

Minnesota Public Drainage Manual – Chapter 2 – IV

Administration and Legal Considerations - Preliminary Hearing

Summary

Preliminary hearings are required for new drainage systems projects; improvements of a drainage system; improvements of an outlet; laterals; and impounding, rerouting, and diverting drainage system waters. The preliminary hearing takes place after the preliminary survey report has been filed and the drainage authority has noticed the hearing. This process tests the project's feasibility, specifically in regard to jurisdictional defects, project expense, potential for significant environmental impacts, and compatibility with procedural or statutory requirements. Informal meetings prior to the preliminary hearing may be held to discuss potential controversial issues, provide engineer guidance, further discuss potential use of external funding for wetland preservation or restoration, creation of water quality improvements, flood control and alternative measures identified in applicable state-approved and locally adopted water management plans. ([Section IV](#))

After a petition and bond are filed, the drainage authority's attorney has 30 days to review the petition and bond to determine if it meets the requirements of the proceedings in which it is intended or if it needs to be referred back to the petitioners for correction. ([Section IV, B](#)).

After the drainage authority's attorney has determined the petition and bond are valid, the drainage authority has 30 days to appoint a project engineer to conduct a preliminary survey. The engineer must file an oath to faithfully perform the required duties to the best possible manner and a bond with the auditor. The engineer is required to track expenses by filing an expense report every two weeks until the construction contract is awarded. ([Section IV, C.3](#))

[Minn. Stat. § 103E.245](#) obligates the engineer to conduct five main tasks in preparing the preliminary survey which are outlined in [Section IV, C.2](#). The scope of these tasks is further detailed in **Chapter 3**. The preliminary survey and report will be considered at the preliminary hearing to determine whether there is sufficient basis to proceed with more elaborate construction plans. One of the most critical components of the preliminary survey is to assess the environmental impacts of the project; thus, the engineer will typically make early contact with regulatory officials who likely have an interest in the project. The engineer's preliminary survey report must provide sufficient detail to inform the drainage authority and the public on issues related to feasibility and on whether the proposed project complies with the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015, subd. 1 \(2015\)](#). Further elements required of the engineer's preliminary survey report are outlined and discussed in [Section IV, D](#).

After the engineer files the preliminary survey report, the auditor or watershed district secretary must send a copy to the Director of Ecological and Water Resources at the Minnesota Department of Natural Resources (DNR). Within statutory time constraints, the DNR is required to review the engineer's preliminary survey report and prepare a preliminary advisory report to the drainage authority stating whether any additional investigation and evaluation should be done relating to public waters that may be affected or the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015, subd. 1](#) and citing specific portions of the preliminary survey report the Commissioner deems

inadequate. The report becomes part of the record created during the preliminary hearing ([Section IV, E](#)).

When the engineer files the engineer's preliminary survey report, the auditor or watershed district secretary notifies the drainage authority and obtains an "order" for hearing that sets the hearing no later than 30 days after the date of the order. Preliminary hearing procedures are discussed in detail in [Section IV, F](#) through [Section IV, H](#).

The preliminary hearing's purpose is to ascertain the presence of jurisdiction and viability of the project before large costs and expenses have been incurred. It may redefine the location and scope of the proposed project, thus potentially changing the cost, benefits, and environmental impacts. It also offers a convenient stopping point where a doomed project must be terminated before costs get out of hand. After the preliminary hearing, the drainage authority must dismiss a petition if it finds any of the following:

1. The proposed project is not feasible;
2. The adverse environmental impact is greater than the public benefit and utility;
3. The proposed project is not of public benefit or utility; or
4. The outlet is not adequate. ([Section IV, G](#)).

To approve the engineer's preliminary survey and authorize the engineer to prepare with a detailed survey report, the drainage authority must adopt four essential findings:

1. The proposed drainage project outlined in the petition, or modified and recommended by the engineer, is feasible;
2. There is necessity for the proposed drainage project;
3. The proposed drainage project will be of public benefit and promote the public health, after considering the environmental, land use, and multipurpose water management criteria ([Minn. Stat. § 103E.015, subd. 1](#)); and
4. The outlet is adequate.

In addition to directing the engineer to proceed with conducting a detailed survey report, the preliminary order also appoints three disinterested persons as viewers for the purposes of determining benefits and damages of the proposed project. ([Section IV, H](#))

The preliminary order may not be appealed. ([Section IV, I](#))

[A. General](#)

The preliminary hearing is the first real test of whether the proposed project has merit. The project may be popular with the drainage authority's constituents, but if jurisdictional defects are discovered with the petition or the engineer says it will not work, is going to be too expensive, or will create significant environmental impacts, the project may not meet procedural or statutory requirements.

Cutting the hearings short, before all interested persons have had a reasonable opportunity to speak, is a mistake. In the case of a particularly controversial proposal, informal meetings may be held in advance of the preliminary hearing to help focus the issues and to give guidance to the engineer.⁵⁸⁴ Such meetings also provide an important opportunity to discuss the potential use of external sources of

funding for purposes of wetland preservation or restoration or creation of water quality improvements of flood control as required by the drainage code.⁵⁸⁵

The preliminary hearing takes place after the preliminary survey report has been filed and the drainage authority has noticed the hearing.⁵⁸⁶ The following drainage projects require a preliminary hearing:

- A new drainage system project;⁵⁸⁷
- Improvement of a drainage system;⁵⁸⁸
- Improvement of an outlet;⁵⁸⁹
- Laterals;⁵⁹⁰ and
- Impounding, rerouting, and diverting drainage system waters.⁵⁹¹

For decision-making, the preliminary hearing is an important point in the proceeding because it occurs before the significant financial investment in detailed engineering. If a proposed project is to fail, failure at this point will save on expenses incurred. The purpose of this section is to describe the procedures, as well as the potential pitfalls, of the preliminary hearing stage in the evolution of a public drainage project.

FOOTNOTES

⁵⁸⁴ See Minn. Stat. § 103E.043 (2015) (“A drainage authority may hold informal meetings in addition to the meetings and hearings required in [the drainage code] to inform persons affected by the drainage system about the drainage proceedings and provide a forum for informal discussions.”).

⁵⁸⁵ Minn. Stat. §§ 103E.011, subd. 5 (2015) & 103E.015, subd. 1a (2015).

⁵⁸⁶ Minn. Stat. § 103E.261, subd. 1 (2015).

⁵⁸⁷ See Minn. Stat. § 103E.212 (2015).

⁵⁸⁸ See Minn. Stat. § 103E.215, subd. 5 (stating that the “improvement proceedings must be conducted under [the drainage code] as provided for the original proceedings for the establishment of a drainage project”).

⁵⁸⁹ See Minn. Stat. § 103E.221, subds. 5 & 6 (2015) (discussing the order for a detailed survey and appointment of viewers after a preliminary hearing is held on a preliminary survey report).

⁵⁹⁰ See Minn. Stat. § 103E.225, subd. 2 (2015) (stating that “[a]fter a petition is filed, the procedure to establish and construct the lateral is the same as that provided [in the drainage code] to establish a drainage project.”).

⁵⁹¹ See Minn. Stat. § 103E.227, subd. 3(b) (2015) (“After filing of the engineer’s report, notice must be given and a public hearing held as provided in section 103E.261.”). Note that, for projects that propose to impound, reroute, and divert drainage system waters under Minn. Stat. § 103E.227, there is a public hearing as provided in the preliminary hearing statute (Minn. Stat. § 103E.261), but the drainage authority issues its order to grant or deny the petition at the preliminary hearing—there is no final hearing. Minn. Stat. § 103E.227, subd. 2(c) (2015).

B. Review and Approval of Petition by the County Attorney

Within 30 days after a petition and bond are filed, the drainage authority’s attorney must review the petition and bond to determine if it meets the requirement of the proceedings for which it is intended.⁵⁹² If the drainage authority’s attorney determines the petition or bond do not meet the requirements of the drainage code, the attorney must refer the petition and bond back to the petitioners with the attorney’s opinion describing the deficiencies of the petition.⁵⁹³ If the drainage authority’s attorney determines the petition and bond do meet the requirements of the drainage code, the attorney should affix and date an endorsement on the petition and must refer the petition to the drainage authority.⁵⁹⁴

FOOTNOTES

⁵⁹² See Minn. Stat. § 103E.238 (2015). The statute states that the “county attorney must review each petition and bond to determine if it meets the requirement of the proceedings for which it was intended.” Minn. Stat. § 388.09, subd. 1 authorizes the county board to “employ an attorney to assist the county attorney, to appear for the county or any county officer in any action in which the county or officer in an official capacity is a party, to advise the board or its members in relation to the action, or in relation to any other matter affecting the interests of the county.” Employment of private attorneys with experience and specific knowledge on public drainage matters to represent county boards, joint county boards, and watershed districts in their capacity as the public drainage authority is a long-standing practice in Minnesota. A strict reading of Minn. Stat. § 103E.238 would create absurd results for joint county drainage authorities and watershed districts in determining which county attorney represents the drainage authority in its proceedings.

⁵⁹³ Minn. Stat. § 103E.238 (2015).

⁵⁹⁴ Minn. Stat. § 103E.238 (2015).

C. Appointment of the Engineer

Within 30 days of receiving a petition and bond from its attorney, the drainage authority shall appoint an engineer to make a preliminary survey within a prescribed amount of time.⁵⁹⁵ **A sample Order Appointing an Engineer is found in Template A.**

The drainage code requires the drainage authority to either appoint the county highway engineer of the county where the affected property is located, or a professional engineer registered under state law.⁵⁹⁶

Unless otherwise ordered by the drainage authority, the engineer is the engineer for the drainage project throughout the proceeding and construction of the project.⁵⁹⁷ However, the engineer may be removed by the drainage authority at any time.⁵⁹⁸ If the engineer position is vacant, the drainage authority must appoint another engineer as soon as possible.⁵⁹⁹

1. Engineer's Oath and Bond

The engineer is required to file an oath to faithfully perform the required duties in the best possible manner and must file a bond with the auditor.⁶⁰⁰ While the bond is subject to approval by the auditor or watershed district secretary, the drainage authority sets the bond amount within 10 days of appointing the engineer.⁶⁰¹ The minimum amount of the bond must be \$5,000, but the bond must have adequate surety.⁶⁰² The \$5,000 minimum bond requirement is a vestige from a time when drainage projects were small and inexpensive. Now, the risk involved is substantially higher. It is not uncommon for the drainage authority to require a minimum bond of \$100,000 for today's projects. **A sample Engineer's Bond is found in Template B.**

The aggregate liability of the surety for all damages may not exceed the amount of the bond.⁶⁰³ The bond must be payable to the county where the petition is filed, or for a proposed joint county drainage project to all counties in the petition, and must be conditioned to pay any person or the drainage authority for damages and injuries resulting from negligence of the engineer while the engineer is acting in the proceedings or construction and provide that the engineer will diligently and honestly perform the engineer's duties.⁶⁰⁴

A sample Engineer's Oath is found in Template B-2.

2. Duties of the Engineer

The engineer may appoint assistant engineers and hire help necessary to complete the engineer's duties, but the drainage project engineer is responsible for these engineers and may remove them.⁶⁰⁵

After the drainage project engineer is appointed, the drainage authority may also employ an engineer as a consulting engineer for the proceeding and construction.⁶⁰⁶ The purpose of a consulting engineer is to advise the engineer and the drainage authority on engineering matters or problems that may arise related to the proceeding and construction of the drainage project.⁶⁰⁷

Once appointed, the project engineer should proceed promptly with the preliminary survey of the area likely to be affected by the proposed drainage project. The public drainage code directs the engineer to conduct five main tasks in preparing the preliminary survey:

1. Examine the petition and order;⁶⁰⁸
2. Make a preliminary survey of the area likely to be affected by the proposed drainage project to enable the engineer to determine whether the proposed drainage project is necessary and feasible with reference to the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015, subd. 1](#);⁶⁰⁹
3. Examine and gather information related to determining whether the proposed drainage project substantially affects areas that are public waters;⁶¹⁰
4. If the proposed drainage project requires construction of an open channel, examine the nature and capacity of the outlet and any necessary extension;⁶¹¹ and
5. Consider the impact of the proposed drainage project on the environmental, land use, and multipurpose water management criterion in [Minn. Stat. § 103E.015, subd. 1](#).⁶¹²

Additional details regarding the scope of these tasks is provided in **Chapter 3**.

In the preliminary survey, engineers are limited in the extent of the surveying to the “drainage area described in the petition,” except, to secure an outlet, the engineer may run levels necessary to determine the distance for the proper fall of water.⁶¹³

If the engineer determines that the project could be improved if other areas were surveyed, the engineer should report that information to the petitioners and, if petitioners’ have retained one, the petitioners’ attorney. The petitioners’ attorney may then call a meeting of the petitioners to obtain their consent to do additional surveying. If consent appears to be forthcoming, the petitioners’ attorney should request the drainage authority to convene a hearing. The drainage authority must give notice by mail of a hearing to survey the additional areas to the petitioners and the persons liable on the petitioners’ bond.⁶¹⁴ The hearing must be held at least 10 days after the mailed notice.⁶¹⁵

A sample Notice of Hearing to Survey Additional Areas is found in [Template C](#).

At the hearing, if the petitioners who are also principals on the bond do not unanimously consent to the additional surveying, the drainage authority may not order additional area surveyed by the engineer.⁶¹⁶ Petitioners who are not principals on the bond do not have to consent.⁶¹⁷ If following the hearing the drainage authority determines that the additional surveying should be done, the drainage authority shall order the additional work.⁶¹⁸

The engineer may approve and include as a part of the report, a project of the United States relating to drainage or flood control that is within the proposed drainage project area, and may accept data, plats, plans, or information relating to the project furnished by United States engineers.⁶¹⁹ The engineer does not need to make the preliminary survey if the material furnished by the United States is sufficient for the engineer to make the preliminary survey report.⁶²⁰

3. Engineer's Compensation

After the beginning of the engineer's work, the engineer must make an expense report every two weeks until the construction contract is awarded.⁶²¹ The report must show the following:

1. Costs incurred by the engineer and expenses incurred under the engineer's direction relating to the proceeding;
2. Include the names of the engineer, engineer assistants, and employees and the time each was employed; and
3. Every item of expense incurred by the engineer.⁶²²

The engineer must file this report with the auditor or the watershed district secretary as soon as possible.⁶²³ The public drainage code states that the engineer may not incur expenses for the proceeding greater than the petitioners' bond.⁶²⁴ The bi-monthly expense report assists in ensuring that the costs do not exceed the petitioners' bond.

The compensation of the engineer, the engineer's assistants, and other employees is on a per diem basis and must be set by order of the drainage authority.⁶²⁵ The order setting compensation must provide for payment of the actual and necessary expenses of the engineer, the engineer's assistants, and other employees, including the cost of the engineer's bond.⁶²⁶

FOOTNOTES

⁵⁹⁵ Minn. Stat. § 103E.241, subd. 1 (2015).

⁵⁹⁶ Minn. Stat. § 103E.241, subd. 1 (2015).

⁵⁹⁷ Minn. Stat. § 103E.241, subd. 1 (2015).

⁵⁹⁸ Minn. Stat. § 103E.241, subd. 1 (2015).

⁵⁹⁹ Minn. Stat. § 103E.241, subd. 1 (2015).

⁶⁰⁰ Minn. Stat. § 103E.241, subds. 1 & 2 (2015).

⁶⁰¹ Minn. Stat. § 103E.241, subd. 2 (2015).

⁶⁰² Minn. Stat. § 103E.241, subd. 2 (2015).

⁶⁰³ Minn. Stat. § 103E.241, subd. 2 (2015).

⁶⁰⁴ Minn. Stat. § 103E.241, subd. 2 (2015).

⁶⁰⁵ Minn. Stat. § 103E.241, subd. 3 (2015).

⁶⁰⁶ Minn. Stat. § 103E.241, subd. 5 (2015).

⁶⁰⁷ Minn. Stat. § 103E.241, subd. 5 (2015).

⁶⁰⁸ Minn. Stat. § 103E.245, subd. 1(1) (2015).

⁶⁰⁹ Minn. Stat. § 103E.245, subd. 1(2) (2015).

⁶¹⁰ Minn. Stat. § 103E.245, subd. 1(3) (2015).

⁶¹¹ Minn. Stat. § 103E.245, subd. 1 (2015).

⁶¹² Minn. Stat. § 103E.245, subd. 2 (2015).

⁶¹³ Minn. Stat. § 103E.245, subd. 2 (2015).

⁶¹⁴ Minn. Stat. § 103E.245, subd. 2(1) (2015).

⁶¹⁵ Minn. Stat. § 103E.245, subd. 2(1) (2015).

⁶¹⁶ Minn. Stat. § 103E.245, subd. 2(2)-(3) (2015).

⁶¹⁷ Minn. Stat. § 103E.245, subd. 2(3) (2015).

⁶¹⁸ Minn. Stat. § 103E.245, subd. 2(4) (2015).

⁶¹⁹ Minn. Stat. § 103E.245, subd. 3 (2015).

⁶²⁰ Minn. Stat. § 103E.245, subd. 3 (2015).

⁶²¹ Minn. Stat. § 103E.241, subd. 4 (2015).

⁶²² Minn. Stat. § 103E.241, subd. 4 (2015).

⁶²³ Minn. Stat. § 103E.241, subd. 4 (2015).

⁶²⁴ Minn. Stat. § 103E.241, subd. 4 (2015).

⁶²⁵ Minn. Stat. § 103E.645, subd. 2 (2015).

⁶²⁶ Minn. Stat. § 103E.645, subd. 2 (2015).

D. Engineer's Preliminary Survey and Preliminary Survey Report

The engineer's preliminary report must report on the proposed drainage project plan or recommend a different practical plan.⁶²⁷

First, the engineer must give sufficient details to the drainage authority to inform it on issues related to feasibility and on whether the proposed project complies with the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015, subd. 1](#) (2015).⁶²⁸ If necessary, the engineer must give sufficient information, in detail, to show changes necessary to make the proposed plan practicable and feasible including extensions, laterals, and other work.⁶²⁹ The engineer should point out specific findings that support the engineer's conclusion on whether the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015, subd. 1](#) (2015) is met.⁶³⁰ Adverse environmental impacts should be specifically noted.⁶³¹

If the proposed project is not feasible or does not meet the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015, subd. 1](#) (2015), all other issues are moot.⁶³²

If the proposed project is feasible and does meet the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015, subd. 1](#) (2015), then the engineer shall include in the preliminary survey report a preliminary plan of the drainage project showing the proposed ditches, tile, laterals, and other improvements, the outlet of the project, the watershed of the drainage project or system, and the property likely to be affected and its known owners.⁶³³

The engineer's preliminary survey report must also show the following:

1. The elevation of the outlet and the controlling elevations of property likely to be affected referenced to standard sea level datum, if practical;
2. The probable size and character of the ditches and laterals necessary to make the plan practicable and feasible;
3. The character of the outlet and whether it is sufficient;
4. The probable cost of the drains and improvements shown on the plan;
5. All other information and data necessary to disclose the practicability, necessity, and feasibility of the proposed drainage project;
6. Consideration of the drainage project under the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.215, subd. 1](#); and
7. Other information ordered by the drainage authority.⁶³⁴

When planning a drainage project or a repair under [Minn. Stat. § 103E.715](#), and prior to making an order on the engineer's preliminary survey report for a drainage project or the engineer's report for a repair, the drainage authority shall investigate the potential use of external sources of funding to:

1. Facilitate the purposes indicated in [Minn. Stat. § 103E.011, subd. 5](#); and
2. Alternative measures listed in [Minn. Stat. § 103E.015, subd. 1\(2\)](#).⁶³⁵

Under [Minn. Stat. § 103E.011, subd. 5](#), a drainage authority may accept and use funds from sources other than, or in addition to, those derived from assessments based on the benefits of the drainage

system for the purposes of wetland preservation or restoration or creation of water quality improvements or flood control.

The alternative measures listed in [Minn. Stat. § 103E.015, subd. 1\(2\)](#), include measures identified in applicable state-approved and locally adopted water management plans, to:

1. Conserve, allocate, and use drainage waters for agriculture, stream flow augmentation, or other beneficial uses;
2. Reduce downstream peak flows and flooding;
3. Provide adequate drainage system capacity;
4. Reduce erosion and sedimentation; and
5. Protect or improve water quality.

This investigation must include early coordination with applicable soil and water conservation districts and county and watershed district water planning authorities about potential external sources of funding and technical assistance for these purposes and alternative measures.⁶³⁶ The drainage authority may request additional information about potential funding or technical assistance for these purposes and alternative measures from the Executive Director of the Board of Water and Soil Resources.⁶³⁷

In addition to the statutory requirements mentioned above, the engineer must also prepare a list of affected properties by legal description.⁶³⁸

Upon completion, the drainage code directs the engineer to file the engineer's preliminary survey report in duplicate with the auditor of each affected county.⁶³⁹ However, if the drainage authority for the proposed drainage project is a watershed district, the engineer's preliminary survey report should be filed with the watershed district secretary.⁶⁴⁰ The auditor or watershed district secretary must send one copy of the preliminary survey report to the Director of the Division of Ecological and Water Resources in the Department of Natural Resources.⁶⁴¹

FOOTNOTES

⁶²⁷ Minn. Stat. § 103E.245, subd. 4 (2015).

⁶²⁸ Minn. Stat. § 103E.245, subd. 4 (2015).

⁶²⁹ Minn. Stat. § 103E.245, subd. 4 (2015).

⁶³⁰ Minn. Stat. § 103E.245, subd. 4 (2015).

⁶³¹ See Minn. Stat. § 103E.245, subd. 4 (2015).

⁶³² See Minn. Stat. § 103E.261, subd. 4(a)(1) (2015).

⁶³³ Minn. Stat. § 103E.245, subd. 4 (2015).

⁶³⁴ Minn. Stat. § 103E.245, subd. 4 (2015).

⁶³⁵ Minn. Stat. § 103E.015, subd. 1a (2015).

⁶³⁶ Minn. Stat. § 103E.015, subd. 1a (2015).

⁶³⁷ Minn. Stat. § 103E.015, subd. 1a (2015).

⁶³⁸ Minn. Stat. § 103E.245, subd. 4 (2015).

⁶³⁹ Minn. Stat. § 103E.251 (2015).

⁶⁴⁰ See Minn. Stat. § 103D.625, subd. 4 (2015) (requiring petitions for new drainage systems or improvements of drainage systems in a watershed district to be initiated by filing a petition with the watershed district and directing the proceedings to conform to Minn. Stat., Chapter 103E).

⁶⁴¹ Minn. Stat. § 103E.251 (2015).

E. Commissioner's Preliminary Advisory Report

The Commissioner of the Department of Natural Resources ("DNR")⁶⁴² is required to review the engineer's preliminary survey report and prepare a preliminary advisory report to the drainage authority with an opinion about the adequacy of the preliminary survey report.⁶⁴³ The preliminary advisory report must:

1. State any additional investigation and evaluation that should be done relating to public waters that may be affected;
2. State any additional investigation and evaluation that should be done relating to the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015, subd. 1](#); and
3. Cite specific portions of the preliminary survey report that are determined inadequate.⁶⁴⁴

This may also be a good time for the DNR Commissioner to notify the drainage authority of its position on applicable requirements for DNR permits, permissions, or other reviews and approvals, and to mention to the drainage authority requirements that may apply under other state and federal agency jurisdiction.

The DNR Commissioner's preliminary advisory report must be filed with the auditor or watershed district secretary before the date of the preliminary hearing.⁶⁴⁵ The DNR Commissioner may request additional time for review and evaluation of the preliminary survey report if additional time is necessary for proper evaluation.⁶⁴⁶ A request for additional time may not be made more than five days after the date of the notice by the auditor that a date is to be set for the preliminary hearing and an extension of time may not exceed two weeks after the date of the request.⁶⁴⁷ The preliminary hearing may be convened even though the DNR Commissioner's preliminary advisory report has not been received if the Commissioner fails to file the report prior to the preliminary hearing or fails to request additional time as directed in the public drainage code.

Since the DNR Commissioner must later make a final advisory report on the engineer's final survey report,⁶⁴⁸ the DNR Commissioner's comments should be carefully considered. Problems not addressed at this stage will likely show up in the DNR Commissioner's final advisory report, probably causing delay and possibly giving project opponents grounds for appeal based on failure to consider the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015](#).

FOOTNOTES

⁶⁴² While the public drainage code directs the DNR Commissioner to make a preliminary advisory report, this authority is typically dedicated to the Director of the Division of Ecological and Water Resources within the DNR.

⁶⁴³ Minn. Stat. § 103E.255 (2015).

⁶⁴⁴ Minn. Stat. § 103E.255 (2015).

⁶⁴⁵ Minn. Stat. § 103E.255 (2015).

⁶⁴⁶ Minn. Stat. § 103E.255 (2015).

⁶⁴⁷ Minn. Stat. § 103E.255 (2015).

⁶⁴⁸ See Minn. Stat. § 103E.301 (2015).

F. The Preliminary Hearing

When the engineer files the engineer's preliminary survey report, the auditor or the watershed district secretary notifies the drainage authority and obtains an "order" for hearing which sets the hearing not

later than 30 days after the date of the order.⁶⁴⁹ A sample Order Setting Hearing on Preliminary Survey Report is found in **Template D**.

1. Notice

Notice of the time and place of the preliminary hearing must be given by mail to the petitioners, to the owners of all property within the watershed likely to be assessed (this information is taken from the engineer's preliminary survey report), and to political subdivisions likely to be affected.⁶⁵⁰ It is recommended, but not required, that the notice be published at least one time as a legal notice in a legal newspaper serving the area of the proposed project. The auditor or secretary should also send a copy of the notice of hearing to the Director of the Division of Ecological and Water Resources of the Department of Natural Resources ("DNR") though, again, the statute does not so require.

2. Preliminary Hearing Procedures

At the hearing itself, the drainage authority must examine the petition and determine if it meets the legal requirements for the type of proposed drainage project.⁶⁵¹ If the legal requirements are not met, then the preliminary hearing must be adjourned until a specified date by which the petitioners must resubmit the petition.⁶⁵² The petitioners may unanimously amend the petition and may obtain signatures of additional property owners before resubmitting the petition to the drainage authority.⁶⁵³ If the petition is not resubmitted by the specified date or the amended petition does not meet the legal requirements, the proceedings must be dismissed.⁶⁵⁴

If the petition meets the mandatory legal requirements, then after convening and opening remarks by the chairperson of the drainage authority, the floor should be turned over to the petitioners' representative to present information regarding the petition.⁶⁵⁵ The petitioners, as well as the drainage authority, should be familiar with the engineer's preliminary report and with the DNR Commissioner's preliminary advisory report. The petitioners' representative outlines the problems sought to be solved by the petitioners, describing the petitioners' proposal to remedy them, and discusses the procedures involved.

During the preliminary hearing, the engineer will, with the use of maps and profiles, explain what is proposed, discuss the evaluation of the environmental, land use, and multipurpose water management criteria, describe the investigation of potential use of external sources of funding and technical assistance, show whose land the proposed project will cross, tell whether tile or open ditch is recommended, delineate the watershed, identify the land likely to be assessed, and give the estimated costs of construction.⁶⁵⁶

At the conclusion of the drainage project engineer's presentation, the chairperson must have the DNR Commissioner's preliminary advisory report publicly read and included in the record of proceedings if one was filed.⁶⁵⁷

Next, the chairperson should open the meeting for questions and/or comments by interested persons present.⁶⁵⁸ Speakers should be asked to identify themselves and be required to state the nature of their interest, such as the property they own that is affected by the proposed drainage project. Hearings should be electronically recorded, or if an appeal from an order is likely, recorded verbatim by a court reporter. Costs of having a court reporter present are chargeable to the system or petitioners. The auditor or secretary to the drainage authority should take careful minutes of the comments made.

After everyone has had at least one opportunity to speak, the chairperson should end the public comment portion of the agenda and should open the matter up for discussion by the drainage authority board. During board discussion, the chairperson should entertain a motion to accomplish one of three things:

1. If there are unanswered questions which will require more work of the engineer or other investigation, entertain a motion to adjourn the meeting to another date certain and direct the engineer and other necessary staff of the drainage authority to conduct the necessary investigations. Adjourning the meeting to a date certain avoids having to send out notices again. However, if the notices are not numerous, it might be desirable to send them out anyway. Although it is not required, a notice of reconvening of the hearing should also be published as a legal notice in the local newspaper.
2. Entertain a motion to take the matter under advisement without further testimony. This is the desired course of action if the drainage authority needs more time to think or desires to consult with legal counsel and/or the engineer. Taking the matter under advisement has the advantage of allowing the drainage authority and legal counsel sufficient time to prepare a proposed findings and order. The findings must be adopted at an open meeting of the drainage authority, but they can be adopted without further notice. This method seems unsatisfactory in some respects in that the participants of the meeting leave the meeting not knowing what has happened and are generally suspicious of influences that the drainage authority members may encounter outside of the meeting; or
3. Entertain a motion to dismiss the petition or motion to order the engineer to proceed with the preparations of the engineer's final design survey in accordance with the requirements as discussed in Paragraph G and Paragraph H below. If such a motion is forthcoming, the motion should state with particularity the reasons for the motion. At this point, legal counsel can be helpful in assisting the drainage authority to formulate the motion in a manner which conforms to [Minn. Stat. § 103E.261, subds. 4 or 5](#) (2015).

FOOTNOTES

⁶⁴⁹ Minn. Stat. § 103E.261, subd. 1 (2015).

⁶⁵⁰ Minn. Stat. § 103E.261, subd. 1 (2015).

⁶⁵¹ See Minn. Stat. § 103E.261, subd. 3(a) (2015).

⁶⁵² Minn. Stat. § 103E.261, subd. 3(b) (2015).

⁶⁵³ Minn. Stat. § 103E.261, subd. 3(b) (2015).

⁶⁵⁴ Minn. Stat. § 103E.261, subd. 3(c) (2015).

⁶⁵⁵ See Minn. Stat. § 103E.261, subd. 2 (2015).

⁶⁵⁶ See Minn. Stat. § 103E.261, subd. 2 (2015) ("The engineer shall attend the preliminary hearing and provide necessary information.").

⁶⁵⁷ Minn. Stat. § 103E.261, subd. 2 (2015).

⁶⁵⁸ Minn. Stat. § 103E.261, subd. 2 (2015).

G. Reasons for Dismissal

The public drainage code requires that the drainage authority dismiss a petition if it finds the following:

1. The proposed drainage project is not feasible⁶⁵⁹;
2. The adverse environmental impact is greater than the public benefit and utility after considering the environmental, land use, and multipurpose water management criteria in [Minn. Stat. §](#)

[103E.015, subd. 1](#), and the engineer has not reported a plan to make the proposed drainage project feasible and acceptable;⁶⁶⁰

3. The proposed drainage project is not of public benefit or utility;⁶⁶¹ or
4. The outlet is not adequate.⁶⁶²

Even if such a motion is made and passed in the open meeting, it should be made clear to all in attendance that the drainage authority will make more elaborate written findings setting forth the facts which support the statutory legal grounds for dismissal. The drainage authority's legal counsel should then be asked to prepare the findings and the order for dismissal that will accompany it. The proposed findings and order should be presented to the drainage authority at a regular open meeting, with or without notice, and the chairperson should be authorized to sign the order by resolution of the drainage authority approved by the majority thereof. **A sample Findings and Order Dismissing Petition is found in [Template E](#).**

FOOTNOTES

⁶⁵⁹ Minn. Stat. § 103E.261, subd. 4(a)(1) (2015).

⁶⁶⁰ Minn. Stat. § 103E.261, subd. 4(a)(2) (2015).

⁶⁶¹ Minn. Stat. § 103E.261, subd. 4(a)(3) (2015).

⁶⁶² Minn. Stat. § 103E.261, subd. 4(a)(4) (2015). Whether the outlet for a drainage project is adequate contemplates whether there is potential for flooding of the system or lands downstream of the project for 5-, 10-, 25-, and 50-year flood events. Minn. Stat. § 103E.015, subd. 1(4) (2015). The Minnesota Supreme Court has previously stated that the consideration of whether an outlet is adequate includes the contemplation of whether the drainage project will cause "excessive erosion" of the downstream drainage ditch. See *Edwards v. Massett*, 164 N.W.2d 382 (Minn. 1969) (holding that downstream landowners must raise concerns about erosion issues at the time the drainage system is being petitioned for establishment, and that takings claims after the drainage system is established are barred). Historically, the focus of the adequacy of the outlet has been on flooding impacts. See *Titrud v. Achterkirch*, 213 N.W.2d 408, 413 (Minn. 1973); *Oltman v. Ohlen*, 257 N.W.2d 338, 341 (Minn. 1977). Water quality, fish and wildlife resources, and environmental impact considerations on the outlet of a drainage system are covered separately under Minn. Stat. § 103E.015, subd. 1 (2015).

H. Adoption of Findings and Order

A motion for approval of the engineer's preliminary survey report must describe any changes that must be made in the proposed drainage project from those outline in the petition, including changes necessary to minimize or mitigate adverse impacts on the environment.⁶⁶³ To approve the engineer's preliminary survey, the drainage authority must make the following determinations:

1. The proposed drainage project outlined in the petition, or modified and recommended by the engineer, is feasible⁶⁶⁴;
2. There is necessity for the proposed drainage project⁶⁶⁵;
3. The proposed drainage project will be of public benefit and promote the public health, after considering the environmental, land use, and multipurpose water management criteria in [Minn. Stat. § 103E.015, subd. 1](#);⁶⁶⁶ and
4. The outlet is adequate.⁶⁶⁷

Changes may be stated by describing them in general terms or filing a map that outlines the changes in the proposed drainage project with the order.⁶⁶⁸ The drainage authority then must direct the engineer to proceed with a detailed survey⁶⁶⁹ and must order the appointment of viewers.⁶⁷⁰

After the open meeting has adjourned, the petitioners' attorney should prepare detailed findings and a proposed order which should be presented, after approval by the drainage authority's legal counsel, at

an open meeting of the drainage authority with or without notice. It is recommended the drainage authority pass a resolution authorizing the chairperson to sign the findings and the order.

A sample Findings and Order Directing the Engineer to Proceed with a Detailed Survey and Appointing Viewers is found in [Template F](#).

The order and accompanying documents must be filed with the auditor or watershed district secretary.⁶⁷¹

FOOTNOTES

⁶⁶³ Minn. Stat. § 103E.261, subd. 5(a) (2015).

⁶⁶⁴ Minn. Stat. § 103E.261, subd. 5(a)(1) (2015).

⁶⁶⁵ Minn. Stat. § 103E.261, subd. 5(a)(2) (2015).

⁶⁶⁶ Minn. Stat. § 103E.261, subd. 5(a)(3) (2015).

⁶⁶⁷ Minn. Stat. § 103E.261, subd. 5(a)(4) (2015). Minn. Stat. § 103E.261, subd. 4(a)(4) (2015). Whether the outlet for a drainage project is adequate contemplates whether there is potential for flooding of the system or lands downstream of the project for 5-, 10-, 25-, and 50-year flood events. Minn. Stat. § 103E.015, subd. 1(4) (2015). The Minnesota Supreme Court has previously stated that the consideration of whether an outlet is adequate includes the contemplation of whether the drainage project will cause “excessive erosion” of the downstream drainage ditch. See *Edwards v. Massett*, 164 N.W.2d 382 (Minn. 1969) (holding that downstream landowners must raise concerns about erosion issues at the time the drainage system is being petitioned for establishment, and that takings claims after the drainage system is established are barred). Historically, the focus of the adequacy of the outlet has been on flooding impacts. See *Titrud v. Achterkirch*, 213 N.W.2d 408, 413 (Minn. 1973); *Oltman v. Ohlen*, 257 N.W.2d 338, 341 (Minn. 1977). Water quality, fish and wildlife resources, and environmental impact considerations on the outlet of a drainage system are covered separately under Minn. Stat. § 103E.015, subd. 1 (2015).⁶⁶⁸ Minn. Stat. § 103E.261, subd. 5(b) (2015).

⁶⁶⁹ Minn. Stat. § 103E.265, subd. 1 (2015).

⁶⁷⁰ Minn. Stat. § 103E.305, subd. 1 (2015).

⁶⁷¹ Minn. Stat. § 103E.261, subd. 5(b) (2015).

I. Appeals of the Preliminary Order

The preliminary order is, in and of itself, not appealable. The public drainage code says that the findings and order at the preliminary hearing are conclusive as to the signatures and legal requirements of the petition, the nature and extent of the proposed plan, and the need for a detailed survey.⁶⁷² The findings and order are conclusive only for the persons or parties shown by the preliminary survey report as likely to be affected by the proposed drainage project.⁶⁷³ The trouble with that statement is that the signatures and legal requirements of the petition are jurisdictional. Jurisdiction is always appealable. The inadequacy of the petition may be raised in an appeal from the final order, though technically the adequacy of the petition is not an issue at the final hearing.

FOOTNOTES

⁶⁷² Minn. Stat. § 103E.261, subd. 7 (2015).

⁶⁷³ Minn. Stat. § 103E.261, subd. 7 (2015).