

## Drainage Work Group (DWG) Meeting

October 13, 2022

Following the welcome and introductions, Tom Gile, Board of Water and Soil Resources (BWSR) gave an overview of the agenda. Information was provided about the following drainage-related events. Information of particular interest to watershed organizations is highlighted in gray.

- AMC Fall Policy Conference: September 15
- [Minnesota Water Resources Conference](#): October 18-19
- MAWD Annual Conference: December 1-3, 2022

### *Outlet Adequacy*

Tom Gile gave an overview of the outlet adequacy discussions that have taken place. The intent with Clean Water Funds is that any money allocated must go above and beyond the drainage project. The drainage project must stand on its own merits. There is a need to better understand outlet adequacy. The challenge is that this will likely be highly technical in nature. It may be necessary to have recommendations from the Drainage Management Team (DMT) for the DWG to consider.

Comments from attendees:

- A subcommittee should be created to work on this. The recommendations should not come from state agencies. The participants need to be more inclusive. Members of the DWG need to be included before recommendations are presented.
- BWSR staff are uncomfortable with outlet adequacy as described in the drainage manual. Will there be agreement on what makes an adequate outlet? BWSR staff have no problem starting discussions with a group larger than the DMT.
- The Red River mediation agreement could be a model for how discussions could be held. The DWG could determine the questions that need to be answered and send them to a subcommittee.
- If a subcommittee is formed, the list of questions and membership need to be determined.
- Is adequate outlet geared toward future projects or existing conditions? It would be helpful to be able to revisit outlet scenarios for past projects. There are laws and permitting rules for current conditions. It's situations from the past that need to be fixed.
- We need to start with questions that lend themselves to consensus and not try to address too many questions. Questions could include what is an adequate outlet, is there a standard we can agree on, and what information is necessary to decide if the outlet is adequate. Information submittal is also a strong candidate.
- It was suggested to speak with Henry Van Offelen, Ron Harnack, Blake Carlson, and Charlie Anderson since they were involved in the mediation process.
- The first step may be to ask DWG members to present their questions, concerns, and desired outcomes, without being too technical. Starting with discussing general issues is better than starting with a discussion about solutions.
- While the Red River mediation agreement is good to look at, many things have changed. It could be used to inform what we might do going forward, but not to replicate something from 1998. That is not viable. Most people won't know what it was. We need to look forward. The agreement was a multi-jurisdictional issue. It has been non-functional for at least 10 years. We would be going backwards if we use it. There are other examples that could also be considered. Most of those findings have no bearing on other parts of our landscape. To think it applies to other landscapes is limiting.
- It would be helpful to contact Chuck Fritz to serve as a moderator.
- The Red River Basin mediation agreement could be used to develop a framework to define outlet adequacy. We know that one size fits all won't work and that it may not be completely applicable.

- BWSR wants to determine how to successfully bring money into an improvement project to do good things over and above the drainage project. They also want to be able to explain that funds are being spent in the way they were intended. They are looking for a consistent framework.
- One of the technical papers developed in the Red River mediation agreement addressed storing water on wetlands, impact on flood mitigation, and how much bounce would be allowed without negatively impacting ecological benefits. This has some parallel to adequate outlet.
- Tom Gile will solicit questions from DWG members and share them before the next meeting.

[10-minute break]

#### *DNR Submittals*

- The DNR intends to schedule individual conversations to discuss early coordination efforts and submittal requirements. They are contemplating legislation next session. The DNR intends to meet with state agencies, AMC, and MAWD, and environmental groups to discuss their proposal. They intend to bring the discussion back to DWG. The intent is to be more certain on how early coordination occurs and how environmental considerations need to be considered. They are only focusing on drainage improvement projects. They will bring the information to the DWG in November or December. They are interested in the review process not just for DNR, but other state agencies, as well as how the public at large may be involved.
- Questions were asked of the DNR as to why this wasn't being addressed with the entire DWG and whether they would submit legislation only with DWG consensus. The DNR hopes to have individual conversations and eventually bring to the group concepts that are formulated with a broader perspective.
- Consensus is central to what the DWG is about. The DNR does value consensus and understands the benefits of the DWG. If there isn't consensus, the chance of success at the legislature is none.
- It would be helpful to have a clear understanding of what the legislation will be. It was stated that it is a concept at this point. The DNR wants individual discussions to clarify.
- In the last couple DWG meetings, there was discussion about the importance of making sure there is involvement before issues are presented to DWG. The DNR intends to use the DWG as envisioned. The purpose of the individual conversations in advance is because they want consensus around potential legislation.
- It was noted that the chances of the legislature dealing with drainage-related matters in the upcoming session is high. It would be good to share ideas and reach agreements through the DWG.
- Transparent communication between agencies will continue.

#### *Petitioned versus Non-petitioned Repairs*

Tom Gile provided an overview of the steps in "Understanding Minnesota Public Drainage Law" regarding petitioned versus non-petitioned repairs. He noted that in the document from Ted Suss, it was important to engage with people earlier in the notification process. The document explained the statute language regarding the bidding process for repairs.

#### Discussion:

- The document addressed language in Minnesota Statutes Chapter 103E.705 Subd. 5. This statute deals with whether the contract needs to go for public bid. The drainage authority would know when the repair is ordered by the board whether the threshold is met. Subd. 6 states that the drainage authority may not levy an assessment of more than 20% of drainage system benefits, \$1,000 per mile of open ditch in the system, or the dollar amount requiring the solicitation of bids. The drainage authority can authorize a repair based on an inspection report at a regularly

scheduled meeting without holding a hear. It would be better to reference the statutory language in Subd. 6. In some redetermined systems the amount is higher than \$175,000. The minimum requirement is if the estimated cost exceeds the greater of the three thresholds, the drainage authority must follow the petition procedures.

- A drainage improvement project entails changing capacity, depth, or width of a system. That process is under a different statute. Repairs are straightforward. Spending more than \$175,000 is a board decision and would be discussed with landowners. There are also cases where systematic repairs are done. There isn't confusion about when the drainage authority should require a petition or issue board order.
- At what point does the drainage inspector have sufficient information to go to a board because of the potential cost? The decision is made almost immediately by looking at the size of the system. The repair can only be done to the original as-built plans. That determines the amount of work that can be done.
- Is there ample opportunity for stakeholder engagement? An established drainage system has gone through every legal proceeding possible. A repair should have no bearing on stakeholder engagement. The repair is putting back what the drainage authority is legally required to maintain. The system has been ordered and approved by law. Not sure why we are having this discussion.
- The drainage system has been legally established. The stakeholders for the repair are the benefitting landowners and the drainage authority. On some repairs regulatory LGUs for WCA or public waters are engaged. That must be a part of the repair report. The necessary entities are engaged from the beginning as part of the repair report process.
- Repairs are done for prevention or mitigation of erosion. All repairs have environmental effects. Delaying a repair will cause additional erosion. That is the very purpose of the repair; something is broken that will cause an immediate or future erosion problem that needs to be fixed. Emphasis shouldn't be on size of the project. Every repair is trying to reduce downstream impacts.
- Drainage authorities don't stray from statutory requirements. In a petitioned repair, there is a 30-day review. The definition of repair is putting the system back at the same depth, size, and capacity.
- The proponents have learned that repairs are one place where we need more discussion. Just because there is notice doesn't include mean there is early involvement. There are cases where the agencies have review. There may be some DNR permitting or WCA issues. In many cases, as-constructed plans don't exist. There is a process in statute for creating those plans. Public notice is done so people have access to finding out, so they know there is a repair in process. The word emergency doesn't exist in statute. It makes sense to exclude repairs caused by a natural disaster.
- Was there a specific repair project that brought this forward or is there intent to solve a specific problem? This is a subject that was raised in the drainage registry portal from the last legislative session. The intent is to create an earlier opportunity for notice and dialogue in the drainage process. The repair portion is the most challenging. It seems difficult to determine a solution when the problem is vague.
- As the drainage authority [Blue Earth County] we have interpreted that all repairs need a report of some sort, no matter the size. Smaller emergency repairs are done, but the repairs still require a report.
- From an AMC perspective, we are certainly committed to continue to discuss the issues. We are united in our concern that repairs should not be included in notice requirements.
- There is no need for an outside group to discuss how to fix a tile or put a ditch back to its original as-built condition. Repairs are regulated by statute. Repairs need to be stricken from this conversation, especially anything not petitioned.

- This discussion will inform the proponents' discussions. If a tile system is causing erosion beyond the original project and the repair will remedy the erosion, is that still a repair or is it an improvement? The drainage authority is limited to where the work can be done and what can be spent. If the work is done too far downstream, it would not be economically feasible.
- MAWD stands with AMC. The repair issue should be off the table.
- Proponents have heard drainage authorities' perspectives on repair inclusion. The idea of an improvement proceeding may still have some merit.
- Since drainage authorities are governed by statute, what is the reasoning behind the inclusion of repairs? What is the necessity to include them at all, other than letting outside groups look at this for 30 days?

[Five-minute break]

### *Limbo Creek Discussion*

[Opinion](#) from the Minnesota Supreme Court

Tom Gile asked if there were specific questions for future discussion around this legal opinion.

Discussion:

- How does Limbo Creek differ from a waterway that wasn't listed in the Public Waters Inventory (PWI) map? How does Limbo Creek compare to a grassed waterway that is under the two square mile drainage area? Two square miles and defined bed and bank are statutory requirements. The PWI is the map and the list. In this case, the stream does meet the statutory definition.
- The PWI is an important tool. The decision reaffirmed that the DNR has the authority to correct errors.
- Wasn't there an attempt to fix errors on protected waters during the inventory for buffer strips? As part of the buffer mapping, the DNR requested additional information from counties and drainage authorities. There were portions of water courses that were included in the inventory that shouldn't have been for a variety of reasons. Changes were made with the understanding that they could be revisited if they met the statutory definition of a public water. The process is not complete. As part of the process, people could ask the DNR to look at this. In some areas there was agreement, not in others.
- Given what appears to be a fairly narrow scope in this decision, will there be much change in the process? There should not be significant changes. The DNR relies significantly on the PWI. They intend to increase the GIS data accuracy.
- MCEA hasn't had an opportunity to review the decision. This is good discussion. There are two cases pending in Renville County that were awaiting this decision.
- The Supreme Court decision is pointed in that it only pertains to one case and says that the legislature ought to fix it. That may drive some legislation on this.
- If this is introduced at legislature, it should come to the DWG first. If there is talk of legislation, the DNR requested discussion with their staff.

### *Next Meeting*

Wednesday, November 16, 11 am to 2 pm location TBD.

The meeting adjourned at 1:49 p.m.

Meeting notes by Jan Voit