




Division of Ecological and Water Resources

DATE: February 28, 2018

TO: Division Staff Authorized to Regulate Public Waters Work

FROM: Luke Skinner   
Director

SUBJECT: Public Waters Authority over Work Done in Public Drainage Systems

## I. INTRODUCTION

This guidance supersedes previous guidance from Director Seymour, dated February 12, 1980 and titled: *Division of Waters' Policy, M.S. 105.42 Permit Authority over Work Done in Public Drainage Systems*. A primary goal is to update DNR guidance to better enable accurate, consistent and timely implementation of the applicable DNR responsibilities and authorities for public waters potentially impacted by public drainage systems pursuant to Minn. Stat. Ch. 103E Drainage, and referenced in Minn. Stat. Ch. 103D Watershed Districts. Clarity for Department of Natural Resources (DNR) staff, as well as for drainage authorities and their advisors, can increase common understanding of applicable statutes, rules and associated procedures, improve sharing of pertinent information, and provide for more predictable and timely decision making.

When drainage authorities undertake public drainage system repairs or public drainage projects in or near public waters, the DNR has a statutory obligation under Minn. Stat. Ch. 103G (Waters of the State) and/or Minn. Stat. Ch. 103E (Drainage) to appropriately exercise DNR's regulatory authority. While DNR's statutory obligations apply to all public waters, altered natural watercourses that are part of a public drainage system present unique challenges in implementing DNR's oversight responsibility and authority. Altered natural watercourses are public waters within the definition of [Minn. Stat. §103G.005, subd. 15](#). In most cases, public drainage systems that are shown as heavy dashed lines on the Public Waters Inventory (PWI) maps are also altered natural watercourses. This memo provides guidance on regulation of public drainage system work that affects public waters. This guidance is intended to clarify the interaction between Minn. Stat. Ch. 103G and 103E/103D and the DNR's exercise of jurisdiction over public ditch repairs and public drainage projects that have the potential to affect public waters. The I:\EWR\CAR\WR\Drainage--103G and 103E Decisions folder will contain this guidance and copies of Findings of Fact, permits, and letters of permission prepared for applicable drainage system repairs and drainage projects. This folder will provide a number of case studies as a resource that DNR staff can use when determining how to exercise DNR's regulatory jurisdiction.

Although this guidance is specific to exercising DNR public water authority, state law also requires that DNR consider impacts to threatened and endangered species and rare resources, DNR responsibilities under the Wetland Conservation Act, compliance with state and federal environmental review requirements, requirements for utilities across state lands and public waters, and measures to limit the

potential for spreading invasive species. These requirements are under statutes and rules that are different than the regulations covered by this guidance document.

## II. General Guidance for Repairs of Public Drainage Systems

There are many types of work in drainage systems that are considered repairs, from minor repairs to sediment removal. Most of these are exempt from DNR permitting but may require DNR involvement. DNR's main interest is in repairs that require sediment excavation because DNR needs to be sure the repair will not substantially impact public water basins or wetlands. DNR typically becomes involved in drainage repairs in 3 different ways. First, DNR may review repair plans with drainage authorities, usually after the drainage authority contacts DNR, so that DNR staff can determine if a public water may be affected by the repair. Second, some repairs will require DNR to provide a letter of permission in order for the repair to proceed. Third, if the repair is not done in a manner consistent with drainage law<sup>1</sup>, DNR would have public waters jurisdiction and may be required to implement its regulatory authority. The guidance below discusses in more detail how and when DNR engages in these processes associated with repairs.

**1. Definition of Repair.** The term "repair" is defined in drainage law as *"... to restore all or a part of a drainage system as nearly as practicable to the same hydraulic capacity as originally constructed and subsequently improved, including resloping of ditches and leveling of spoil banks if necessary to prevent further deterioration, realignment to original construction if necessary to restore the effectiveness of the drainage system, and routine operations that may be required to remove obstructions and maintain the efficiency of the drainage system. "Repair" also includes: (1) incidental straightening of a tile system resulting from the tile-laying technology used to replace tiles; and (2) replacement of tiles with the next larger size that is readily available, if the original size is not readily available."* [Minn. Stat. § 103E.701, subd. 1](#). When DNR and the drainage authority disagree about the depth of a repair they use the process described in section II.2.b. of this guidance.

### 2. DNR Notification.

- a. Drainage authorities are legally required to notify the DNR if a repair to a public drainage system **may affect** public waters. [Minn. Stat. § 103E.701, subd. 2](#) (emphasis added). Drainage authorities are encouraged to contact the DNR area hydrologist before undertaking a repair<sup>2</sup>. This notification is not in itself an indicator that DNR has regulatory jurisdiction, but provides an opportunity to make that determination. If the area hydrologist becomes aware of a potential repair that may affect public waters by being undertaken below the Ordinary High Water Level of a public water basin or wetland or if a public water wetland or basin is immediately upstream, downstream or within the lateral effect of a proposed repair<sup>3</sup> but has not been contacted by the drainage authority, the area hydrologist should initiate contact.

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<sup>1</sup> References to drainage law in this document refer to drainage provisions in Minn. Stat. chapters 103E and 103D.

<sup>2</sup> [Minnesota Public Drainage Manual, Chapter 2, section IB4B](#)

<sup>3</sup> The lateral effect distance is the distance on either side of a ditch or tile line within which wetland hydrology would be impacted by the installation of the ditch or tile line.

Timely review of the proposed repair plan and a conversation and/or site visit with the drainage authority and its representative(s) at the outset can often clarify whether the proposed work meets the definition of a repair and whether the work may impact public waters. Determining whether a proposed project is a repair at the outset is essential to define the scope of the DNR's authority under [Minn. Stat. § 103E.701, subd. 2](#). This is also a good opportunity to determine and communicate any permission requirements under [Minn. Stat. § 103E.011, subd. 3](#) (see section II.5).

- b. Dispute Resolution.** Drainage law has a provision to resolve differences of opinion between DNR and drainage authorities on repair depths. It is important to distinguish between needing additional information and disputing a proposed repair depth. If, after reviewing the public drainage system repair proposal, there is a disagreement about whether the work is a repair<sup>4</sup> as defined by [Minn. Stat. § 103E.701, subd. 1](#), the DNR can implement the dispute resolution process outlined in [Minn. Stat. § 103E.701, subd. 2](#). DNR staff should consider the severity of potential impacts of the proposed repair to public waters, level of costs to implement the conflict resolution process, and the drainage authority's willingness to resolve the issue short of dispute resolution before committing to this resolution process. Discuss use of the dispute resolution process with the DNR district manager and regional manager before initiating the dispute resolution process. The area hydrologist should notify the drainage authority in writing if there is a dispute over repair depth. If the drainage authority and area hydrologist negotiate an agreement through the dispute resolution process, this should also be documented in writing. Regional managers are expected to upload documents to the I:\EWR\\_CAR\WR\Drainage--103G and 103E Decisions folder as they are sent to drainage authorities.
- 3. No Permit Required.** A public waters work permit is not required to maintain or repair a public drainage system so long as the work is undertaken according to drainage law. [Minn. Stat. § 103G.245](#) and [MN R. part 6115.0200, subp. 4C](#). See *Supra* note 4 (discussing Attorney General's Opinions and case law regarding the definition of repairs). Most ditch repairs will fall into this category. It is important to recognize that if DNR and the drainage authority do not agree on the repair depth, the public waters work permit exemptions provided under [Minn. Stat. § 103G.245, subd. 2](#) and [MN R. part 6115.0200, subp. 4C](#) do not apply.
- 4. Prohibited Excavation.** There are certain circumstances when excavation, including drainage work, is prohibited. [Minn. R. part 6115.0200, subp. 3](#). Area hydrologists should review drainage repair proposals and determine if they would be prohibited. The permit exemption in [MN R. part 6115.0200, subp. 4C](#) only applies to activities that are not prohibited.

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<sup>4</sup> If the work requires digging a deeper ditch or a wider ditch than was originally constructed (as-built), even if it brings the ditch up to the specification of the original plan (as-designed), then it is an improvement not a repair. *Zimmer v. Kandiyohi County*, 359 N.W. 2d 266 (Minn. 1984). Likewise, increasing capacity of a tile or changing the elevation of a tile also constitutes an improvement. Attny Gen. Op. 602-J, March 8 1956, Op. Atty. Gen. 602-J, Sept. 8, 1950 *but see* Minn. Stat. § 103E.701, subd. 1(2) (permitting use of the next larger size tile only if the original size is not readily available). The establishment of a lateral into a ditch is not a repair. *Seidlitz v. Faribault County*, 55 N.W.2d 308 (Minn. 1952).

5. **Permission Required.** Any public drainage system repair that would drain or lower the level of a public water basin or wetland requires written permission from the DNR. [Minn. Stat. § 103E.011, subd. 3](#). This most commonly occurs when the repair will change the outlet elevation. Before giving permission, DNR may require that the repair plan includes actions by the drainage authority to minimize or mitigate for the impacts of the proposed repair to public water. Any permission granted by the DNR under [Minn. Stat. §103E.011, subd. 3](#) will be issued in writing. No verbal permission will be granted by the DNR. All letters of permission, along with the repair plan, and permits for work in a public water ditch system must be approved and signed by the DNR Regional Manager after consultation with the CAR Section Manager of Ecological and Water Resources. A Findings of Fact should be prepared to describe how the decision was made to send a letter of permission. Regional managers are expected to upload documents to the I:\EWR\\_CAR\WR\Drainage--103G and 103E Decisions folder as they are sent to drainage authorities.
  
6. **DNR Jurisdiction under Minn. Stat. Ch. 103G.** If a repair in a public drainage system that affects public waters is not undertaken according to Minn. Stat. Ch. 103D or 103E, the repair is subject to public waters regulation under [Minn. Stat. § 103G.245, subd. 1](#). An example of this is the Big Stone County Ditch 2 repair,<sup>5</sup> in which the county failed to contact DNR on a repair that would have impacted an upstream public water wetland. Private property owners are not authorized to conduct work in a public drainage ditch without following the requirements of Minn. Stat. Ch. 103E or 103D. If work is being done in a public ditch and is not authorized by the drainage authority, DNR staff should direct the project sponsor to consult with the drainage authority. If the repair isn't undertaken under Minn. Stat. Ch. 103D or 103E, DNR should exercise its regulatory authority through a cease and desist order, permit or restoration order. A Findings of Fact should be prepared to describe how the decision was made to assert Minn. Stat. Ch. 103G jurisdiction. DNR Regional managers are expected to upload documents to the I:\EWR\\_CAR\WR\Drainage--103G and 103E Decisions folder as they are sent to drainage authorities.

### III. General Guidance for Public Drainage System Projects

Public drainage system “drainage projects” are administered and regulated differently than repairs, both by the drainage authority and by DNR. In addition to determining jurisdiction and regulating through a Minn. Stat. Ch. 103G permit or Minn. Stat. Ch. 103E letter of permission, DNR also is responsible for reviewing preliminary and final engineer’s reports required by Ch. 103E. [Minn. Stat. § 103E.255](#) and [§ 103E.301](#). The guidance below discusses how and when DNR engages in these processes associated with drainage projects.

1. **“Drainage Project” Defined.** Unlike a repair, a drainage project involves establishment of a new drainage system, an improvement of an existing public drainage system, an improvement of an outlet, or a lateral. [Minn. Stat. § 103E.005, subd. 11](#). All drainage projects are subject to DNR review and may fall under DNR jurisdiction.
  
2. **Review of Drainage Projects.** A drainage project constructed under Minn. Stat. Ch. 103E or 103D must comply with the applicable environmental, land use and multipurpose water management

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<sup>5</sup> See the Minnesota Court of Appeals decision in *Minnesota Center for Environmental Advocacy v. Big Stone County*, 638 N.W.2d 198, 203 (Minn. Ct. Ap. 2002.)

criteria considerations set forth in [Minn. Stat. § 103E.015, subd. 1](#), the determination of utility, benefit or welfare considerations in [Minn. Stat. § 103E.015, subd. 2](#), and comply with the procedural requirements set forth in [Minn. Stat. § 103E.202 et seq.](#) In the case of a drainage project, the DNR will be involved early on. This includes the review of the Engineer's Preliminary and Final Survey Reports compiled by the drainage authority's engineer, and associated considerations before drainage work is done, and EAW review, if required. [Minn. Stat. §§ 103E.011, 103E.015, 103E.202 et seq.](#) and [Minn. Stat. Ch. 116D](#) (the Minnesota Environmental Policy Act). Further information on DNR involvement in the review of public drainage project engineer's reports can be found at I:\EWR\\_CAR\WR\Drainage--103G and 103E Decisions.

- 3. Permit Not Required.** A public waters work permit is not required for a drainage project that is an improvement to an existing public drainage system in an altered natural watercourse, so long as the work is undertaken according to Minn. Stat. Ch. 103D or 103E (i.e., in accordance with drainage law) **and** the project does not substantially affect public waters (see subsection III.7.) other than the altered natural watercourse. [Minn. Stat. § 103G.245, subd. 2\(1\) and \(2\)](#). Permission may be required; see subsection III.5.
- 4. Prohibited Excavation.** There are certain circumstances when excavation, including drainage work, is prohibited. [Minn. R. part 6115.0200, subp. 3](#). Area hydrologists should review drainage project proposals and determine if they would be prohibited. The permit exemption in [Minn. Stat. § 103G.245, subd. 2\(2\)](#) only applies to activities that are not prohibited.
- 5. Permission Required.** Any drainage project that will (1) remove, construct, or alter a dam<sup>6</sup> affecting public waters; (2) establish, raise, or lower the level of public waters; or (3) drain any portion of a public water, requires written permission from the DNR. [Minn. Stat. § 103E.011, subd. 3](#). This most commonly occurs when the project will change the outlet elevation of a public water. Before giving permission, DNR may require that the project plan includes actions by the drainage authority to minimize or mitigate for the impacts of the proposed project to public waters. Any permission granted by the DNR under [Minn. Stat. § 103E.011, subd. 3](#) will be issued in writing. No verbal permission will be granted by the DNR. All letters of permission for projects in public ditch systems that affect public waters must be approved and signed by the Regional Manager after consultation with the CAR Section Manager of Ecological and Water Resources. A Findings of Fact should be prepared to describe how the decision was made to send a letter of permission. Regional managers are expected to upload documents to the I:\EWR\\_CAR\WR\Drainage--103G and 103E Decisions folder as they are sent to drainage authorities.
- 6. Permit Required.** A DNR public waters work permit is required for projects that: "(1) construct, reconstruct, remove, abandon, transfer ownership of, or make any change in a reservoir, dam, or waterway obstruction on public waters, or (2) change or diminish the course, current, or cross section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing of materials in or on the beds of public waters." [Minn. Stat. § 103G.245, subd. 1](#). Drainage projects that substantially affect public water basins, wetlands or watercourses that are

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<sup>6</sup> A dam is an artificial barrier that exceeds 6 feet in height. Minn. R. part 6115.0320, subp. 5.B. Water level control structures are less than 6 feet in height and are not included in the Minn. Stat. § 103E.011 provisions for permission.

up gradient, down gradient, or within the lateral effect of the work, do not meet the exceptions under [Minn. Stat. § 103G.245, subd. 2\(2\)](#) and would therefore require a permit. Finally, the proposed drainage project may require a determination by the DNR that an impacted public water requires replacement pursuant to [Minn. Stat. § 103G.211](#). Whether a proposed drainage project will substantially affect a public water requires the professional judgement of the drainage authority and DNR staff, and must be assessed based on the facts presented in each project. Section IV of this Guidance Document contains applicable, but not necessarily all, of the factors that drainage authorities and DNR staff should consider in assessing whether a particular drainage project at a particular location has the potential to have a substantial effect on other public waters. A Findings of Fact should be prepared to describe how the decision was made to require a permit. DNR Regional Managers are expected to upload documents to the I:\EWR\\_CAR\WR\Drainage--103G and 103E Decisions folder as they are sent to drainage authorities.

- 7. Substantially Affects Public Waters.** Whether a proposed drainage project will substantially affect public waters triggering the [Minn. Stat. § 103G.245, subd. 1 and 2\(2\)](#) threshold, requires the professional judgement of DNR staff in light of the facts presented in each situation.<sup>7</sup> Section IV of this Guidance contains applicable, but not necessarily all, of the factors that drainage authorities and DNR staff should consider in assessing if a particular project at a particular location has the potential to have a substantial effect on public waters. Additional guidance can be found in applicable case law. For example, the Minnesota Supreme Court and Minnesota Court of Appeals have found the following activities to be substantial effects: a project that drains a lake during dry periods; changes in a drainage system that cause a wetland to be reclassified from public waters wetland to non-public water wetland; a drainage project that causes increased flow and erosion in a public water; a project that lowers a brook bed and a downstream lake.<sup>8</sup>
- 8. DNR Jurisdiction under Minn. Stat. Ch. 103G.** If a drainage project is conducted in an altered natural watercourse that is a public drainage system, or the project affects a public waters basin or wetland, and is not undertaken according to Minn. Stat. Ch. 103D or 103E, the project is subject to public waters regulation under [Minn. Stat. § 103G.245, subd. 1](#). If the work is being done by someone other than the drainage authority, DNR staff should direct the project sponsor to consult with the drainage authority. If the project isn't undertaken under Minn. Stat. Ch. 103D or 103E, DNR would exercise its regulatory authority through a cease and desist order, permit or restoration order. A Findings of Fact should be prepared to describe how the decision was made to assert Minn. Stat. Ch. 103G jurisdiction. DNR Regional Managers are expected to upload documents to the I:\EWR\\_CAR\WR\Drainage--103G and 103E Decisions folder as they are sent to drainage authorities.
- 9. When Permit Authority and Permission Overlap.** There will be occasions when a proposed drainage project requires both permission pursuant to [Minn. Stat. § 103E.011, subd. 3](#) (because it will raise, lower, or drain a public water) and a public waters work permit pursuant to [Minn. Stat. § 103G.245, subd. 1 and 2\(2\)](#) (if the project **may** substantially affect a public water basin, wetland or

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<sup>7</sup>*Bloomquist v. Sanders*, 202 N.W. 496 (Minn. 1926).

<sup>8</sup>*Petition of Jacobson*, 234 Minn. 296, 300-01, 48 N.W.2d 441, 444 (Minn. 1951); *Bloomquist v. Sanders*, 202 N.W. 496 (1926); *Minnesota Center for Environmental Advocacy v. Big Stone County*, 638 N.W. 2d 198, 201 (Minn. Ct. Ap. 2002) and Minn. R. 6115.0200, subp. 4.

watercourse). **The DNR cannot require both permission and a permit.**<sup>9</sup> In this situation, the DNR must require a public waters permit to allow the project to proceed, unless the drainage authority agrees to project modifications that would result in no substantial effects to public waters. DNR staff must exercise their professional judgment, based on the facts at hand, to determine if permission pursuant to [Minn. Stat. §103E.011, subd. 3](#) can be issued. The determination of whether to use a permit or permission will depend on the facts of each case. All letters of permission and permits for drainage projects must be approved and signed by the DNR Regional Manager after consultation with the CAR Section Manager of Ecological and Water Resources. A Findings of Fact should be prepared to describe how the decision was made to issue a permit or letter of permission. DNR Regional Managers are expected to upload documents to the I:\EWR\\_CAR\WR\Drainage--103G and 103E Decisions folder as they are sent to drainage authorities.

#### **IV. Factors to Consider in Determining if There Will Be a Substantial Effect to a Public Water**

For drainage projects the potential for substantial effects influences whether the project is exempt from PW permit requirements and for repairs, the potential for substantial affects can inform the types of modifications to the repair plan that may be needed before permission can be granted. The following is a list of factors for use by drainage authorities and DNR staff in analyzing the facts of each case to determine if a drainage project will have a substantial effect on a public water. Since the type, extent, and available means to avoid and minimize impacts to public waters varies between drainage projects, this list, which was developed after consultation with stakeholders, is not intended to be prescriptive or exhaustive. These decisions are highly fact dependent and vary case by case. It is DNR's goal to provide drainage authorities and DNR staff with the information they need to assure that similarly situated circumstances are treated in a like manner, while recognizing the need for flexibility in light of the facts of each case.

- \* Would the project change the course, current or cross-section of a public water?, e.g.:
  - o Enlarging, extending, straightening, or deepening a public ditch that impacts a public watercourse, basin or wetland;
  - o Conversion of a heavy dashed line on the PWI map to a subsurface tile line;
  - o Extension of a public ditch system outlet downstream into a public watercourse (solid blue line on the PWI map);
  - o Significant sediment or spoil material deposition into public waters;
  - o Causing a change to a FEMA mapped floodplain
  - o Partial or complete drainage of a public water;
  - o The water supply, navigational, and drainage characteristics of the public waters is altered in a way that adversely affects the interests of the public and of private riparian landowners; or
  - o Inconsistent with the provisions of Minn. R. parts 6115.0150 through 6115.0270.
  
- \* Would the project trigger mandatory environmental review?, e.g.:

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<sup>9</sup> This is consistent with the Minnesota Court of Appeals decision in *Minnesota Center for Environmental Advocacy v. Big Stone County*, 638 N.W.2d 198, 203 (Minn. Ct. Ap. 2002)(holding that where a proposed drainage project meets the requirements of Minn. Stat. §103E.011, subd. 3 requiring DNR permission and Minn. Stat. § 103G.245 requiring a public waters work permit the drainage authority must have either permission or a public waters work permit but is not required to have both permission and the public waters work permit.)

- Dams and impoundments – Minn. R. part 4410.4300 subp. 24;
  - Stream diversions – Minn. R. part 4410.4300 subp. 26; or
  - Wetlands and public waters – Minn. R. 4410.4300 subp. 27 A & B; Minn. R. part 4410.4400 subp. 20.
- \* Would the project impact significant fish and wildlife habitats?, e.g.:
    - Trout streams;
    - Impacts to WMAs, SNAs, State Parks or other areas designated for wildlife and habitat purposes;
    - Fish spawning areas; or
    - Impacts to rare plant communities or areas of biodiversity significance.
  - \* Would the project have the potential to impact protected species? Minn. R. part 6115.0200 subp. 3.D.?

## **V. Applicable Statutes & Rules**

Relevant statutes and rules include the following:

### **[Minn. Stat. § 103G.005 DEFINITIONS.](#)**

- Subd 15. Public Waters
- Subd. 15a. Public waters wetlands

### **[Minn. Stat. § 103G.225 STATE WETLANDS AND PUBLIC DRAINAGE SYSTEMS](#)**

### **[Minn. Stat. § 103G.245 WORK IN PUBLIC WATERS](#)**

- Subdivision 1. **Permit requirement.**
- Subdivision 2. **Exceptions.**
- Subdivision 11. **Emergency repairs.**
- Subdivision 12. **Operation of structure prior to permit requirement.**

When evaluating public drainage projects, drainage authorities and DNR staff should also consult with the requirements for public waters work permits set forth in Minn. R. [6115.0200](#) through [6115.0272](#).

### **[Minn. Stat. § 103E.005. DEFINITIONS.](#)**

- Subdivision 11. **Drainage project.**

### **[Minn. Stat. § 103E.011. DRAINAGE AUTHORITY POWERS.](#)**

- Subdivision 2. **Drainage of water basins and water courses.**
- Subdivision 3. **Permission of commissioner for work in public waters; application.**

### **[Minn. Stat. § 103E.015. CONSIDERATIONS BEFORE DRAINAGE WORK IS DONE.](#)**

- Subdivision 1. **Environmental, land use, and multipurpose water management criteria.**
- Subdivision 2. **Determining public utility, benefit, or welfare.**

### **[Minn. Stat. § 103E.255. COMMISSIONER'S PRELIMINARY ADVISORY REPORT.](#)**



[Minn. Stat. § 103E.301. COMMISSIONER'S FINAL ADVISORY REPORT.](#)

[Minn. Stat. § 103E.701. REPAIRS.](#)

Subdivision 1. **Definition.**

Subdivision 2. **Repairs affecting public waters.**

[Minn. Stat. § 103D.621 DRAINAGE IMPROVEMENTS.](#)

[Minn. Stat. § 103D.625 DRAINAGE SYSTEMS IN WATERSHED DISTRICT.](#)