
Report to the Minnesota Legislature

Minnesota Public Drainage; Outlet Adequacy and Public Notice
January 24, 2024

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This report has been prepared for the Minnesota State Legislature by the Minnesota Board of Water and Soil Resources (BWSR) in pursuant to Minnesota Statutes, section 103B.101, subdivision 13 and Minnesota Laws 2023, Chapter 60, Article 1, section 4, paragraph (d).

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Table of Contents

Introduction and Overview	3
Definition and Application of Outlet Adequacy	4
Public Notice Requirements for 103E Activities	6
Clarifying and Aligning Notice Requirements.....	6
Broader Notice.	7

Introduction and Overview

During the 2023 legislative session the following language was enacted (Laws 2023, Chapter 60, Article 5, section 21):

(a) The Board of Water and Soil Resources [BWSR] and the Drainage Work Group [DWG] established under Minnesota Statutes, section 103B.101, subdivision 13, must evaluate and develop recommendations on the following subjects:

(1) the definition and application of outlet adequacy as provided in Minnesota Statutes, section 103E.261; and

(2) public notice requirements for proposed public drainage activities, including a drainage registry portal.

(b) The Board must submit the report to the chairs and ranking minority members of the house of representatives and senate committees and divisions with jurisdiction over environment and natural resources by February 1, 2024.

The DWG was also directed to complete another task as provided in Laws of Minnesota Chapter 60, Article 1, section 4, paragraph (d):

The Drainage Work Group must review a drainage authority's power under Minnesota Statutes, Chapter 103E, to consider the abandonment or dismantling of drainage systems; to re-meander, restore, or reconstruct a natural waterway that has been modified by drainage; or to deconstruct dikes, dams, or other water-control structures.

This report addresses each of the directives identified above and also presents the DWG recommendation for the sunset language in Section 103E.729.

There are no consensus recommendations at this time with respect to “outlet adequacy” or “public notice requirements for proposed public drainage activities”. There is reasonable agreement that more time would be needed to effectively bring forward potential policy recommendations on these two topics.

Other tasks completed by the DWG during the past season include:

- 1) The DWG initiated efforts to assess Drainage Authority Powers during the past year which was legislatively directed and which does not require a legislative report.
- 2) While not a required part of this report, the DWG is supporting a recommendation to extend the sunset provision of 103E.729 for an additional five years via legislative action during the 2024 Legislative Session.

Definition and Application of Outlet Adequacy

Drainage law specifies in Section 103E.261, subd. 4, that in order to authorize a new public drainage system or an improvement to an existing one, the drainage authority must determine that the “outlet” into which the system discharges will be “adequate.” Neither of these terms is explicitly defined, leading to uncertainty and disagreement as to both the scope of what is to be assessed and what is sufficient to show “adequacy”.

Short of providing more clarity in the statute, a common understanding among those involved in proposing or reviewing potential projects of both scope and assessment could improve the administration of drainage projects.

The DWG began discussions related to the use of “outlet adequacy” in October 2022.

The DWG agreed to convene a technical subcommittee to assess outlet adequacy which would examine the topic in more detail and provide preliminary assessment for the full DWG to consider. This report was intended to be a starting point for what would likely be an iterative process covering several detailed topic areas that fall under the concept and framework of “outlet adequacy”.

The technical subcommittee consisted of 16 individuals selected by state agencies, drainage authorities, watershed districts, agricultural organizations, and environmental groups. This subcommittee was charged to look at terms and methods used to evaluate outlets for drainage projects and if appropriate provide options and recommendations to make the evaluation of an outlet a more repeatable and defensible process. The efforts of the technical subcommittee should be commended as an important first step in the assessment of and future discussions on outlet adequacy by the DWG. Those efforts culminated in a technical report that was delivered to the DWG.

While a deadline for the technical subcommittee’s discussion in 2023 was not originally envisioned, the Technical Subcommittee Report was provided to the DWG on December 12, 2023, for their review and consideration. Areas of technical agreement and disagreement are presented in that report, with the intent that all topics may be discussed further by the full DWG and may require further assessment.

As of the writing of this legislative report, the DWG discussed the following items from the Technical Subcommittee Report: hydrograph duration, model calibration, approaches to modeling private drain tile, and if/how to model future conditions.

These items had consensus on the general scope and importance to a preliminary engineer’s report and the considerations of outlet adequacy. Members of the DWG generally agree that further development of consensus language addressing these topics should be completed by the DWG for inclusion in the Minnesota Public Drainage Manual. While there is consensus on these items, not all participating members of the DWG have indicated they are willing to move forward in considering application of those changes until they feel there is sufficient agreement on the larger assessment of outlet adequacy.

Items that did not have consensus at the subcommittee level included: how to consider water quality outside of channel scour, requirements if the existing outlet is unstable, and how the project may affect downstream conditions at times other than peak flow from the storm event.

The DWG did not have time to discuss these items prior to the preparation of this report, but they are planning to discuss each outstanding item and determine a path forward for each. This plan may include deciding the topic and adding recommendations to the Multi-Purpose Drainage Management, convening another subcommittee to discuss the topic further, or working through policy changes to address the item. At this time, the DWG does not have specific policy recommendations; however, there was strong support expressed at its last meeting for continued dialoged by the DWG to continue this work.

The efforts put into the Technical Subcommittee report and importance of the outlet adequacy assessment for drainage projects lead many members to support further work by the DWG to clarify and advance the overall understanding of the definition and application of outlet adequacy as provided in Minnesota Statutes, section 103E.261.

Public Notice Requirements for 103E Activities

The legislative directive has been separated into two parts for the purposes of DWG deliberations and this report.

- 1) **Clarifying and Aligning Notice Requirements**
- 2) **Broader Notice**

Clarifying and Aligning Notice Requirements

The DWG spent time at each meeting from June through December 2023 reviewing forms of notice and their application in 103E. That assessment identified 37 different sections of Chapter 103E that specify some form of public notice for a matter before the drainage authority. The type of notice, timing of notice, and who receives notice is specific in each of these 37 sections of statute.

As the statute has been amended over time, these sections read differently and, in some places, are ambiguous in describing the form of notice, the timing of notice, and who is to receive notice.

With a number of different activities requiring notice of a hearing and variation in timing and methods, it can be challenging to communicate and implement notice in a predictable manner. This is important from the perspective of informing the public and providing due process.

Variation and inconsistency in timing and methods also increases potential for administrative error which could imperil both the proposed project and due process. Administration of the drainage code would benefit by standardizing and bringing clarity to these many disparate notice provisions.

The DWG assessed each of the 37 sections that specify notice and sought to assess the forms and extent of notice that are warranted given the impact of the associated drainage activity on the physical system and its taxation/assessment consequences. This effort was valuable for the members to better understand the scope of drainage authority actions that currently require some form of notification.

Attorneys working with the DWG stakeholders also reviewed constitutional due process requirements so that modernization revisions of chapter 103E proposed by the DWG pass legal/constitutional muster for any future recommendations.

The DWG's work on this topic started with identifying specific areas to be evaluated:

- Establishing a more adaptable and uniform set of definitions for notice.
- Establishing a more uniform timing and method for giving notice.
- Incorporating these definitions and this consistent timing framework into the 37 sections of statute that currently call for notice.

Based on the above areas of evaluation, the DWG identified the following for future work to establish consensus on these items:

- DWG will consider an overarching notice framework to streamline timing and methods of notice.
- The DWG will consider application of the public notice framework to chapter 103E.
- The DWG will bring any consensus recommendations proposing modification of 103E to the legislature.

Broader Notice.

Notice requirements for proceedings under the drainage law focus on landowners who pay for and benefit from drainage systems and to public agencies tasked with overseeing drainage activity that may have an impact on the state's natural resources. There is interest in improving options for notice of drainage projects to the general public that allows interested parties opportunity to engage in the process.

During the 2022 legislative session, a bill was introduced to establish a "Drainage Registry Portal". The language requested a searchable electronic database of all documents initiating proceedings and non-petitioned repairs under Minnesota Statutes, Chapter 103E. This bill was introduced without consideration by the DWG. The bill was not adopted by the legislature.

After the legislative session, this subject was on each DWG meeting agenda in June 2022 through February 2023. The DWG discussed many options including statutory notice requirements, reports to state agencies, repairs, early coordination, drainage authority websites, email notification through drainage authority websites, and email notification through a state agency process. Revisions were discussed on the language introduced in the prior legislative session as well; however, DWG consensus was not achieved.

A revised bill was introduced during the 2023 legislative session but was not adopted.

Instead, the legislature directed the DWG to consider public notice requirements for proposed public drainage activities, including a drainage registry portal.

When it became apparent the scope of the notice assessment was quite expansive, the Drainage Work Group formed a subcommittee to discuss public notice requirements for proposed public drainage activities as well as the drainage registry portal concept of early public notice. The subcommittee included representatives from Association of Minnesota Counties (AMC), Minnesota Watersheds (MW), Minnesota Center for Environmental Advocacy (MCEA), Friends of the Minnesota River Valley, the Minnesota Corn Growers Association, and the Minnesota Department of Natural Resources (DNR).

The subcommittee was tasked to respond to the legislative mandate to "to evaluate and develop recommendations on public notice including a drainage registry portal". That subcommittee met in November and December 2023.

As a set of recommendations was being developed, several members of the committee ceased participation in the subcommittee meetings and the committee discontinued meeting at that time. Therefore, the subcommittee concluded deliberations without bringing forward a set of recommendations. The DWG did not have an opportunity to consider further options given no specific recommendations from the subcommittee and the deadline associated with the legislative report.

Specific areas of evaluation on this topic included: modification of public notice to include web-based or electronic notice or to create a centralized database; timing of broadened notice, duration of notice (i.e., whether specific notice duration provide greater opportunity for comment and feedback); and information that should be made available via notice.

The DWG also has and may continue considering ways to advance web-based or electronic notice but did not fully vet ideas before finalizing this report.

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