

From: [Louis Smith](#)
To: [Jaschke, John \(BWSR\)](#)
Cc: [Jan Voit](#); [Sherry Haley](#); [Emily Javens \(MAWD\)](#); [Ray Bohn \(raybohnmg@gmail.com\)](#)
Subject: Heron Lake WD and Drainage Management
Date: Friday, August 16, 2019 3:19:18 PM
Attachments: [Resolution 19-028.pdf](#)

Dear Mr. Jaschke,

I am writing on behalf of the Heron Lake Watershed District(HLWD) to request the assistance and guidance of the Board of Water and Soil Resources to address questions of water law and policy concerning drainage management. HLWD has served as a drainage authority for more than 30 years, and has always cooperated with Jackson County in the financing of drainage projects. This year, the county and HLWD have had ongoing discussions about effective collaboration in drainage management, and held a particularly productive joint meeting on March 12, 2019. Key topics of that meeting included a shared understanding of drainage authority jurisdiction, cooperative project finance, and ongoing communications to avoid duplication of effort.

More recently, the Jackson County Board of Commissioners has turned to the position that it will only provide bonding for drainage projects on the condition that HLWD surrender all jurisdiction over drainage systems, as stated in the attached resolution. We feel this action is an unfortunate detour from our past collaboration with the county, and also is in serious conflict with state water law and policy. We see three important issues of water law and policy having statewide implications, and which must be addressed to resolve our current situation:

1. Minnesota water law and policy favors Integrated watershed and drainage management;
2. Minnesota water law and policy provides no legal basis for a county to demand surrender of drainage authority by a watershed district in any circumstances, let alone when HLWD has more than thirty years of demonstrated capacity, commitment and expertise to integrated watershed and drainage management;
3. Minnesota water law and policy obligates a county to finance duly ordered drainage projects.

We would very much like to return to the collaborative posture with the county to coordinate drainage management and finance, but feel that it is important that you take an active role to facilitate the resolution of these issues. It is our hope that these issues can be resolved short of a formal intervention petition. We would be pleased to provide any further information you may require.

Sincerely,

Louis N. Smith

smith

partners

PLLP

400 Second Avenue South

Suite 1200
Minneapolis, MN 55401
(612) 344-1400 Office
www.smithpartners.com

Confidentiality Notice: This email message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information and must be protected in accordance with those provisions. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

May 22, 2020

To: Louis Smith, Smith Partners PLLP on behalf of the Heron Lake Watershed District

Fr: John Jaschke, Executive Director
MN Board of Water and Soil Resources

Tom Gile, Resource Conservation Section Manager
MN Board of Water and Soil Resources

Re: BWSR Staff Assessment, HLWD petition requesting intervention

The following questions were submitted as part of the Heron Lake Watershed District (HLWD) petition to BWSR requesting intervention per §103A.311 in a proceeding (JD #14 improvement) under Minn. Stat. §103E on April 24, 2020.

- a. Whether a county, on receipt of an assessment statement, is obligated to provide funds for the total cost of a drainage project duly ordered by the watershed district acting as drainage authority, for which the county may issue bonds.
- b. Whether the watershed district is operating as the lawful drainage authority in this proceeding, and if so, whether the county may lawfully step in to take over that authority.

The purpose of this memo is to provide a staff assessment as to whether the BWSR Board has proper jurisdiction to act on these questions based on the definition of "Question of water policy" as defined under Minn. Stat. §103A.301, and some practical considerations related to the circumstances leading to the petition.

Assessment of Question b

We first looked at whether the watershed district is operating as the lawful drainage authority in this proceeding, and if so, whether the county may lawfully step in to take over that authority.

As to whether this is a "Question of water policy" as defined in Minn. Stat. §103A.301 the statute defines a "Question of water policy" as meaning a question of water law and policy in which use, disposal, pollution, or conservation of water is a factor in a proceeding, including:

(1) Determination of the governing policy of state law in the proceeding and resolution of apparent inconsistencies between different statutes;

Or

(2) The proper application of the policy of state law to facts in the proceeding if application is a matter of administrative discretion.

Petition Conclusion:

"Question b" of the petition does not appear to be an issue of inconsistencies between different statutes based on the information provided by the petitioner. Nor does this appear to be an issue of proper application of the policy of state law to the facts in the proceeding as the application does not seem to be a matter of administrative discretion.

Circumstantial Findings:

According to **103D.625 Subd. 4. Construction or improvement.** *Construction of new drainage systems or improvements of existing drainage systems in the watershed district must be initiated by filing a petition with the managers. The proceedings for the construction or improvement of drainage systems in the watershed district must conform to chapter 103E, except for repairs and maintenance done pursuant to section 103D.621, subdivision 4.*

Further review of the Minnesota Public Drainage Manual was conducted to provide guidance to the statutory interpretation.

Chapter 2, Section II, Paragraph C. Determining the Correct Drainage Authority

The legal concept of jurisdiction is built on having a statutorily authorized body adopt findings and make decisions. Determining what drainage authority has jurisdiction over a petition for a drainage project or repair is crucial. Determining the proper drainage authority depends on two equal factors:

- 1. The type of petition being filed; and*
- 2. The location of the public drainage system.*

Chapter 3 Section C (3)(i) Obtaining Jurisdiction as Drainage Authority;

The public drainage code expressly states that the petition for an improvement and bond are to be filed with the county auditor. If the proposed drainage project affects land in two or more counties, the petition must be filed with the auditor of the county with the largest area of property in the proposed drainage system.

However, if a new drainage system or an improvement to an existing drainage system is located within the jurisdiction of a watershed district, the petition must be filed with the managers of the watershed district.

Chapter 2, Section II, Paragraph C Part (3)(i). Obtaining Jurisdiction as Drainage Authority

Whether a watershed district is the proper drainage authority with jurisdiction over a drainage project or repair proceeding is dependent upon three factors:

- Whether the drainage system exists, or is proposed to be constructed, within the boundaries of an established watershed district;*
- The type of project under petition; and*
- Whether the joint county or county drainage authority has transferred authority over the drainage system to the watershed district.*

When a watershed district is established, it has no jurisdiction as the drainage authority over existing public drainage systems until the respective joint county or county boards transfer to the watershed district all or certain joint county or county drainage systems within the watershed district, or as described below for improvement of existing drainage systems in the watershed district.

A watershed district does have jurisdiction over all new drainage systems and improvements to existing systems within its boundaries, but must proceed according to the procedures under Minn. Stat. § 103E.

Jurisdiction over a petition for the construction of new drainage systems, the improvement of existing drainage systems, or the improvement of the outlet of an existing drainage system in the watershed district is established by the filing of a petition with the board of managers of the watershed district. While the statute does not address an officer of the watershed district with whom to file the petition as it does for the county, presumably one would file the petition with the secretary of the board of managers.

Circumstantial Conclusion:

Both Minnesota Statutes 103D.625, Subd. 4 and the Minnesota Public Drainage Manual seem to clearly indicate that HLWD now has jurisdiction over Jackson Judicial Ditch #14 as triggered by the improvement petition.

There is no indication that Jackson County could simply “step in” as the Drainage Authority, as noted in your question, without following appropriate provisions of 103E or through mutual agreement.

Assessment of Question a.

Secondly, we looked at whether a county, on receipt of an assessment statement, is obligated to provide funds for the total cost of a drainage project duly ordered by the watershed district acting as drainage authority, for which the county may issue bonds.

As to whether this is a "Question of water policy" as defined in Minn. Stat. §103A.301 the statute defines a “Question of water policy” as meaning a question of water law and policy in which use, disposal, pollution, or conservation of water is a factor in a proceeding, including:

(1) Determination of the governing policy of state law in the proceeding and resolution of apparent inconsistencies between different statutes;

Or

(2) The proper application of the policy of state law to facts in the proceeding if application is a matter of administrative discretion.

Petition Conclusion:

“Question a” of the petition does not appear to be an issue of inconsistencies between different statutes based on the information provided by the petitioner. Nor does it appear to be an issue of proper application of the policy of state law to the facts in the proceeding as the application does not seem to be a matter of administrative discretion.

Circumstantial Findings:

According to **103D.901 Subdivision 1.Assessment. (a)** *After the managers file an approved assessment statement listing the property and corporations benefited or damaged or otherwise affected by a project with the auditor of an affected county, the auditor shall assess the amount specified in the assessment statement against the property, municipalities, or other corporations as specified in the pertinent provisions of chapter 103E.*

Subd. 2. County funding. *After the assessment statement is filed with the auditor, the county board of each affected county shall provide funds to meet its proportionate share of the total cost of the project, as shown by the engineer's report and order of the managers. The county may issue bonds of the county in the manner provided by section 103E.635. If an improvement is to be constructed under section 103D.611, the provisions of section 103E.635 requiring the county board to award a contract for construction or implementation before issuing bonds is not applicable to bonds issued to provide the funds required to be furnished by this section.*

Subd. 3. Levy and collection. *(a) The respective county auditors and county treasurers shall levy and collect the amount shown in the tabular statement and lien as provided in sections 103E.601 to 103E.631.*

(e) The money received by the treasurer of a county from the sale of bonds, assessments, or otherwise, for the benefit of the watershed district shall be accounted for by the auditor and paid to the treasurer of the watershed district.

Further review of this question in the Minnesota Public Drainage Manual was conducted to provide guidance to the statutory interpretation.

Administration and Legal Considerations - Funding Collection and Payment of Drainage System Costs

Summary: *A statement showing the total cost of the drainage project with the estimated cost of all items required to complete work must be issued by the auditor or watershed district secretary after the construction contract has been awarded. The cost is then prorated to each tract of property affected in direct proportion to the benefits awarded. The cost to each property is the amount of liability for the property for the drainage project. The auditor uses this information to create the tabular lien statement, the purpose of which is to reflect the cost of the drainage system that each tract will bear. (Section VIII, A.1) More information on drainage liens is provided in Section VIII, A. In order to defray the cost of establishing and constructing a drainage system and to generate capital for disbursement from a drainage system fund until monies from liens and assessments are received, the county board may authorize the issuance of county bonds. There are four different kinds of bonds or debt instruments mentioned in Minn. Stat. 103E that may be issued by the county to pay for the cost of establishment and construction of a project: temporary drainage bonds, definitive drainage bonds, drainage funding bonds, and drainage bonds. Not all projects may require a bond as the drainage system may have enough funds to pay for a project, if not, the drainage system account may borrow funds. More information on drainage bonds is provided in Section VIII, B.*

B. Drainage Bond Issues

The drainage code mentions four different kinds of bonds (debt instruments) that may be issued by the county to pay for the cost of establishment and construction of a project. First of all, it should be said that not every project requires the sale of bonds. The drainage system account may have enough funds in it to pay for the project. Failing that, the drainage system account may borrow excess funds from other drainage system accounts or from county general revenue. Interest on such borrowed funds is

computed at the rate of 7 percent per year for the time the money is actually needed and is paid from the assessments of the drainage systems or from the later sale of drainage funding bonds. All drainage bonds are of the general obligation variety. That means that the full faith and credit of the drainage authority is pledged in support of payment of interest and principal coming due on the bonds. The drainage authority, through the county, in effect, uses its taxing authority to assure bondholders.

D. Funding of Watershed Districts and Projects 1. Assessments and Levies

Watershed districts do not have the power to tax. Watershed districts are dependent upon the county's power to levy assessments on the real property of the county. Also, watershed districts do not have the power to issue bonds to pay for drainage projects. Except for contractual participation by state and federal governments, all funds available to a watershed district are levied and collected by the respective county boards.

Circumstantial Conclusion:

The statute noted above and the Minnesota Public Drainage Manual indicate that the County is obligated to provide financing for a duly ordered HLWD project through various means of assessments, levies or borrowing.

The method of funding (including the issuance of bonds) does appear to be at least partially discretionary, as the County could take into consideration the availability of several other funding sources prior to making a determination on the need to issue bonds.

Assessment Summary

Though this staff assessment has concluded that neither question constitutes a Question of water policy as defined under Minn. Stat. §103A.301, there may be other avenues HLWD could pursue in an effort to obtain a more definitive direction as to the proceeding and questions posed including the following:

- Request an opinion from the State Attorney General's Office.
- Request that the Drainage Work Group take up a review of the underlying policy issues involved in coordination of drainage management and project financing between counties and watershed districts.

Both options may take varying degrees of time and thus may not be entirely feasible considering the timelines indicated in your request. However, they may lead to a more definitive long term foundation for decision-making in the public interest.

If you have any questions or would like to discuss the preliminary staff assessment further please feel free to contact Travis Germundson at travis.germundson@state.mn.us to coordinate that discussion.

CC:

Jan Voigt, Heron Lake Watershed District

Emily Javens, Minnesota Association of Watershed Districts

Sherry Haley, Jackson County Attorney

Brian Martinson, Association of Minnesota Counties

Travis Germundson, Minnesota Board of Water and Soil Resources

Gerald VanAmburg, Chair, Minnesota Board of Water and Soil Resources

Doug Goodrich, Minnesota Board of Water and Soil Resources

Ed Lenz, Minnesota Board of Water and Soil Resources