
2) The auditor or secretary is responsible for mailing out a final hearing notice and property owners' report to all interested persons within one week after the notice is first published. A printed copy of the final hearing notice for each affected county must be posted at least three weeks before the date of the final hearing at the front door of the courthouse, and published once a week for three successive weeks in a legal newspaper in each affected county.
3) The proceedings of a final hearing are described in detail in the MPDM 2.83 - 2.87.
4) If discussion at the final hearing leads to simple changes in the engineer's report, they may be adopted at that time. If, however, changes are more extensive, the meeting may be adjourned to a new date. If it appears that revisions will include additional lands for assessment, then a new hearing must be scheduled to be held 25 - 50 days after a notice, as before. Only owners of newly included lands must be given notice.

▶ The Final Order

To dismiss (Minn. Stat. § 103E.341, subd. 1):

If, after the final hearing is complete, possible changes have been explored, and any rescheduled hearings held, the drainage authority still must dismiss the proceedings for one or more of the following reasons:

1) The benefits are less than total cost, including damages awarded.
2) The project will not be of public benefit and utility.
3) The project is not practical after considering environmental/land use criteria.

To establish (Minn. Stat. § 103E.341, subd. 2):

1) A motion should be adopted, stating that all of the criteria necessary for establishment are met and the project is established.
2) The petitioners' attorney should prepare detailed findings, adopting and confirming the engineer's final report (as amended) and the viewers' report (as amended), and establishing the project as reported. This order should include all credible facts established at the final hearing that support the conclusion that the project should be established. The drainage authority's attorney should review and approve the findings and order before it is submitted to the drainage authority for approval.
3) The proposed findings and order may be considered and adopted at an open meeting of the drainage authority without further notice. A resolution adopting the findings and order should designate a member of the drainage authority to sign the order. A copy of the findings and order should be mailed out by the auditor or secretary to all interested persons.
4) No construction contracts may be let for at least 30 days after filing. If no appeals have been filed when that time expires, contracts then may be let.

THE DRAINAGE AUTHORITY SITS IN A QUASI-JUDICIAL CAPACITY. EVERYTHING IT DOES IS OPEN TO REVIEW.

▶ Appeals Process

As an administrative body, the drainage authority sits in a quasi-judicial capacity. Everything the drainage authority does is open to review. MPDM 2.101 - 2.108 discusses the types of judicial proceedings available to review certain grievances, the standards of review applicable, and the procedures involved.

The appeals of orders or actions of a drainage authority are briefly covered in a later section in this manual, entitled The Appeals Process, page 24.

▶ Letting Of Construction Contract

1) The order to establish a drainage project must be filed in the office of the county auditor or the secretary of the board of managers of a watershed district. Once the order is filed, a 30-day waiting requirement must be met before any actions may be taken toward letting a contract. If, after the 30-day period, there have been no appeals filed regarding the determination of benefits and damages, then the letting process may begin and contracts may be awarded.

   If an appeal or appeals have been filed, the drainage authority still may authorize a contract to be let if the benefits so far exceed the damages and costs that, even if the appeal was successful, the project still would be feasible. If there is an appeal from the order to establish the project, then contracts may not be let until the appeal has been determined, and the time for further appeals expired.

2) If the project is a county or joint county project, the invitation to bidders must be published once a week for three successive weeks in a legal newspaper in the county or counties where the work is to be done. The required contents of the notice are described in Minn. Stat. § 103E.505.
3) If the work is expected to cost more than $3,000, the notice of the awarding of the contract must be published in a legal newspaper in the county or counties where the project is to be constructed, and in a drainage construction trade newspaper.
4) The contract letting is governed by the Uniform Municipal Contracting Law. See MPDM 2.89 - 2.98.

DRAINAGE REPAIRS *(See page 5 for a definition of repairs)*

▶ Initiating a Repair:

A repair is initiated by *a petition* of one or more landowners, or by the *drainage authority* in response to an inspection or report of a ditch inspector or a ditch inspection committee.

▶ Hearing Requirement

No public hearings are necessary.

▶ Costs and Construction

1) Costs are paid by assessment on the existing benefited area. Costs in any one year may not exceed $50,000 or $1,000 per mile of open ditch, whichever is greater.
2) Work may be done without advertising for bids or entering into a contract for the repair work.

▶ Limitations

A repair will not increase the channel design capacity.

IF THE REPAIRED CHANNEL IS MAINTAINED ON AN ANNUAL BASIS, SUBSEQUENT MAJOR REPAIRS SHOULD NOT BE REQUIRED.

PETITIONED REPAIRS

▶ A Petition

A repair must be initiated through a petition filed by an individual, individuals, or an entity affected by the drainage system when total anticipated repair costs exceed $50,000 or $1,000 per mile of ditch repaired, or the repair will incur damages or benefits to lands not included in the original ditch proceedings.

▶ Appointment of Engineer

If the drainage authority determines that the drainage system needs repair, an engineer is appointed.

▶ Engineer's Report

An engineer's repair report is ordered, detailing the required repair and the estimated costs.

▶ Public Hearing

1) A public hearing is held on the petition and the engineer's report.
2) If additional right-of-way is required, then viewers are appointed.

▶ Viewers

1) Viewers assess and report benefits and damages. Cost for repair projects are assessed on existing benefiting areas, plus any additional benefiting areas.
2) A grass buffer strip is required along the alignment of the repaired ditch.

- **Costs and Construction** (Minn. Stat. § 103E.705, subd. 5, 6, 7)
  1) Costs are paid by assessment on existing benefited areas, plus additional benefited areas as determined by viewers.
  2) In one calendar year, the drainage authority may not levy assessments for repairs for more than 20 percent of the benefits of the drainage system, $1,000 per mile of ditch repaired, or $50,000, whichever is greater.
  3) If total costs exceed $50,000, then the project must be advertised for competitive bids.
- **Limitations**

Repair is not intended to significantly increase the hydraulic efficiency or capacity of the ditch, or to extend and improve drainage benefits to new land.

If the repaired channel is maintained on an annual basis, subsequent major repairs should not be required.

THERE IS NO DOLLAR LIMITATION ON THE AMOUNT OF MONEY THAT CAN BE SPENT ON AN IMPROVEMENT IN ANY ONE YEAR.

DRAINAGE IMPROVEMENTS *(See page 5 for a definition of improvements)*

An existing drainage system may only be extended downstream by an improvement to a more adequate outlet, and then only for one mile. Extensions in an upstream direction are called *laterals*. An improvement project usually upgrades and enhances the existing system's hydraulic capacity and drainage ability. If the improvement is for a separable portion of a drainage system and the proposed improvement restores the original system capacity, the cost of improvement may be assessed partially as repair and partially as improvement. Proceedings for an improvement are essentially the same as for a new system.

- **The Petition must:**
  1) Designate the drainage system to be improved, by number or other description.
  2) State that the drainage system has insufficient capacity or needs enlarging or extending to furnish sufficient capacity or a better outlet.
  3) State that the drainage system must be out of repair if the petition for improvement is for a separable portion of the drainage system and a portion of the cost is to be assessed as repair.
  4) Describe the starting point, general course, and ending point of any extension.
  5) Describe the improvement, including names and addresses of owners of the 40-acre tracts or government lots and property that the improvement passes over.
  6) State that the improvement will be of public utility and promote the public health.
  7) Contain an agreement by the petitioners that they will pay all costs and expenses that may be incurred if the improvement proceedings are dismissed.
  8) Be signed by:
     - 26 percent of the owners of the property affected by the proposed improvement, or
     - 26 percent of the owners of property that the proposed improvement passes over, or
     - the owners of at least 26 percent of the property area affected by the improvement, or
     - the owners of at least 26 percent of the property area that the proposed improvement passes over.

- **A Bond**

A bond of $10,000 is required when the petition is filed.

- **Preliminary Engineer's Report**
- **Preliminary Public Hearing**
  1) Engineers' report is reviewed.
  2) Viewers are appointed.
- **Viewers**
  1) Assessment of benefits and damages.
  2) Viewers' report/property owners report.
- **Final Engineer's Report**
- **Final Public Hearing**

Project is established or dismissed.

- **Costs and Construction**
  1) Costs of an improvement project are paid by assessment on the benefiting areas determined by the viewers in this proceeding and subsequently ordered by the Board. Project costs, minus any separable maintenance, cannot exceed the value of the benefits. (Minn. Stat. § 103E.215, subd. 6)
  2) The project must be advertised for bids. Improvement projects are generally more costly than repairs or maintenance.
  3) There is no dollar limitation on the amount of money that can be spent on an improvement in any one year, as there is in the case of a repair.

If the improved system is maintained annually, subsequent major repairs should not be required.

PROJECT COSTS MINUS ANY SEPARABLE MAINTENANCE CANNOT EXCEED THE VALUE OF THE BENEFITS.

OTHER DRAINAGE PROCEEDINGS

REDETERMINATION OF BENEFITS

- The drainage authority may redetermine benefits and damages:
  1) Whenever it judges the original benefits and damages determined in a drainage proceeding do not reflect reasonable present-day values or that the benefited or damaged areas have changed,

     OR
  2) When more than 50 percent of the owners of the property benefited or damaged by a drainage proceeding petition for the correction of an error that was made at the time the system was established.
- The most common reasons for a redetermination of benefits and damages include:
  1) There are lands draining into the system which are benefited by the system but are not assessed for benefits. Drainage ditches established before 1920 were constructed through horse-powered excavation or tile trenches dug by hand. Modern technology and system-tiling have expanded the present-day drainage capabilities of many public drainage systems.
  2) Benefits determined many years ago are unrealistic in terms of current land values.
  3) In the case of a repair by petition, additional lands may be brought into the system that have not previously been assessed benefits. Lands already in the system may have been assessed at land values determined many years ago. A redetermination will assess the entire system at current land values.
  4) Redetermined benefits and damages replace the original benefits and damages. According to Minn. Stat. § 103E.351 subd. 3, the redetermined benefits and damages, and benefited and damaged areas, must be used in place of the original determinations in all subsequent proceedings related to the drainage system.
  5) When a petition for an improvement of a separable portion of a drainage system or lateral has been filed, it may be necessary to provide for a fair distribution of the separable maintenance costs and for assessment of future repair costs.

REDETERMINED BENEFITS AND DAMAGES REPLACE THE ORIGINAL BENEFITS AND DAMAGES.

- **Procedure Requirements:**
  1) A *resolution* of the drainage authority. (See Appendix 2F of the MPDM for a sample resolution)
  2) Three *viewers are appointed* to perform the redetermination and report the benefits and damages and the benefited and damaged areas.
  3) An *engineer* may be appointed to assist the viewers.
  4) The *viewers' report* is filed with the auditor in a county or a joint county system, or with the secretary of the board of managers in a watershed district system.
  5) A *property owners' report* is prepared by the auditor or secretary from the viewers' report, and a copy of the property owners' report is mailed to each owner of property affected by the drainage system.
  6) A *hearing* is held on the report. The hearing is similar to the final hearing in the establishment of a new system, except it is to be held within 30 days after the property owners' report is mailed.
- A redetermination of benefits and damages is appealed in the same way as an order establishing benefits and damages.

IMPROVEMENT OF OUTLET

▶ This proceeding is usually used to channelize upland drainage waters spilling out at the lower end of a system of insufficient capacity to handle the additional discharge during periods of high water. It may lead to an extension of the system or systems, or it might require a system of dikes or pumps to protect surrounding lands from overflow, or it may require an impoundment that stores water.

▶ An improvement of outlet *may not be used* for improvement or enlargement of the drainage system itself. If the deepening and widening of the existing channel, or increasing the size of an existing tile is needed, then a regular improvement should be used, either by itself, or in combination with an improvement of outlet petition.

▶ **Procedure Requirements:**

A petition that:

1) Describes the property that has been, or is likely to be, overflowed, including names and addresses of landowners.
2) States the drainage systems that contribute to the overflow.
3) Describes the location of the overflow drainage system and outlet.
4) Shows the need for outlet improvement by enlarging the system or controlling waters by take-off ditches, additional outlets, etc.
5) Shows that the outlet improvement will protect the adjoining property.
6) States that the outlet improvement will be of public benefit/utility and improve public health.
7) States that petitioners will pay all costs incurred if proceedings are dismissed or contract for construction is not awarded.

The petition is filed with the county auditor, or in the case of a joint county project, with the county auditor of the county wherein lies the greatest affected area. If a watershed is the drainage authority, then it should be filed with the secretary of the board of managers.

The petition must be signed 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. See MPDM 2.48 for more information.

A bond:

A bond of at least $10,000 must accompany the petition.

Assessment of benefits:

Viewers are appointed and they determine and report the benefits to all property from the outlet improvement, including property drained, or to be drained, by the existing drainage system and proposed drainage project.

IMPROVEMENT OF OUTLET MAY NOT BE USED FOR IMPROVEMENT OR ENLARGEMENT OF THE DRAINAGE SYSTEM ITSELF.

LATERALS

▶ A *lateral* is constructed as a tributary to the main stream/ditch. It is a separate project. It has many of the same characteristics as a new system, in that it is new drainage.

▶ **Procedure Requirements:**

A petition that:

1) Describes the starting point, general course and ending point of the proposed lateral.
2) Describes the property crossed by the lateral, including names/addresses of property owners.
3) States the necessity to construct the lateral.
4) States that it will be of public benefit/utility and promote the public health.
5) Requests that the lateral be constructed and connected with the drainage system.
6) Provides that the petitioners will pay all costs incurred if the lateral is not established or a construction contract is not awarded.

The petition must be signed by at least 26 percent of the owners of the property that the lateral passes over, or by the owners of at least 26 percent of the area that the lateral passes over.

A LATERAL IS SIMILAR TO A NEW SYSTEM, IN THAT IT IS NEW DRAINAGE.

If it appears that new lands will be drained into the system, a petition seeking to use the system as an outlet should be filed simultaneously with the petition for a lateral.

The petition is filed with the county auditor of the county in which is located the largest number of acres of the property to be passed over by the lateral. If it is a joint county system, records may be maintained in a different auditor's office if the majority of the land traversed by the system lies within another county.

A bond:

A surety bond for $10,000 is required if the petition is for a lateral to an existing legal drainage system.

The following procedures:

Once the petition for a lateral is filed, the procedures are identical to those followed under a new system.

1) A project engineer is appointed and a survey/report is ordered.
2) A preliminary hearing is held, and if the drainage authority feels the project should move forward, a final survey is ordered and viewers are appointed.
3) The final engineer's report and viewers' report are prepared.
4) A final hearing is held and the project established or dismissed.

▶ If new lands will be brought into the system, *permission to use the outlet* will be required. If there is doubt about whether new lands will be drained into the system, a determination should be made at the preliminary hearing as to whether the drainage authority will consent to use of the outlet. An outlet fee most likely will be required. See Minn. Stat. § 103E.401.

IMPOUNDING AND DIVERSION OF DRAINAGE SYSTEM WATERS

▶ This type of drainage proceeding was added to the drainage code in 1990.

See Minn. Stat. § 103E.227. This proceeding provides a means to divert drainage waters and impound or pond it.

▶ **Procedure Requirements:**

A petition that:

1) Contains the location of the installation, plans and specifications for the proposed structure, and a map of the areas likely to be affected by the impoundment or diversion.
2) Contains a statement that the petitioner agrees to be responsible for the cost of installation and construction of the structure.
3) Is accompanied by a public waters permit or a water use permit from the commissioner of the Department of Natural Resources (DNR), if required.

The petition may be signed by a person, a public or municipal corporation, or a governmental entity.

The petition must be filed with the drainage authority. If that is a joint county drainage authority, the petition would be filed in the county where the majority of the acres to be ponded lie.

A bond:

If the petition is filed by the State of Minnesota or one of its agencies, by an agency of the United States government, or by a municipality, no bond is required. In all other cases, a surety bond for $10,000 is required.

The following procedures:

After the petition and bond are received, the drainage authority must:

1) Appoint an engineer to conduct a survey and file a report.
2) When the engineer's report is filed, the auditor or board of managers gives notice to all persons whose property is assessed for the system waters to be diverted.
3) A public hearing is held. This is both a preliminary and final hearing.

There is no need for a final hearing, as no privately owned lands are going to be assessed for the cost of construction. No viewers are needed.

1) If the drainage authority finds that the project will not impair the utility of the system, or deprive affected landowners of the benefits of the system, the authority should make an order modifying the drainage system and issue the permit authorizing the installation. This is a final order and is appealable.
2) After obtaining an order and permit, the petitioner must obtain right-of-way easements and flowage easements from landowners whose private property will be inundated by the impounded waters.

▶ The petitioner is forever liable for maintenance/repair of the impoundment installation.

▶ Impounding and diversion of drainage system waters also can be accomplished by the use of an improvement of outlet proceeding. See MPDM 2.53

THIS PROCEEDING PROVIDES A MEANS TO DIVERT DRAINAGE WATERS AND IMPOUND OR POND IT.

CONSOLIDATION, DIVISION, ABANDONMENT AND TRANSFER

Consolidation of two or more systems may be done only after the benefited area of the systems has been redetermined by a redetermination of benefits proceeding under Minn. Stat. § 103E.351, or in connection with other drainage proceedings. The same is true of dividing one system into two or more separate systems. This redetermination will avoid inequities in liability for future repairs.

CONSOLIDATION OR DIVISION

▶ Procedure Requirements

Initiating the proceedings:

1) Consolidation or division is most often initiated by the drainage authority, or
2) It may be initiated by a petition, which requires only one signature.
3) The petition is filed with the county auditor or the secretary of the board of managers, depending on the jurisdiction.

A hearing:

The drainage authority may order a consolidation or division if it determines that the proposed project:

1) Is consistent with the redetermination of the benefited areas of the system.
2) Will provide for the efficient administration of the drainage system.
3) Will be fair and equitable.

Drainage consolidation/division proceedings do not release any property from an existing drainage lien or assessment filed before the date of the consolidation or division order.

CONSOLIDATION OF TWO OR MORE SYSTEMS MAY BE DONE ONLY AFTER THE BENEFITED AREA HAS BEEN REDETERMINED.

ABANDONMENT

The drainage authority may find that part of the drainage system or the entire system should be abandoned.

▶ Procedure Requirements

A petition:

1) The move to abandon must be initiated by assessed landowners presenting a petition signed by at least 51 percent of the property owners assessed for the construction of the system, or by owners of not less than 51 percent of the area of the property assessed for the system. The petition must designate the system to be abandoned, and show that it is not of public benefit and utility.
2) The petition is filed with the county auditor or the watershed district secretary.
3) If the property assessed for the system is located in two or more counties, the petition is filed with the auditor of the county having the largest benefited acreage.

A hearing:

1) The drainage authority examines the petition and decides whether it is sufficient. It hears comments from all interested parties.
2) If there is at least one objection to the proposed abandonment, the drainage authority or court appoints three disinterested persons as viewers. The hearing is adjourned to give the viewers time for an examination and to make a report.
3) At the reconvened hearing the drainage authority or court considers the viewers' report and any other evidence. It then makes a finding that either the drainage system serves a useful purpose to affected property, or the general public, and the petition is denied; or the

drainage system does not serve any useful purpose to the affected property and is not of public benefit and utility, and the petition to abandon is approved.

Once abandoned, a repair petition may not be accepted, and the responsibility of the drainage authority for maintenance of the system ends. Existing liens are not affected.

TRANSFER

New authority to allow the transfer of all or part of a drainage system was passed by the Legislature in 2002. (Minn. Stat. § 103E.812) The ditch may be transferred to a water management authority that is defined as a county, city, watershed district, watershed management organization, storm water management district, lake improvement district or other special purpose district.

▶ Procedure Requirements

A petition:

1) The move to transfer must be initiated by a petition presented by assessed landowners signed by at least 51 percent of the property owners assessed for the construction of the drainage system, or by owners of not less than 51 percent of the area of the property assessed for the system, or a city, or a water management authority (in the seven-county metro area). The petition must designate the system to be transferred, and show that the transfer is necessary for the management of storm, surface, or flood waters.
2) The petition is filed with the county auditor, the watershed district secretary, or the court administrator if the county is the petitioner.
3) If the property assessed for the system is in two or more counties, the petition is filed with the auditor or court administrator of either (a) the county where the system to be transferred exists; (b) the county that is not petitioning for the transfer; or (c) the county where the majority of the system to be transferred exists.

A hearing:

1) The drainage authority or court examines the petition and decides whether it is sufficient. All interested parties are heard from.
2) If a property owner assessed benefits makes a written objection, the drainage authority or court appoints a technical panel to examine the drainage system, the property, the proposed transfer, and the extent to which the transfer will damage or take property. The panel, at a minimum must consist of a viewer and representatives of the drainage authority, Department of Natural Resources, Board of Water and Soil Resources, and the soil and water conservation district. The hearing is adjourned to give time for an examination and to make a report.
3) At the reconvened hearing, the drainage authority or court considers' the report and all evidence offered. If the drainage authority or court determines a water management authority could better manage the storm, surface, or flood waters along the drainage system or within the benefited area, it approves the petition.

A transfer must guarantee, for property assessed benefits, that all rights to an outlet must be preserved of at least equal hydraulic efficiency as the outlet rights that existed on the date of transfer. A water management authority must compensate a benefited property owner for the loss or impairment of any drainage rights occurring after the transfer. Once transferred, a drainage system ceases to be subject to the drainage law (Mn. Stat. 103E), and all responsibility of the drainage authority ends.

THE DRAINAGE AUTHORITY IS NO LONGER RESPONSIBLE FOR MAINTAINING THE SYSTEM ONCE IT HAS BEEN ABANDONED OR TRANSFERRED.

USE OF THE DRAINAGE SYSTEM AS AN OUTLET

USE BY ANOTHER PUBLIC OR PRIVATE SYSTEM

The procedure for seeking authority to use an established system as an outlet is found in Minn. Stat. § 103E.401.

▶ Procedure Requirements

A petition:

The petition may be signed by any person with an interest in obtaining the outlet. Presumably, the petitioner would have an ownership interest in the land to be drained. (The construction of a drainage project which will depend upon an established system for an outlet should never be commenced without first obtaining consent from the drainage authority for the outlet.)

The petition should be filed at the same time as the petition for the establishment of a lateral or new system which will be dependent on that outlet.

If the outlet is a joint county system, the petition may be filed with one county auditor while the petition for the construction of the lateral or new system is filed with another.

THE PETITION SHOULD BE FILED AT THE SAME TIME AS THE PETITION FOR THE LATERAL OR SYSTEM THAT IS DEPENDENT ON THAT OUTLET.

No bond is required

A hearing

All persons who are assessed on the system proposed to be used as an outlet are notified by mail and by publication. The purpose of the hearing:

1) To consider the capacity of the outlet drainage system.
2) To consider proposed terms and conditions for use of the system.
3) To establish the amount to be paid by the tributary as an outlet fee.

If the drainage authority approves the outlet drainage system, an order is made which must describe the property in the tributary system that is to be benefited.

In all cases, the property to be benefited is the same property that is assessed for the benefits of the construction for the tributary system. All of the benefited property in the tributary system is liable for repair assessments levied by the outlet system, but costs of repairs of the tributary system are not borne by the outlet system. See MPDM 2.63 - 2.64 for a discussion of costs and assessments.

USE BY A MUNICIPALITY

A municipality that wishes to use a public drainage system as an outlet also must obtain the consent of the drainage authority, and pay an outlet charge. The procedure is much the same as that followed by a public or private system.

The *petitioner* must be the municipality, and *written pre-approval by the Minnesota Pollution Control Agency* should accompany the petition.

The petition 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 municipal drainage system.
4) Be accompanied by specifications showing the plan of connection from the municipal drainage system to the drainage system.

The petition is filed with the county auditor, when the drainage authority is a county or joint county authority, or with the secretary of the board of managers when a watershed district is the drainage authority.

A hearing:

A notice is given by publication only, and mailed to the auditors of the counties affected in the case of a joint county drainage system. Any interested party may give evidence at the hearing. If the authority approves the petition, it should make findings that:

1) 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) The use of the drainage system will be of public benefit and utility and will promote the public health.
3) The proposed connection conforms to the requirements of the MPCA and provides for the construction and use of proper disposal works.

In its order, the drainage authority must make the municipality a party to the drainage proceedings and determine the benefits for using the drainage system as an outlet. It will be a lump sum charge. Additional discussion of this determination process is found in MPDM 2.65 and MPDM 4.17- 4.23.

THE DRAINAGE AUTHORITY SETS A LUMP SUM CHARGE FOR USING THE DRAINAGE SYSTEM AS AN OUTLET.

THE APPEALS PROCESS

In handling drainage proceedings, the drainage authority acts in a quasi-judicial role. In making decisions, it receives evidence, draws conclusions, and makes orders. Everything the drainage authority does is open to review by the state district court. Even the "failure to act" is reviewable by a state district court. In cases where drainage authority activities conflict with federal agencies, the matter may be reviewed by a United States district court.

APPEALS FROM ORDERS:

- Appeals from orders dismissing or establishing drainage systems are tried by a judge, not a jury.
- There are two points at which the drainage authority can dismiss a petition for a project:
  1) At the preliminary hearing. This decision is appealable. An order to proceed with a detailed survey and report is not appealable. See MPDM 2.101.
  2) At the final hearing. This decision is appealable.
- A petition may be dismissed by a voluntary action of the petitioners. This may be done at any time before the establishment of a project by an action of a majority of the petitioners who own at least 60 percent of the area as described in the petition. Costs must be paid before the dismissal becomes effective. See MPDM 2.102 or Minn. Stat. § 103E.231.
- A petition is dismissed if the required bond is not provided.
- An *order to establish* a project is appealable under Minn. Stat. § 103E.095.
- An order *redetermining benefits* is appealable under Minn. Stat. § 103E.095.
- If the lowest construction bid comes in at more than 30 percent above the engineer's estimated costs, an interested landowner may petition to have the *engineer's detailed report and viewers' report reconsidered*. A hearing is held. The drainage authority usually will either reject the petition and refuse to reopen, or will order the viewers' report and engineer's final report to be reconsidered. Modified reports may lead to a new order. See MPDM 2.103.
- If the engineer, during his survey, finds that land drains into the system that has not previously been assessed, it is reported to the drainage authority. The drainage authority then notifies the landowners, and a hearing is held. Viewers may be appointed, and another hearing is held after they have completed their study. After the second hearing, the drainage authority makes an order identifying the property and determining the *benefits assessable* from the original construction of the system. A landowner may appeal this order.
- Legal representation and attorney costs during appeals are discussed in MPDM 2.104.

A DECISION TO DISMISS A PETITION IS APPEALABLE. A DECISION TO ESTABLISH A PROJECT ALSO IS APPEALABLE.

APPEALS FROM BENEFITS AND DAMAGES DETERMINATIONS:

- An appeal from an order determining benefits, damages, or fees and expenses must be filed in the auditor's or secretary's office where the order is filed, within 30 days after the filing of the order.
- A jury trial is allowed in an appeal from an order determining benefits, damages, fees and expenses. If there is more than one appeal pending in the same drainage project proceeding, the cases may be consolidated for trial.
- At the request of the person appealing, the trial may be held in the district court in the county where the affected land is located, even if the order is filed in the office of the auditor of another county or with the secretary of a watershed district.
- More information on appeal of benefits and damages determinations can be found in MPDM 2.105 - 2.106. Other litigation, such as injunctions, actions for mandamus, actions for certiorari, and criminal penalties for misdemeanors, is discussed in MPDM 2.106 - 2.108.

VIEWING

Viewing gathers information that is used by the watershed district board of managers or the county board of commissioners to decide if a drainage project is feasible. It also identifies who will pay for construction and maintenance of the drainage system. The original establishment of benefits on a new system will affect all later repairs related to that system.

There are 11 types of projects included within the present drainage law that require some action by viewers:

- New systems
- Improvements
- Improvement of outlets
- Laterals
- Redetermination of benefits
- Resloping, leveling, erosion control (if required by Minn Stat. § 103E.715, subd. 6)
- Outlet fees for municipalities
- Violation of grass strip provision
- Inclusion of additional land
- Removal of property
- Apportionment of liens

The viewing procedures for these different projects are discussed in MPDM 4.6 - 4.9.

VIEWERS GATHER INFORMATION THAT IS USED BY MANAGERS OR COUNTY COMMISSIONERS TO DECIDE IF A DRAINAGE PROJECT IS FEASIBLE.

APPOINTMENT AND QUALIFICATIONS OF VIEWERS

The drainage code gives little guidance on the appointment of viewers. It basically states that viewers shall consist of three disinterested residents of the state qualified to assess benefits and damages. They should have a knowledge of agriculture, topography, residential developments, and soils found in the project area. They must be able to understand soils maps, aerial photos, and engineering and survey data. They should be able to present their findings in an orderly and concise manner.

The outcome of any proceeding will be affected by the quality of the viewers' work. They may be required to testify in court in the case of an appeal.

Compensation for viewers is generally low. It is established by the drainage authority and is paid on a per diem basis.

ASSESSMENT OF DRAINAGE BENEFITS

Drainage is considered an improvement to land. It should increase the value of land by more than the cost of the investment.

- **Benefits may be based on:**
  1) An increase in the current market value of property as a result of the project;
  2) An increase in the potential for agricultural production as a result of the project;
  3) An increase value of the property as a result of a potential different land use;
  4) Accelerated runoff or increased sedimentation causing the need for increased hydraulic capacity or maintenance.

A general overview of the types of properties which may be found to benefit from a drainage system is found in MPDM 4.10 - 4.23. Viewers should carefully review this section of the drainage manual.

▶ **Special properties:**

Viewers will encounter a number of different types of special properties when performing their duties. These will include:

1) Federal and tribal lands, state and municipal lands.
2) Public roads
3) Railways and other utilities
4) Wetlands

Because there are different practices and statutory requirements for viewing these different properties, viewers should consult the MPDM and proper administrative authorities before filing their report.

▶ **Extent and basis of benefits:**

The drainage code states, "The viewers shall determine the amount of benefits to all property within the watershed, whether the property is benefited immediately by the construction of the proposed drainage project or the project can become an outlet for drainage, makes an outlet more accessible or otherwise directly benefits the property." (Minn. Stat § 103E.315, subd. 5) This describes the factors to be considered in deciding on the benefits of a drainage project.

BENEFITS MAY BE FOUND TO ANY PROPERTY THAT WOULD BE IMPROVED THROUGH THE DRAINAGE SYSTEM.

Minn. Stat. § 103E.401, subd. 2, says that a public or private drainage system that drains property not assessed for benefits for the established system may not be constructed to use the established drainage system for an outlet without obtaining express authority from the drainage authority that has jurisdiction over the system proposed to be used as the outlet.

It appears that benefits may be found to any property within the watershed which would be improved through construction of additional public or private drainage systems. The drainage system only has to make the outlet available, or more accessible, to these properties to allow consideration of benefits. Helpful information may be found in MPDM 4.13 - 4.23.

EXTENT OF DAMAGES

Damages to be paid may include acquisition or encumbering of the property for the right-of-way needed for the open channel and the grass strip seeding area. Normally, right-of-way is not taken for tile systems. The value determined for the right-of-way for an open channel should be at least equal to the fair market value of similar lands.

Consideration should also be made for the potentially lowered value of a farm due to severing of a field by an open channel. The grass strip seeding area may or may not have lesser damage value as it may still serve a useful function.

▶ **Other damages that may be paid:**

1) Crop damages for the temporary use of property during construction, and reduced productive value of the area covered by leveling of the spoil banks.
2) Diminished productivity or land value from increased overflow if the outlet for the drainage project is within an area which may have increased flooding or overflow.
3) Damages to road authorities for road crossings.

VIEWERS' REPORT/PROPERTY OWNERS' REPORT

The viewers' report is the listing of facts and findings of the team of viewers. It may be the single most important document in drainage system procedures. This report is the forerunner to the property owners' report, which is prepared by the auditor or secretary of the watershed district. The viewers' report should include most of the information required in the property owners' report.

The viewers' report must show, in tabular form, each 40-acre tract or lot, and fraction of a tract or lot, under separate ownership, that is benefited or damaged. It must include:

1) A description of the tract or lot, under separate ownership that is benefited or damaged.
2) The name(s) of the owner(s) as they appear on current tax records of the county and their addresses.
3) The number of acres in each tract or lot.
4) The number and value of acres added to a tract or lot by the proposed drainage of public waters.
5) The damage, if any, to riparian rights.
6) The damages paid for the permanent grass strip.
7) The total number and value of acres added to a tract or lot by the proposed drainage of public waters, wetlands, and other areas not currently being cultivated.
8) The number of acres and amounts of benefits being assessed for drainage of areas which before the drainage benefits could be realized would require a permit (under Minn. Stat. § 103G.245; Section 404 of the Clean Water Act; or Section 1344 of the Clean Water Act).
9) The number of acres and amount of benefits being assessed for drainage of areas that would be considered conversion of a wetland.
10) The amount of right-of-way acreage required.
11) The amount that each tract or lot will be benefited or damaged.

THE OUTCOME OF ANY PROCEEDING WILL BE AFFECTED BY THE QUALITY OF THE VIEWERS' WORK.

The report also must include a benefits and damages statement, describing the procedure used for similar tracts/lots within the watershed of the project. See MPDM 4.25 - 4.26.

If viewers cannot agree on certain issues, they should each file a separate report stating their findings on the unresolved issues.

The viewers' report should be filed with the auditor of each county affected by the proposed project. The report should include a statement showing the actual time the viewers spent in fulfilling their responsibilities, and the costs incurred.

Within 30 days, the auditor or watershed district secretary must make a *property owners report*. It must contain:

1) The name and address of the property owners.
2) Each lot or tract and its area that is benefited or damaged.
3) The total number and value of acres added to a tract or lot by the proposed drainage of public waters, wetlands and other areas not currently being cultivated.

4) The number of acres and amount of benefits being assessed for drainage of areas which, before the drainage benefits could be realized, would need a DNR permit to work in public waters, or a permit from the U.S. Army Corp of Engineers to excavate or fill a navigable water body, or to discharge into waters of the U.S.
5) The number of acres and amount of benefits being assessed for drainage of areas that would be considered conversion of a wetland.
6) The damage, if any, to riparian rights.
7) The amount of right-of-way acreage required.
8) The amount that each tract or lot will be benefited or damaged.
9) The net damages or benefits to each property owner.
10) The estimated cost to be assessed to the property owner based on the cost of the drainage project in the engineer's final report.
11) A copy of the benefits and damages statement under Minn. Stat. § 103E.321, subd. 2(a).

The auditor/secretary must mail a copy of this report to each owner of property affected by the proposed project.

THE VIEWERS' REPORT MUST INCLUDE A BENEFITS AND DAMAGES STATEMENT, DESCRIBING THE PROCEDURE USED FOR SIMILAR TRACTS.

APPLICABLE LAWS AND PERMIT REQUIREMENTS

Minnesota state laws affecting drainage are found in Minn. Stat. ch. 103E, called the "drainage code". Copies of the drainage code and other pertinent legislation are included as appendices at the end of the MPDM.

There are a number of other important federal and state laws which impact drainage projects and drainage issues. Some of these include:

THE CLEAN WATER ACT, SECTION 404

Under Section 404 of the federal Clean Water Act, the U.S. Army Corps of Engineers (COE) is authorized to issue permits for the discharge of dredged or fill material in "waters of the United States." COE regulations define these waters to include wetlands.

The Environmental Protection Agency (EPA) has authority to make final determinations on the extent of Clean Water Act jurisdiction as well as the authority to oversee the Section 404 permit program. It can overrule a COE Section 404 permit decision.

This means that individuals cannot undertake activities involving filling activity or the discharge of dredge material even on privately owned lands, if that land comes under the broad definition of "wetlands", unless a COE permit is issued.

COE regulations provide that their district offices can determine if land is subject to wetland regulation.

IN ADDITION TO THE MINNESOTA *DRAINAGE CODE* THERE ARE A NUMBER OF OTHER IMPORTANT FEDERAL AND STATE LAWS WHICH IMPACT DRAINAGE.

"SWAMPBUSTER" RULES

The wetland conservation provisions (called "Swampbuster") of the 1985, 1990 and 1996 Farm Bills require agricultural producers to protect wetlands on the farms they own or operate in order to be eligible for USDA farm program benefits. Producers cannot plant an agricultural commodity on land that was converted from a wetland by drainage, leveling, or any other means after December 23, 1985. They cannot convert a wetland for the purpose of agricultural production after November 28, 1990.

Producers may maintain existing drainage systems on drained wetlands designated as farmed in the same manner as before December 23, 1985, without loss of USDA benefits, as long as the action doesn't drain additional wetlands.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

This federal law was passed in 1969. It was intended to prevent damage to the environment, including wetlands, and to advance understanding of the ecological systems and natural resources of the United States.

Executive Order 11990, issued by President Carter in 1977, directed federal agencies to take action to minimize the destruction and loss of wetlands, and to preserve and enhance the natural and beneficial values of wetlands.

GOVERNOR'S EXECUTIVE ORDER, APRIL, 2000

Governor Jesse Ventura signed this order directing state agencies and departments to follow a "no-net-loss" policy in regard to wetlands. The order directs state departments and agencies to protect, enhance, and restore Minnesota's wetlands to the fullest extent of their authority. The order sets guidelines to avoid, minimize and mitigate actions that impact the state's wetlands.

MINNESOTA ENVIRONMENTAL POLICY ACT (MEPA)

This state law was passed in 1973 to promote efforts to prevent or eliminate damage to the environment. Authorization for the State Environmental Review Program is found in MEPA (Minn. Stat. § 116D.04 and 116D.045). This program may require the drainage authority to prepare an environmental assessment worksheet (EAW) or an environmental impact statement (EIS). An EAW or EIS may be required by the Environmental Quality Board (EQB) through a petition to the EQB by interested landowners.

An EIS or EAW does not "make or break" a project, even if the conclusion is that the project is environmentally unsound. It is only an informational document which forces consideration of project impacts. In the case of an EIS, alternatives must be considered. The cost of preparing these documents is generally absorbed by the project proposer.

1991 WETLANDS CONSERVATION ACT (WCA)

This "no-net-loss" legislation states that drained or filled wetlands must be replaced with created wetlands or restored wetlands of equal or greater size and quality. (Minn. Stat. § 103G.222, subd. 1) Wetlands subject to this act have been expanded to include most type one through type eight wetlands.

For wetlands regulated by the WCA, the drainage authority must obtain approval of a wetland replacement plan, exemption, or no-loss determination from the appropriate local governmental unit. There are several exemptions which are potentially applicable to drainage projects. (Minn. Stat. § 103G.2241, subd. 2) Soil and Water Conservation Districts have been designated as the clearinghouse for wetland information.

DNR PERMITS MAY BE REQUIRED FOR A NUMBER OF ACTIVITIES AFFECTING PUBLIC WATER. THE AREA DNR HYDROLOGIST SHOULD BE CONSULTED.

DNR PERMIT REQUIREMENTS

The Minnesota Department of Natural Resources (DNR) administers the state's public waters permit program, under Minn. Stat. ch. 103G. Any person proposing to change the course, current, or cross-section of a public water (which includes draining or partially draining a lake or wetland) must obtain a permit from the DNR. (Minn. Stat. § 103G.245)

A permit may be required for such activities as construction of outlet on grade control structures, spoil placement, modifying runout elevation, modifying a cross-section of an altered natural watercourse, or otherwise affecting the ordinary high water mark. The area DNR hydrologist should be contacted for a determination of permit requirement.

METRO AREA DRAINAGE LAWS

Special and general laws have been passed to address metropolitan drainage issues.

▶ Special laws

Special legislation has been enacted to provide five metropolitan watershed districts (Minnehaha Creek, Nine Mile Creek, Riley-Purgatory-Bluff Creek, Ramsey-Washington Metro, and Coon Creek) with the authority to levy ad valorem property taxes to establish "water maintenance and repair" funds.

▶ General laws

The Metropolitan Surface Water Management Act, Minn. Stat. § 103B.201 - .251, authorizes metropolitan watershed management organizations (WMOs) to accept transfer of county or joint county drainage systems and to construct all new systems and improvements of existing systems.

It also authorizes WMOs to use the power of Minn. Stat. ch. 103E, the drainage code, and Minn. Stat. ch. 103D, watershed law, in carrying out projects on public drainage systems. Procedures for financing projects with ad valorem property taxes are included.

OTHER PROGRAMS

The taxes on wetlands are usually minimal because of the low valuation used by the assessor. Certain wetlands are entirely exempt from taxation. However, there also are several state and federal programs available to landowners who have wetlands as part of their property.

USDA CONSERVATION RESERVE PROGRAM (CRP)

Under the CRP program, which became effective January 10, 1989, certain wetlands became eligible for enrollment. Wetlands and surrounding cropland could be enrolled into CRP under the following guidelines:

- Any croplands identified as wetland or farmed wetland, as defined under the 1985 Food Security Act, that was planted or considered planted by the Farm Service Agency (FSA) at least two years of the period 1981-1985 are eligible for CRP.
- There is no obligation to continue keeping the lands out of production after the expiration of the ten-year contract. Land enrolled under wetland criteria retains the original wetland designation when the contract expires.
- For more information, the local FSA or Natural Resources Conservation Service (NRCS) office should be contacted.

THERE ARE SEVERAL STATE AND FEDERAL PROGRAMS AVAILABLE TO LANDOWNERS WHO HAVE WETLANDS ON THEIR PROPERTY.

BOARD OF WATER AND SOIL RESOURCES WETLAND PROGRAMS

The Board of Water and Soil Resources (BWSR) administers several programs dealing with wetland restoration and preservation.

One program is the Reinvest in Minnesota (RIM) Reserve Program. This law was expanded in 1987 to accept previously drained wetlands for enrollment. The intent is to restore wetlands by plugging ditches, blocking or altering subsurface drainage systems, or using other methods to re-establish the wetland areas. All construction costs are covered by the RIM program and other agencies or private organizations. The minimum wetland restoration size is one acre, along with up to four acres of cropped upland for each acre of wetland restored. The landowner is paid based on appraised market value.

The Permanent Wetlands Preserve Program is authorized by language contained in the 1991 Wetlands Conservation Act. Under this legislation, the Board may acquire permanent easements on land containing type one, two, three or six wetlands, as defined in U.S. Fish and Wildlife Service Circular No. 39.

U.S. FISH AND WILDLIFE SERVICE LAND ACQUISITION PROGRAM

Two methods of acquisition are used by this federal agency. The most suitable and permanent habitat is purchased in fee title and the surrounding wetland areas are protected by easement. Acquisition is by negotiated purchase from willing sellers.

Purchased lands and easements become a part of the National Wildlife Refuge system and are managed by the local U.S. Fish and Wildlife Wetlands Management District.

A conservation easement amounts to a contract in which the owner agrees not to drain, fill, burn, or level certain existing or naturally recurring wetlands on the property. Owners retain all other rights and may farm the wetland basins when they are dry from natural causes.

Land is purchased at market value. The U.S. government makes payments in place of taxes each year to counties where the lands have been purchased.

DRAINAGE SYSTEM COSTS

Each drainage system is an entity unto itself. Each project, except a repair, is an entity unto itself until payment has been made for it, then it becomes part of the system it is tributary to, or that it improves.

The county auditor keeps the financial records for drainage systems under county jurisdiction, and the watershed district treasurer keeps the financial records for drainage systems under watershed district jurisdiction. A separate set of accounts is required for each drainage system.

The proceeds of the sale of bonds and all interest, lien payments, assessments, and other sources of proceeds (such as outlet charges, liquidated damages, and bond forfeitures) are deposited in the drainage system account. All expenses of establishment, construction, and maintenance of the system or project are paid from the drainage system account.

When a watershed district is the drainage authority for a project or a drainage system, it depends on the county to levy and collect the assessments. Watershed districts do not have the power to tax. Also, watershed districts do not have the power to issue bonds to pay for drainage projects. Except for contractual participation by state and federal governments, all funds available to a watershed district are levied and collected by the respective county boards.

WHEN A WATERSHED DISTRICT IS THE DRAINAGE AUTHORITY, IT DEPENDS ON THE COUNTY TO LEVY AND COLLECT THE ASSESSMENTS.

A statutory change made in 2000 allows drainage authorities to use outside sources of funding (instead of or in addition to assessments on benefited properties) for wetland preservation/restoration, water quality improvement, or flood control. These funds may be used outside of the benefited area, but must be used within the watershed of the drainage system.

More information on drainage levies, liens, bonds and accounting requirements are found in MPDM 2.110 - 2.118.

RESOURCE DIRECTORY

ASSOCIATION OF MINNESOTA COUNTIES
125 Charles Avenue
St. Paul, MN 55103-2108
Tele: 651-224-3344
Fax: 651-224-6540
Web: mncounties.org

MINN. BOARD OF WATER & SOIL RESOURCES
One West Water Street, Suite 200
St. Paul, MN 55107
Tele: 651-296-3767
Fax: 651-297-5615
Web: bwsr.state.mn.us

MINN. ASSOCIATION OF WATERSHED DISTRICTS
3848 Westbury Drive
St. Paul, MN 55123
Tele: 651-452-8506
Fax: 651-686-8679
Web: mnwatershed.org

MINN. ASSOCIATION OF SOIL AND WATER CONSERVATION DISTRICTS
790 Cleveland Avenue South, Suite 201
St. Paul, MN 55116
Tele: 651-690-9028
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Web: maswcd.org

MINN. DEPARTMENT OF NATURAL RESOURCES
Division of Waters - Central Office
500 Lafayette Road
DNR Building
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Fax: 651-296-0445
Web: dnr.state.mn.us

MINN. POLLUTION CONTROL AGENCY
520 Lafayette Road
St. Paul, MN 55155
Tele: 651-296-6300
Fax: 651-297-8683
Web: pca.state.mn.us

MINN. DEPARTMENT OF AGRICULTURE
90 West Plato Boulevard
St. Paul, MN 55107
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Fax: 651-297-5522
Web: mda.state.mn.us

NATURAL RESOURCES CONSERVATION SERVICE
375 Jackson Street, Suite 600
St. Paul, MN 55101-1854
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FARM SERVICE AGENCY
375 Jackson Street, Suite 400
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Fax: 651-602-7743
Web: fsa.usda.gov

U.S. ARMY CORPS OF ENGINEERS
Army C.E. Centre - 190 Fifth Street East
St. Paul, MN 55101-1638
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Web: usace.army.mil

U.S. FISH AND WILDLIFE SERVICE
Twin Cities Field Office
4101 East 80th Street
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