

STATEMENT OF NEED AND REASONABLENESS

ON THE MATTER OF ADOPTING PROPOSED RULES TO ESTABLISH
CRITERIA FOR DETERMINING DRAINAGE BENEFITS TO STATE-OWNED
LANDS IN CONSOLIDATED CONSERVATION AREAS

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

I. INTRODUCTION

The Department of Natural Resources (DNR) is establishing by rule the criteria for determining drainage benefits to state-owned lands in consolidated conservation (con-con) areas in parts of Aitkin, Beltrami, Koochiching, Lake of the Woods, Mahnomen, Marshall, and Roseau counties. Con-con areas were created by the legislature in 1929 (Beltrami, Lake of the Woods, Koochiching; MS 84A.01); in 1931 (Aitkin, Mahnomen, Roseau; MS 84A.20); and in 1933 (Marshall; MS 84A.31).

Within the con-con areas there are 409,300 acres of state-owned land in Aitkin County; 515,430 acres in Beltrami County; 227,349 acres in Koochiching County; 466,661 acres in Lake of the Woods County; 6,198 acres in Mahnomen County; 102,328 acres in Marshall County; and 205,851 acres in Roseau County for a total of 1,934,067 state-owned acres that are managed as Scientific and Natural Areas, State Forests, State Parks, State Recreation Areas, and Wildlife Management Areas.

The following steps were taken to determine reasonable criteria and to reach persons who could be affected by the proposed rules:

1. The department formed an internal work group to develop draft rules. Regional and area staff from the Divisions of Forestry, Wildlife, Waters, Lands and Minerals, Ecological Services, and Regional Operations participated on the work group. Draft rules were reviewed by field staff, and by advisors at the department's central office, and the Office of Attorney General.

2. A "Request for Comments" was published in the State Register on November 25, 2002. This notice described the subject of the proposed rule, geographic areas affected by the proposed rule, persons affected, statutory authority, and alternative methods for submitting comments. Specific rule language was not published at the time.

The Request for Comments was also posted on the DNR website along with maps for each of the seven counties with state-owned lands in con-con areas. The maps defined con-con area boundaries and the state-own lands within.

3. Separate letters requesting comments were mailed to over 200 organizations as well as federal and state agencies, county officials, city officials, township officials, legislative leaders, legislators whose districts comprise the con-con areas, and individuals.

4. A statewide news article announcing this rulemaking process was included in the department's weekly news release for November 26, 2002, and was distributed to all general news media in the state, some border state media, outdoor recreation publications, free lance writers, affected county auditors, and agricultural agencies.

5. During the 60-days "Request for Comment" period that ended January 24, 2003, comments were received from all seven con-con county boards, various

conservation organizations, affected township boards, and individuals. A summary of comments is attached as Exhibit A.

II. ALTERNATIVE FORMAT

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, please contact:

Mike Carroll, Regional Director
Department of Natural Resources
2115 Birchmont Beach Road Northeast
Bemidji, MN 56601

Telephone: 218-755-3623
Facsimile: 218-755-4024

III. STATUTORY AUTHORITY

The statutory authority to adopt these rules is set forth in Minnesota Statutes, section 84A.55, subs. 9 and 11. Section 84A.55, subd. 9 states:

The commissioner may make necessary investigations and surveys for and may undertake projects for the drainage of state-owned lands within a game preserve, conservation area, or other area subject to this section so far as the commissioner determines that the lands will benefit from the project for the purposes for which the area was established. The commissioner may pay the cost of drainage projects out of funds appropriated and available for them. If the commissioner finds after investigation that a project for the construction, repair, or improvement of a public ditch or ditch system undertaken by a county or other public agency as otherwise provided by law will benefit the lands for those purposes, the commissioner may cooperate in the project by joining in the petition for the project or consenting to or approving it on any conditions the commissioner determines. The commissioner shall authorize the imposition of assessments for the projects on the lands in any amounts the commissioner determines, or may make lump sum contributions to the county or other public funds established for the payment of the cost of the project. The assessments or contributions must not exceed the value of benefits to the state-owned lands as determined by the commissioner and specified by written certificates or other statement filed in the proceedings. Assessments or contributions are payable only out of funds appropriated and available for them in amounts the commissioner determines. *The commissioner of natural resources shall establish by rule before January 1, 1986, the criteria for determining benefits to state-owned lands held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other purposes relating to conservation, development, or use of soil, water, forests, wild animals, or related natural resources.*

(Emphasis added). Section 84A.55, subd. 11 also provides that the “commissioner may promulgate rules necessary for the execution of this section.”

Although the department did not meet the January 1, 1986 timeline for adopting the rule, the Minnesota Court of Appeals ruled that an agency’s failure to act within a statutory timeframe does not bar subsequent action unless the statute specifically directs that result. Marshall County v. State of Minnesota, 636 N.W.2d 570 (Minn. Ct. App. 2001). Specifically, the Court stated that:

[R]espondents have shown no legislative history, the rule itself does not prescribe any consequence for the agency's failure [to promulgate the rules], and the counties retained the ability to compel the commissioner, through a mandamus proceeding, to continue with the rule-making process. The fact that respondents chose to not do so speaks more to respondents' legal strategy than the equity of the matter; if they had sought mandamus, they would have effectively admitted the DNR's power to independently determine what benefits the agency would finance. We conclude that agency action in this case is not barred by the failure to promulgate an appropriate rule in a timely manner.

636 N.W.2d at 577.

All sources of statutory authority for these proposed rules were adopted and effective prior to January 1, 1996. Consequently, Minnesota Statutes, section 14.125 does not apply.

IV. REGULATORY ANALYSIS

A. Description of the Classes of Persons Affected by the Proposed Rules

1) Drainage authorities. The proposed rules will affect drainage authorities acting under Minn. Stat. Ch. 103E, which include county boards, joint county drainage authorities and watershed districts. In general, drainage authorities have the responsibility for maintaining drainage systems throughout the state and for determining drainage benefits to all lands within those systems, including benefits to state-owned lands. An exception to this is provided in Minn. Stat. § 84A.55, where the commissioner is given exclusive authority to determine benefits, if any, to state-owned lands within con-con areas from proposed drainage projects by drainage authorities. To the extent that the commissioner determines benefits to state-owned lands that are lower than the benefits for those state-owned lands as were originally determined by the drainage authority, the drainage authority will have reduced revenues. This could lead to increased assessments to other landowners (described in paragraph IV.A.2, below), but only if the benefits of a proposed project outweigh the cost of the project. If the costs are higher than the benefits, the project cannot go forward and the landowners would not be assessed. *See* Minn. Stat. § 103E.341.

2) Landowners. The proposed rules will affect parties that own land on any public ditch system where that ditch system has benefited lands within a con-con area. To the extent that the commissioner determines that benefits to state-owned lands are lower than the benefits for those lands as originally determined by the drainage authority, other landowners' contribution to a drainage project may increase.

3) Minnesota taxpayers. The proposed rules will affect Minnesota taxpayers, who are responsible for paying ditch assessments to state-owned lands (payments for ditch assessments to state-owned lands are made from funds the legislature appropriates for that purpose).

B. Probable Costs to the Agency or Other Agencies of the Implementation and Enforcement of the Proposed Rule and any Anticipated Affect on State Revenues

The proposed rule will cause increased staff commitments and operating costs for DNR. When presented with a proposed drainage project within a con-con area, or with a proposed drainage project outside of a con-con area that could potentially assess benefits against state-owned lands within a con-con area, the commissioner will be required to investigate the project using the criteria contained in the rule, and determine whether the project will benefit state-owned lands for the purposes for which they are managed. When the commissioner determines to participate in a project, he must value the benefits of the project to state-owned lands, and determine how much to contribute. By statute, contributions may not exceed the benefit. Finally, the agency is required to report its findings to the drainage authority.

There are no direct costs to other agencies related to these proposed rules, other than minimal costs to drainage authorities associated with the requirement to notify the commissioner of drainage projects that would have assessments within a con-con area.

C. Determination of Less Costly or Less Intrusive Methods for Achieving the Purpose of the Proposed Rules

The purpose of the proposed rules is to provide criteria for the commissioner to determine drainage benefits to state-owned lands in con-con areas, pursuant to Minn. Stat. § 84A.55, subd. 9. The state-owned lands referenced in subdivision 9 are those "state-owned lands held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other purposes relating to conservation, development, or use of soil, water, forests, wild animals, or related natural resources."

Ostensibly, it would be less costly for the commissioner to accept the drainage benefits as determined by the drainage authority under Minn. Stat. Ch. 103E rather than to determine them as provided in Minn. Stat. § 84A.55, subd. 9. Chapter 103E, however, provides different criteria for determining benefits to land, and those criteria do not take into consideration lands held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other purposes relating to conservation, development, or use of soil, water, forests, wild animals, or related natural resources. Consequently, the

less-costly alternative of accepting drainage benefits as determined by drainage authorities under Minn. Stat. Ch. 103E would not achieve the purpose of the proposed rules.

As the only legal means to determine drainage benefits to state-owned lands in con-con areas fall under either Minn. Stat. § 84A.55, subd. 9 or Minn. Stat. Ch. 103E, no other alternative methods were considered.

D. Description of Any Alternative Methods for Achieving the Purpose of the Proposed Rule

Minnesota Statutes, section 103E.351 does provide that drainage benefits as originally determined under Minn. Stat. Ch. 103E may be redetermined. DNR engaged in mediated negotiations with several drainage authorities in the con-con areas in an attempt develop a process to redetermine benefits to state-owned lands in con-con areas that would achieve the purposes of Minn. Stat. § 84A.55, subd. 9. Those negotiations did not prove successful. Consequently, proceeding with the proposed rules was selected as the best means of achieving the purpose of Minn. Stat. § 84A.55, subd. 9.

E. Probable Costs of Complying with the Proposed Rule

Drainage authorities will incur costs to administer drainage projects within con-con areas due to the notification and documentation requirements of Minn. R. 6115.1520, subp. 1. To the extent notification and documentation relates to a “drainage project” as defined in Minn. Stat. § 103E.005, subd. 11, these costs would already occur under Minn. Stat. Ch 103E. For “drainage projects” under Chapter 103E, drainage authorities are required to send preliminary surveys and survey reports to the commissioner (103E.245), and the commissioner responds with an advisory report to the drainage authority with an opinion about the adequacy of the preliminary survey report (103E.255).

Importantly, the definition of “drainage project” in Minn. Stat. § 103E.005, subd. 11 does not include “repair,” while Minn. Stat. § 84A.55, subd. 9 refers to “[drainage] project[s] for the construction, *repair*, or improvement of a public ditch” (emphasis added). The proposed rules define “drainage project” to include repairs. Consequently, the notification and documentation requirements under the proposed rule, which will apply to drainage repairs, will be slightly more burdensome than under existing law and drainage authorities in con-con areas will incur nominal costs. It is virtually impossible to estimate the quantity of these costs due to the fact that the commissioner’s determination of benefits to state-owned lands under the rules necessarily occurs subsequent to notification to the commissioner of a drainage authority’s proposed project affecting state-owned lands in con-con areas. It is impossible to speculate if or when a drainage authority may propose a drainage project or what the scope of any project might be.

There will be no costs for **landowners** related to compliance with the proposed rules. The proposed rules, however, will affect parties that own land on any public ditch system where that ditch system has benefited lands within a con-con area. To the extent that the

commissioner determines that benefits to state-owned lands are lower than the benefits for those state-owned lands as originally determined by the drainage authority, other landowners' contribution to a drainage project may increase.

Taxpayers of Minnesota, who make the payments to drainage authorities for state-owned lands, will be assured they are contributing only to projects that benefit state lands, as required in Minn. Stat. §84A.55.

F. Probable Costs or Consequences of Not Adopting the Proposed Rules

State law (specifically Minn. Stat. § 84A.55, subd. 9) requires that the commissioner promulgate the proposed rules. If the agency failed to undertake promulgation of the proposed rules, the commissioner would possibly face a mandamus action seeking a court order compelling the commissioner to promulgate the rules. The costs of defending such an action could be significant.

G. Assessment of Differences between the Proposed Rule and Existing Federal Regulations

The proposed rule covers an area that is not addressed by federal law; therefore, this consideration is not applicable.

H. Regulatory, Licensure, or Other Charges in the Proposed Rule

The proposed rule does not involve any new regulatory, permit, or license fees or any other charges to the public.

I. Proposed Rules Affect on Farming Operations

The proposed rule will affect those farming operations that own land on any public ditch system where that ditch system has benefited lands within a con-con area. In such circumstances, to the extent that the commissioner determines that benefits to state-owned lands are lower than the benefits for those state-owned lands as originally determined by the drainage authority, other landowners' contribution to a drainage project may increase.

All other farming operations will not be affected by the proposed rule. The drainage authorities will be able to continue to exercise their authority under Minn. Stat. Ch. 103E to conduct drainage projects that they consider necessary and cost effective.

J. Description of How the Agency Considered and Implemented the Policy to Adopt Rules that Emphasize Superior Achievement in Meeting the Agency's Regulatory Objective and Maximize Flexibility for the Regulated Party and the Agency in Meeting These Goals

Con-Con preserves were created to vest the state with title to lands for the purpose of preserving, protecting, propagating and breeding wildlife, for the development of forests and the prevention of forest fires, and for the preservation and development of rare and distinct plant species native in the area. The legislature, in enacting Minn. Stat. § 84A.55, subd. 9, created an exception to the general laws pertaining to drainage benefits by vesting the commissioner with authority to determine benefits to state-owned lands in con-con areas. The legislature also directed the commissioner to promulgate rules to establish criteria to determine benefits for those lands. The proposed rules set forth criteria that will enable the commissioner to determine if, and to what extent, a drainage project will provide benefits that are consistent with the purposes for which the con-con areas were established.

The criteria set forth in the proposed rule provide the commissioner with the flexibility to consider a number of impacts, both positive and negative, from a proposed drainage project affecting state-owned con-con lands. The rules enable the commissioner to balance these impacts and make a determination as to benefits that is demonstrably neither arbitrary nor capricious. Additionally, the rules provide the commissioner with the flexibility to set conditions to modify a proposed project if it necessary to ensure that the project will benefit state-owned con-con lands.

K. Consultation With Minnesota Department Of Finance On Local Governmental Impacts

As is required by Minn. Stat. § 14.131, DNR is consulting with the Minnesota Department of Finance regarding the fiscal impact of the proposed rules on local units of government. *See Exhibit C*, attached hereto.

The commissioner's determination of benefits to state-owned lands under the rules necessarily occurs subsequent to notification to the commissioner of a drainage authority's proposed project affecting state-owned lands in con-con areas. The rules may impact local units of government, namely, counties, joint county drainage authorities and watershed districts acting in their capacities as drainage authorities in con-con areas. To the extent that the commissioner determines that benefits to state-owned lands from a drainage authority's proposed project are less than the benefits as originally determined by the drainage authority, the drainage authority will either spread the costs of the proposed project to the other landowners or abandon the project.

Drainage authorities will also incur nominal expenses associated with the notification and documentation requirements contained in the rules. This was addressed in the regulatory analysis above.

L. Determination Regarding Cost of Compliance to Businesses and Statutory or Home Rule Charter Cities

State law requires an agency to determine if the costs of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees. *See* Minn. Stat. § 14.127, subd. 1. Neither of these types of entities will incur any costs associated with complying with the proposed rule because they are not subject to the proposed rule as they are not drainage authorities. *See* Minn. Stat. § 103E.005, subd. 9 and proposed Minn. R. 6115.1510, subp. 5. Only drainage authorities will incur costs associated with complying with the proposed rule. *See* discussion in sections I.A.1 and I.E. above.

V. NOTICE PLAN

Additional notice and a copy of the proposed rule will be provided to persons or classes of persons who could be affected as follows: The agency will publish the proposed rule and the Notice of Hearing in the State Register. The agency will mail a copy of the proposed rule and Notice of Hearing to the DNR's official rulemaking mailing list, and to individuals who requested a copy of the proposed rule. The Agency will also mail a copy of the proposed rule and Notice of Hearing to those who responded to a request for comments mailed on November 21, 2002. The Notice of Hearing, proposed rules, and SONAR will also be sent to the legislators required to receive the SONAR pursuant to Minn. Stat. § 14.116. A news release that details the rule will be issued statewide. The Notice of Hearing and proposed rule will be displayed on the DNR web site.

VI. LIST OF WITNESSES

The witnesses listed below may testify on behalf of the department in support of the need and reasonableness of the rule. The witnesses will be available to answer questions about the development and content of the rules.

Mike Carroll, Regional Director
Minnesota Dept. of Nat. Resources
2115 Birchmont Beach Road NE
Bemidji, MN 56601

Craig Engwall, Regional Director
Minnesota Dept. of Nat. Resources
1201 Highway 2 East
Grand Rapids, MN 55744

John Williams, Asst. Regional Wildlife Mgr.
Minnesota Dept. of Nat. Resources
2115 Birchmont Beach Road NE
Bemidji, MN 56601

Larry Kramka, Regional Hydrologist
Minnesota Dept. of Nat. Resources
2115 Birchmont Beach Road NE
Bemidji, MN 56601

VII. RULE-BY-RULE ANALYSIS

6115.1500 PURPOSE.

It is reasonable to include a purpose provision in the rules since there is a larger body of drainage law and rules and this sets out the overall scope of the rules. This section is necessary to show that the purpose of the rules is to carry out the statutory directive contained in Minn. Stat. § 84A.55, subd. 9, that the commissioner establish by rule the criteria for determining benefits to state-owned lands in con-con areas “held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other purposes relating to conservation, development, or use of soil, water, forests, wild animals, or related natural resources.” The counties are listed to help identify the areas impacted by the rules.

6115.1510 DEFINITIONS.

The definitions in 6115.1510 are necessary to harmonize, as well as differentiate, certain terms used in the general drainage laws (Minn. Stat. Ch. 103E), the water laws (Minn. Stat. Ch. 103G), and the con-con drainage provisions of Minn. Stat. §84A.55, subd. 9. It is reasonable to provide the parties affected by the rules with a guide to specific definitions set forth in laws scattered through several different chapters of Minnesota Statutes. Specifically, subparts 2, 3, and 5-12 stem from statutory definitions contained in chapters 84A, 103E and 103G. Subpart 4 simply provides a general definition of the term, “drainage.”

The specific definition of “drainage project” in subpart 6 is reasonable and necessary because the definition of “drainage project” in Minn. Stat. § 103E.005, subd. 11 does not include “repair,” while Minn. Stat. § 84A.55, subd. 9 refers to “[drainage] project[s] for the construction, *repair*, or improvement of a public ditch” (emphasis added). The proposed rules necessarily define “drainage project” to include repairs to mirror the language in the authorizing statute.

6115.1520 DRAINAGE PROJECTS

Subpart 1. Notification and documentation. This subpart describes the procedure for notifying and documenting a proposed project by a drainage authority affecting a con-con area. The department is required by Minn. Stat. § 84A.55, subd. 9 to perform an investigation to determine whether a proposed drainage project will benefit state-owned lands within a game preserve, conservation area or other area for the purposes the areas were established. It is in the interest of the department and the drainage authority that the investigation proceeds in a timely manner. That can only occur when the drainage authority submits a well-documented proposal to the commissioner. In order to determine positive and negative impacts to state-owned lands, the documentation must define what type of project is proposed. It is necessary to know the location and extent of the project. We believe a requirement for this documentation is reasonable, and does not

significantly differ from what is already required for drainage projects outside con-con areas subject to the Minn. Stat. Ch. 103E drainage law.

Subpart 2. Investigation. This subpart sets forth the framework in which the commissioner will investigate a proposed project as well as the foundation for the rationale behind his decision. It is necessary and reasonable to have the commissioner specifically determine positive and negative impacts to show that his decision is neither arbitrary nor capricious.

Subpart 3. Positive impacts. This subpart lays out the criteria the department will use to determine when proposed drainage projects positively impact (benefit) state-owned lands. Simple standards are used: 1) Does the department or lessee of state-owned lands use drainage to achieve a specific management purpose for any of the state-owned lands? Items A through D list criteria the department will use to determine whether it or a lessee uses drainage to achieve a management purpose; and 2) on those lands where drainage is used, will the proposed project allow the department to continue to use drainage or enhance its ability to use drainage to achieve a management purpose?

A ditch repair is an example of a project that could allow the department to continue to use drainage to achieve a management purpose. When sloughing occurs to a ditch bank, the ability of the ditch to carry water may be diminished. When this occurs downstream of state-owned lands that the commissioner has determined benefit from drainage and the sloughing has diminished the capacity of the ditch, the ability of the department or a department lessee to drain those lands is diminished. A repair or cleanout of a ditch in this situation would benefit those state-owned lands that use drainage for a management purpose.

An improvement to a ditch system may be considered a benefit to state-owned lands if the commissioner determines that the improvement will allow the department or a department lessee to increase drainage from selected parcels of state-owned land that require added drainage to achieve a management purpose. It is necessary and reasonable that the drainage authorities know upfront the issues the DNR will be analyzing in determining impacts.

Item A. This criterion describes situations where the department is actively and intentionally using a ditch system to drain state-owned land for agricultural purposes. Evident are lateral ditches that the department maintains, drainage tiles, or pumps the department uses to assist in dewatering the land.

Item B. This criterion describes situations where the department leases state-owned lands and the lessee outlets water from these lands into a public ditch.

Item C. This criterion covers all situations where the department petitions a drainage authority to undertake a drainage project for a repair, improvement or new ditch construction. The petition would include language describing how the project would benefit state-owned lands.

Item D. This criterion covers situations where the department operates impoundments exclusively for wildlife management purposes. As part of the operating plans for such impoundments, the department may raise or lower water levels in an impoundment. When the department lowers water levels, it outlets water from the impoundment into a ditch system. In this situation, benefits to the state-owned lands are realized because the ditch system is important to managing the impoundment for wildlife.

Subpart 4. Negative impacts. It is reasonable for the department to evaluate not only the benefits of a drainage project but to determine if a project will have overall negative impacts. There will likely be instances where a proposed project would benefit an isolated parcel of state-owned land but cause significant damage to the majority of state-owned lands for the purposes they are managed. Without an evaluation for negative impacts, the department would not be able to determine whether to cooperate in a project as proposed, cooperate in a project with conditions, or whether to cooperate at all, as provided by Minn. Stat. § 84A.55, subd. 9. It is necessary for the DNR to assess cumulative negative impacts and determine where they occur, and the local drainage authorities need to know the impacts that will be analyzed for this determination.

Items A through F are criteria to determine when state-owned lands will be negatively impacted by a drainage project.

Item A. The department manages vast acreages of wetlands and drainage is not beneficial for that management purpose. These lands are managed for a variety of wetland resource values, including providing habitat for wetland dependent species, and providing flood control benefits to property downstream. A project that cleans out ditches that have not been cleaned in years, or a project that constructs new ditches into undisturbed wetlands would degrade these wetlands.

Item B. A proposed drainage project may directly damage or destroy rare plants and plant communities. In the case of a ditch repair or cleanout, spoil banks are created when sediments from the ditch are cast onto land adjacent to the ditch. Many miles of ditches on state-owned lands in con-con areas have never received a cleanout since the original ditch construction. It is reasonable to conclude that where rare peatland plant species are growing adjacent to a ditch, these plants will be impacted by construction and ditch spoil. In the case where construction of a new ditch is proposed, any rare plant community in the ditch alignment would be damaged or destroyed.

Item C. This item describes damage to wetland communities when a drainage project disrupts the water regime that sustains it. For example, a ditch cleanout can lower the water table adjacent to the ditch. Rare species and wetland plant communities growing next to the ditch that are not impacted by spoil placement can be negatively impacted by a lowered water table. Also, spoil placement along a ditch can block lateral flow causing unwanted flooding of rare plants and wetland plant communities.

Item D. A drainage project might be proposed within or adjacent to a peatland Scientific and Natural Area (SNA). Minnesota Statute section 84.035, subd. 5, (a) (1) protects these peatland SNAs from new ditch construction and prevents a cleanout of existing ditches. The peatland ecosystems depend and revolve around the water—water levels, water chemistry, and unobstructed water movements. It is critical to these SNAs that an unimpeded hydrologic regime around and within these peatlands is maintained.

Items E and F. These items specify that a drainage project restricting management options or resulting in the reduction of access to state-owned lands will have negative impacts. For example, DNR operates impoundments on state-owned lands such as Moose River in Beltrami County and Elm Lake in Marshall County for dual purposes. They are managed extensively for flood control to alleviate flooding of farmlands and cities downstream, and partly to benefit waterfowl and other wildlife. Since the department operates and maintains these impoundments in cooperation with the local watershed district as a primary flood reduction benefit to downstream landowners, the benefits to wildlife habitat that use the lands are often compromised by exceptionally high water levels. Consequently, the flood reduction benefits provided by the impoundments restrict DNR's ability to manage the impoundments for wildlife benefits. It would be unreasonable to expect the department to pay assessments to drainage authorities for land within and upstream of these impoundments because of the frequent loss of wildlife benefits and because of the significant monetary value the lands already provide to the ditch systems in terms of stored water that other lands on the ditch systems do not provide.

6115.1530 DETERMINING BENEFIT AND PARTICIPATION

In order to determine whether state-owned lands in con-con areas benefit from a proposed project or whether the state should participate in the project, it is reasonable and necessary to require the commissioner to utilize the criteria in the rules to determine whether the positive impacts of the proposed project outweigh the negative impacts. In making this determination, the commissioner evaluates state lands on a parcel-by-parcel basis, with each parcel consisting of no more than 40 acres. It is reasonable for the commissioner to evaluate state-owned lands on a parcel-by-parcel basis of no more than 40 acres because that is the historic and current standard used throughout Minnesota's drainage laws. *See, e.g.,* Minn. Stat. §§ 103E.005, subd. 19, 103E.202, 103E.212, 103E.285, subd. 6, and 103E.321. It is reasonable and necessary that the commissioner have the discretion to impose conditions on the project that would mitigate or offset some or all of the negative impacts. Without this discretion, the commissioner would face an all-or-nothing determination every time a drainage project is proposed that would affect state-owned lands within con-con areas.

Subpart 2 provides an exception to the general rule that the commissioner must investigate every proposed drainage project. It is reasonable and necessary to provide for this exception where the commissioner has already determined the benefits to state-owned lands within a drainage system in con-con areas, the cost of the repair is relatively low, and the administrative expenses for both the drainage authority and DNR associated

with a full investigation are not justifiable under the circumstances. For example, if the commissioner had determined that one-half of state-owned lands in a drainage system within a con-con area had 100% benefit from the operation of the system and the other one-half of state-owned lands had no benefit, the exception could apply to a proposed repair by the drainage authority within that drainage system. Under such a scenario, if the drainage authority proposed a routine repair to the system with an assessment of \$5,000 to state-owned lands, the commissioner could authorize the imposition of an assessment of \$2,500 to those state-owned lands without investigation and without issuing the findings and report normally required under the rules.

6115.1540 FINDINGS AND REPORT

It is reasonable for the drainage authority to receive a timely report on a proposed project. The report will contain the results of the investigation, the commissioner's determination whether or not to participate, the dollar contribution the department will make, if any, and any conditions attached to the project.

VIII. LIST OF EXHIBITS

In support of the need for and reasonableness of the proposed rule, DNR anticipates that it will enter the following exhibits into the hearing record:

Exhibit A: Summary of comments received during the Request for Comments period.

Exhibit B: Marshall County v. State of Minnesota, 636 N.W.2d 570 (Minn. Ct. App. 2001)

Exhibit C: Memorandum to Department of Finance and response.

X. CONCLUSION

Based on the foregoing, the proposed rule to establish criteria for determining drainage benefits to state-owned lands in consolidated conservation areas is both needed and reasonable.

Dated: _____

3/29/07

By: _____

Mark Holsten

Mark Holsten, Commissioner
Department of Natural Resources

Exhibit A
REQUEST FOR COMMENTS CON-CON RULEMAKING FOR
DETERMINING DRAINAGE BENEFITS: SUMMARY OF COMMENTS
Comment Period Ending January 24, 2003

Through its "Request for Comments" process, the DNR received comments from two main groups: the con-con county boards/ Joint Powers Natural Resources Board, and various conservation organizations. A few individuals and a county SWCD also provided comments.

Con-con county boards/Joint Powers Natural Resources Board:

- They indicated that the authority given to the commissioner for this rule only applies to con-con lands within the con-con areas, and not to any other state-owned land.
- They believe the rule applies only to drainage projects that are for improvements and new construction of a drainage system and not to projects for repair of drainage systems. They maintain that all lands contribute water to drainage systems and the state should pay for its share.
- They feel that any rule that maybe proposed should consider all lands impartially and equally regardless of ownership.
- They feel the rule should not affect existing assessment liens, i.e., unpaid ditch assessments from 1992.
- They believe the drainage authorities should appoint viewers to determine benefits to all properties regardless of ownership.
- Each county requested a hearing on proposed rules be held in their county.

Marshall /Beltrami SWCD

- Con-con lands benefit from drainage for forestry, wildlife and recreation. Revenues generated from these activities would not occur without the drainage system.
- The state is responsible for the maintenance of their waters, whether it is for the protection and preservation of state-owned lands, or to control the overland flow from these state lands to adjacent private lands.

Minnesota Center for Environmental Advocacy (MCEA), Minnesota Audubon, Mississippi Headwaters Audubon, American Lands Alliance, Fish & Wildlife Legislative Alliance, and Minnesotans for Responsible Recreation (MRR):

- The commissioner's authority to determine benefits from drainage projects within con-con areas applies to all state-owned lands within con-con areas.
- Benefits should be based on the value of drainage to fish and wildlife habitat. Use soil, vegetation, and topography to determine resource benefits, if any.
- Impairments in water quality and natural wetland hydrology should be considered as damages in this evaluation.

- Consider ditch abandonment and ditch plugs to re-establish natural wetland hydrologic conditions.
- Reduced spending on other natural resource management priorities, due to the State and the DNR's potential obligation to spend scarce dollars on ditch assessments to county drainage authorities, should be considered as damages in this evaluation.
- A landscape view, which includes all public lands (township, county, federal), of resource benefits (soil, vegetation, geography, waters classification) should be used to determine payments

Individuals:

- Consider damages as well as benefits to land
- Need to consider benefits from intact wetland ecosystems to wildlife, and also flood water storage and slow release.
- Ditch plugs and abandonment should be considered as mitigation to damaged wetlands. Many acres of agriculture downstream will benefit if these practices are followed.
- Need to consider ditch abandonment at this time.
- Take a blanket approach. Discard large areas that do not receive benefits and write criteria for areas where there is a potential for receiving benefits. This approach would save time evaluating projects.
- Put the onus on drainage authorities. When they have a potential project, give them a form to fill out addressing the criteria and explaining how the project will meet the criteria.

Exhibit B

Court of Appeals of Minnesota.
MARSHALL COUNTY, in its legal capacity as a drainage authority under Minn.Stat.
Chapter 103E, et al., Respondents,

v.

The STATE of Minnesota & its Department of Natural Resources, et al.,
Appellants.

No. CX-01-716.

Dec. 4, 2001.

Counties and landowners brought action against Department of Natural Resources (DNR) to force it to pay drainage assessments for ditch repairs. The Marshall County District Court, Dennis J. Murphy, J., granted summary judgment in favor of counties and landowners. DNR appealed. The Court of Appeals, Forsberg, Acting J., held that: (1) statute governing construction and maintenance of public drainage systems gave commissioner of DNR discretion to pay ditch assessments; (2) addressing an issue of first impression, DNR's failure to promulgate rule regarding assessments within statutory time frame did not bar subsequent agency action; and (3) existence of property right in drainage systems did not compel state to subsidize cost of system for benefit of private landowners.

Reversed.

West Headnotes

[1] Appeal and Error 863

30k863 Most Cited Cases

On appeal from summary judgment on stipulated facts, the Court of Appeals' lone task is to determine if the district court erred in its application of the law.

[2] Appeal and Error 893(1)

30k893(1) Most Cited Cases

Statutory construction is a question of law, which the Court of Appeals reviews de novo.

[3] Appeal and Error 893(1)

30k893(1) Most Cited Cases

When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, to be reviewed de novo.

[4] Drains 70

137k70 Most Cited Cases

Statute establishing rules by which drainage authorities build and maintain public drainage systems did not require Department of Natural Resources (DNR) to pay for ditch assessments as determined by counties acting as drainage authorities, since they did not show clear intent that state pay drainage assessments; statutes merely noted source of funds from which assessments must be paid, provided that benefits and damages must be reported for state lands generally, and merely stated that state property is "assessable," and that state officer with jurisdiction over property must certify assessment. M.S.A. § 103E.005 et seq.

[5] Drains 70


137k70 Most Cited Cases

Statute on lands dedicated for conservation grants commissioner of Department of Natural Resources (DNR) discretion to pay ditch assessments on consolidated conservation lands, as determined by counties.

M.S.A. § 84A.55.


[6] Drains  50

137k50 Most Cited Cases

[6] Drains  70

137k70 Most Cited Cases

Provision in statute governing consolidated conservation lands that "nothing shall be done" that will "interfere with the operation of ditches...unless the right to them is first acquired by the commissioner by purchase or condemnation, upon payment of just compensation" only barred physical alteration of ditch systems without state first acquiring property rights, and did not prevent commissioner of Department of Natural Resources from refusing to pay ditch assessments, as determined by counties. M.S.A. § 84A.55.

[7] Administrative Law and Procedure  392.1

15Ak392.1 Most Cited Cases

An agency's failure to promulgate a rule within a statutory time frame does not bar subsequent agency action absent a specific indication that the time frame was intended to be a bar; this interest may be manifested through legislative history, statutory language prescribing consequences for failure to promulgate the rule, or the unavailability of a less drastic remedy.

[8] Agriculture  3.6

23k3.6 Most Cited Cases

Requirement in statute governing consolidated conservation lands that Department of Natural Resources (DNR) promulgate, within a certain time frame, rules for determining benefits for consolidated conservation lands did not make DNR's failure to do so an arbitrary agency action; there was no legislative history showing that rule was intended to act as a bar, statute did not prescribe any consequences for agency's failure to act, and counties retained ability to compel commission, through mandamus proceeding, to continue with rulemaking process. M.S.A. § 84A.55.

[9] Drains  70

137k70 Most Cited Cases

The existence of a property right in a drainage system does not compel the state to subsidize the cost of that system for the benefit of private landowners.

[10] Drains  70

137k70 Most Cited Cases

State's refusal to pay for county ditch assessments that it believed were unsupported did not change the property rights of private landowners, and did not relieve counties of their duty to maintain ditches. M.S.A. § § 84A.32, 84A.55.

**572 Syllabus by the Court*

I. Minn.Stat. § 84A.55, subd. 9 (2000), grants the Commissioner of the Department of Natural Resources discretion to pay ditch assessments as determined by counties acting as chapter 103E drainage authorities.

II. An agency's failure to promulgate a rule within a statutory time frame does not bar subsequent agency action absent a specific indication that the time frame was intended to be a bar as manifested through legislative history, statutory language prescribing consequences for failure to promulgate the rule, or the unavailability of a less drastic remedy.

III. The existence of a property right in a drainage system does not compel the state to subsidize the cost of that system for the benefit of private landowners.

Michael O. Freeman, Amy Reed, Lindquist & Vennum, P.L.L.P., Minneapolis, MN, for respondents.

Mike Hatch, Attorney General, Craig L. Engwall, Assistant Attorney General, David P. Iverson, Assistant Attorney General, St. Paul, MN, for appellants.

Noah D. Hall, Leonard, Street and Deinard, Minneapolis, MN, for amici curiae Izaak Walton League, et al.

Considered and decided by ANDERSON, Presiding Judge, SCHUMACHER, Judge, and FORSBERG, Judge.

OPINION

FORSBERG, Judge. [FN*]

FN* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Appellant State of Minnesota challenges the district court's grant of summary judgment to respondents, requiring the state to pay assessments on state lands for certain ditch improvements. The state alleges (a) there was no approval of the assessment by the Commissioner of the Department of Natural Resources (DNR) under Minn.Stat. § 84A.55, subd. 9 (2000); (b) the legislative history of that section shows that the state is to control assessments on public lands; (c) the district court misread Minn.Stat. § 84A.55, subd. 12 (2000), to limit the commissioner's authority to approve assessments; (d) the district court erred in concluding that requiring the commissioner's approval to put an assessment on state lands violates the landowner's right to have a ditch repaired; and (e) the lack of administrative rules regarding the determination of benefits for state lands does not preclude application of Minn.Stat. § 84A.55, subd. 9.

FACTS

In the early 20th century, large amounts of land in northern Minnesota deemed unsuitable for agriculture became part of a massive construction project that created a system of public ditches to drain the land. Construction costs were charged back to the landowners benefiting from the system as ditch assessments. But much of this land proved incapable of supporting agriculture--even after these ditches were *573 constructed--and many farms went bankrupt as the result of unpaid ditch liens. The massive forfeitures threatened the financial collapse of the affected counties. The state took title to this land in 1929 as part of a tax-forfeiture bailout, and the DNR now manages more than 1.5 million acres of this tax-forfeited land commonly known as consolidated conservation lands, or "con-con" lands, under the supervision of its commissioner. The acts governing the con-con lands are codified in chapter 84A of the Minnesota statutes. Over the years, the DNR has classified these lands for various purposes, including forestry, wildlife, and flood control.

Marshall, Beltrami, and Roseau counties (respondent counties) in their capacities as drainage authorities have constructed and maintained drainage systems in each of the respective counties for many decades. In order to fund these systems, respondent counties have levied assessments against the lands that purportedly benefit from each system, including state-owned con-con lands.

During the 1980s, the state disputed assessments made by respondent counties against the con-con lands, arguing that the assessments were not in line with the true benefits to those lands. In 1989, the state attempted to work with respondent counties to establish a redetermination of benefits to the con-con lands. In July 1992, the state sent a letter to respondent counties indicating that it would pay the assessments that had been presented over the previous ten years, but would not pay any future assessments until a joint review of the benefits was completed. Then, in 1993, the state ceased paying assessments on Marshall, Beltrami, and Roseau county con-con lands where a redetermination had not taken place. The state continued to pay assessments on lands other than con-con lands and on con-con lands where a redetermination of benefits had taken place.

Respondent counties and certain landowners brought this action in an effort to force the DNR to pay drainage assessments for ditch repairs. The parties brought cross-motions for summary judgment on stipulated facts. The district court granted respondents' motion for summary judgment, and this appeal followed.

ISSUES

I. Does the Commissioner of the Department of Natural Resources have discretion to decline to pay ditch assessments as determined by counties acting as chapter 103E drainage authorities?

II. May agency action be barred by that agency's failure to promulgate a rule within a statutory time frame?

III. Does a property right in a drainage system compel the state to pay ditch assessments as determined by counties acting as chapter 103E drainage authorities?

ANALYSIS

[1][2][3] The state appeals from summary judgment, arguing that Minn.Stat. § 84A.55, subd. 9 (2000), grants the commissioner discretion in approving or denying assessments on con-con lands. On appeal from summary judgment on stipulated facts, this court's lone task is to determine if the district court erred in its application of the law. Fingerhut Corp. v. Suburban Nat'l Bank, 460 N.W.2d 63, 65 (Minn.App.1990). Statutory construction is a question of law, which this court reviews de novo. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn.1998). When the district court grants summary judgment based on the application of a statute to undisputed *574 facts, the result is a legal conclusion, to be reviewed de novo. Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855, 856 (Minn.1998).

I.

[4] Respondents argue that chapter 103E makes payment of ditch assessments mandatory. Chapter 103E establishes the rules by which drainage authorities build and maintain public drainage systems. The drainage authority evaluates a proposed project in light of several environmental and land-use criteria to establish whether it is "of public utility, benefit, or welfare." Minn.Stat. § 103E.015 (2000). State lands used for conservation may be assessed. See Minn.Stat. § 103E.025, subd. 3 (2000). In determining benefits to the state land, "proper consideration must be given to the value of the area for the purpose it is held or used by the state." *Id.* The process for assessing drainage benefits and damages is laid out in Minn.Stat. § 103E.315, subds. 5-8 (2000). Upon proper consideration of the proposed project, the drainage authority shall establish the project if, *inter alia*, it will be of public utility and benefit and the estimated benefits are greater than the total estimated cost. Minn.Stat. § 103E.341, subd. 2 (2000). This determination may be redetermined if it is no longer accurate. Minn.Stat. § 103E.351 (2000).

After the drainage system is established, the drainage authority must maintain it. Minn.Stat. § 103E.705 (2000). "All * * * costs of * * * repair * * * must be assessed against the property and entities benefited." Minn.Stat. § 103E.725 (2000). [FN1]

[FN1]. Contrary to respondents' assertions, this provision does not stand for the proposition that assessments are mandatory for all benefiting property owners. The subject of Minn.Stat. § 103E.725 is "fees and costs" and not "the property and entities benefited." Therefore this provision refers only to which costs are included (all) and not to whom they might be assessed.

Although respondents assert that the whole of chapter 103E evinces a "clear intent" that the state pay assessments on its land, they are unable to cite any provision that is so clear. Section 103E.025, subdivision 5, [FN2] simply notes the source of the funds from which assessments must be paid; section 103E.315, subdivisions 1 and 2, [FN3] only provide that benefits and damages must be reported for state lands generally; and section 103E.615, subdivision 5, [FN4] merely provides that state property is "assessable," reiterates the location of the funding source to be used for paying assessments, *575 and even specifically provides that the state officer with jurisdiction over the property must certify the assessment first.

[FN2]. Minn.Stat. § 103E.025, subd. 5 (2000), states:

Assessments for benefits made against the state land or water area in a proceeding must be paid out of money appropriated and available to pay assessments as provided by law.

[FN3]. Minn.Stat. § 103E.315, subd. 1 (2000), states:

Property owned by the state must have benefits and damages reported in the same manner as taxable lands subject to the provisions relating to conservation areas in section 103E.025.

Minn.Stat. § 103E.315, subd. 2 (2000), states:

The viewers shall report the benefits and damages to the state, counties, and municipalities from the proposed drainage project. The property within the jurisdiction of a municipality, whether owned by the municipality or by private parties, may be assessed as benefits and damages to the municipality.

FN4. Minn.Stat. § 103E.615, subd. 5 (2000), states:

State property, including rural credit property, is assessable for benefits received. The assessment must be paid by the state from funds appropriated and available for drainage assessments after the state officer having jurisdiction over the assessed property certifies the assessment to the commissioner of finance.

The balance of respondents' chapter 103E argument is that, because it compels the maintenance and establishment of drainage systems, the state is therefore compelled to pay for them. But this conclusion does not follow. Even if the county must maintain certain ditches, respondents fail to cite any rationale for why the state is compelled to pay for them.

[5] In contrast, chapter 84A grants the state discretion in paying assessments on con-con lands. A significant point of emphasis throughout chapter 84A is the power of the commissioner to manage the con-con lands. See Minn.Stat. § § 84A.02, .21, .32 (2000). Minn.Stat. § 84A.55, subd. 9, provides:

Drainage. The commissioner may make necessary investigations and surveys for and may undertake projects for the drainage of state-owned lands within a game preserve, conservation area, or other area subject to this section so far as the commissioner determines that the lands will benefit from the project for the purposes for which the area was established. The commissioner may pay the cost of drainage projects out of funds appropriated and available for them. *If the commissioner finds* after investigation that a project for the construction, repair, or improvement of a public ditch or ditch system undertaken by a county or other public agency as otherwise provided by law will benefit the lands for those purposes, the commissioner *may* cooperate in the project by joining in the petition for the project or consenting to or approving it *on any conditions the commissioner determines*. The commissioner *shall* authorize the imposition of assessments for the projects on the lands *in any amounts the commissioner determines*, or may make lump sum contributions to the county or other public funds established for the payment of the cost of the project. The assessments or contributions must not exceed the value of benefits to the state-owned lands *as determined by the commissioner* and specified by written certificates or other statement filed in the proceedings. Assessments or contributions are payable only out of funds appropriated and available for them in amounts the commissioner determines.

(Emphasis added.) The repeated use of discretionary language in this provision reveals the intent to grant the commissioner almost total discretion in deciding how much should be paid for assessments on con-con lands.

Respondents assail this provision in several ways. First, they argue that this provision does not address ditch maintenance, but only construction, repair, or improvement of future ditches. But respondents do not indicate how ditch maintenance is distinguishable from ditch repair, and we make no such distinction independently.

[6] Respondents next suggest that section 84A.55, subdivision 12, prohibits the commissioner from declining to pay the assessment as determined by the counties. This provision states:

Nothing shall be done under this section that will interfere with the operation of ditches or drainage systems existing in [the con-con lands] * * *, unless the right to them is first acquired by the commissioner by purchase or condemnation, upon payment of just compensation to the political subdivision, public agency, or person affected and damaged.

*576 At issue here is the meaning of the phrase "nothing shall be done * * * that will interfere with the * * * [existing] ditches or drainage systems." Respondents argue that this is a broadly-worded phrase that prevents the commissioner from refusing to pay assessments as determined by the counties. But that interpretation would certainly conflict with the discretion accorded to the commissioner in section 84A.55,

subdivision 9, a disfavored result. See Minn.Stat. § 645.26, subd. 1 (2000) (stating that apparently conflicting statutes should be harmonized where possible). The meaning of section 84A.55, subdivision 12, is narrower than that proposed by respondents. As the state suggests, this provision forbids *physical* alteration of the ditch system without the state first acquiring property rights. Because section 84A.55, subdivision 12, need not be read to conflict with section 84A.55, subdivision 9, we decline to construe it as broadly as suggested by respondents.

Finally, respondents suggest that to grant this authority to the state would effectively invalidate chapter 103E. But as noted earlier, chapter 103E does not grant authority to the counties to be the final arbiters of the appropriate ditch assessment. Rather, it only prescribes how counties are to make such assessments. Furthermore, even if chapters 84A and 103E did conflict, chapter 84A prevails because, as its focus is limited to con-con lands, it is the more specific statute. See Minn.Stat. § 645.26, subd. 1 (specific statutes prevail over general ones).

The principle emerging from reading all of these statutes together is that chapter 103E permits counties to make assessments to lands (including con-con lands); section 84A.55, subdivision 9, grants the commissioner the discretion to pay such assessments to the extent to which they are beneficial; and section 84A.55, subdivision 12, forbids the commissioner from eliminating or physically altering existing ditches or drainage systems that they do not own--even if the commissioner determines that they are detrimental to the con-con lands.

II.

[7] Respondents next argue that the commissioner's failure to establish, through the rulemaking process, the procedures for determining benefits for the con-con lands has resulted in an arbitrary agency action. [FN5] Minn.Stat. § 84A.55, subd. 9, provides that the

FN5. As a preliminary matter, we note that this very argument presumes the relevance of the commissioner's determination.

commissioner of natural resources *shall* establish by rule before January 1, 1986, the criteria for determining benefits to state-owned lands held or used to protect or propagate wildlife, provide hunting or fishing for the public, or serve other purposes relating to conservation, development, or use of soil, water, forests, wild animals, or related natural resources.

By all accounts, the commissioner has failed to do so. Respondents suggest that this failure makes the commissioner's subsequent refusal to pay the assessments an arbitrary state action. The state, on the other hand, argues that this failure is irrelevant--the statute still grants the commissioner discretion.

As the rule-making requirement of section 84A.55, subdivision 9, was not added until 1984, the balance of section 84A.55, subdivision 9 (granting the commissioner discretion in paying assessments), was in effect prior to the requirement that the *577 discretion be exercised pursuant to an established rule. Clearly, prior to 1984, the commissioner could exercise discretion independent of any rule-making requirement. The only issue remaining, then, is whether the addition of the rule-promulgation requirement made determinations after January 1, 1986, arbitrary if made without the benefit of a rule.

Although this question has not been previously addressed in Minnesota, federal courts recognize that the failure of an agency to act within a statutory time frame does not bar subsequent agency action absent a specific indication that the time frame was intended to act as a bar. Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1400 (9th Cir.1995) (interpreting clause in endangered-species act requiring secretary of the interior to act on proposed listings within a year by publishing either a rule or a notice withdrawing the rule). This intent may be manifested through legislative history, statutory language prescribing consequences for failure to promulgate the rule, and the availability of a less drastic remedy, such as a suit to compel agency action. *Id.*

[8] Here, respondents have shown no legislative history, the rule itself does not prescribe any consequence for the agency's failure, and the counties retained the ability to compel the commissioner, through a mandamus proceeding, to continue with the rule-making process. The fact that respondents chose to not

do so speaks more to respondents' legal strategy than the equity of the matter; if they had sought mandamus, they would have effectively admitted the DNR's power to independently determine what benefits the agency would finance. We conclude that agency action in this case is not barred by the failure to promulgate an appropriate rule in a timely manner.

III.

[9] Lastly, respondents allege that private landowners affected by a drainage system maintain a property right in the drainage system, and that the DNR's failure to pay the assessments has improperly divested the other landowners of that property right. Indeed,

when a ditch system is once established, owners of land who * * * have been assessed for benefits for its construction have a vested property right in the maintenance of the ditch in the same condition as it originally was established, which right cannot be divested without due process of law.

Oelke v. Faribault Cty., 244 Minn. 543, 552, 70 N.W.2d 853, 860 (1955); see also *Fischer v. Town of Albin*, 258 Minn. 154, 158, 104 N.W.2d 32, 35 (1960). While the state quibbles over whether this right extends to, for example, the right to demand a specific repair, it does not contest the existence of such a property right. The existence of this right is further evidenced by the legislature's specific instruction that the DNR shall not obstruct or interfere with the operation of existing drainage systems unless compensation is made to affected property. Minn.Stat. § 84A.32, subd. 1(d), .55, subd. 12.

[10] But the mere existence of a property right does not mean that the DNR must pay the assessments as determined by the counties. It is not a deprivation of property rights to limit assessments to the extent of benefits. *In the Matter of the Redetermination of Benefits of Nicollet County Ditch 86A*, 488 N.W.2d 482, 486 (Minn.App.1992). Furthermore, the state's refusal to pay for assessments that it believes are unsupported does not change the property rights of the parties. Respondent counties are not relieved of their duty to maintain the ditches. Although the state-paid portion of the ditch-*578 maintenance costs may decrease, thereby increasing the financial burden on the counties and private landowners, see Minn.Stat. § 103E.728 (2000) (costs of ditch repair assessed "pro rata" on the benefiting property and entities), respondents have not suggested the source of any right to have drainage subsidized by the DNR when the DNR has determined that it receives no benefit from the drainage.

IV.

Respondents' motion to strike the *amicus curiae* brief and appendix is denied.

DECISION

The Commissioner of the Department of Natural Resources was authorized to decline to pay ditch assessments as determined by counties acting as chapter 103E drainage authorities. The Minnesota Department of Natural Resources' failure to promulgate a rule pertaining to payment of ditch assessments within the statutory time frame did not bar the department from subsequently declining to pay those assessments. The state is not compelled to subsidize the cost of constitutionally-guaranteed drainage ditches where it has determined that its lands are not benefited by the ditches.

Reversed; motion denied.

636 N.W.2d 570

Briefs and Other Related Documents [\(Back to top\)](#)

- 2001 WL 34727978 (Appellate Brief) Appellant's Reply Brief and Supplemental Appendix (Jul. 06, 2001)
- 2001 WL 34727979 (Appellate Brief) Joint Brief and Appendix of Amici Curiae Izaak Walton League - Minnesota Division, Minnesota Center for Environmental Advocacy, Minnesotans for Responsible Government Spending, Mississippi Headwaters Audubon Society, and Fish & Wildlife Legislative Alliance (May. 31, 2001)
- 2001 WL 34727977 (Appellate Brief) Appellants' Brief and Appendix (May. 23, 2001)

Exhibit C

Minnesota Department of Natural Resources
500 Lafayette Road • St. Paul, MN • 55155-4037



Gene Merriam, Commissioner
651-296-2549

Office Memorandum

Date: December 29, 2005

To: Peggy Ingison
Commissioner
Minnesota Department of Finance

From: Gene Merriam
Commissioner
Minnesota Department of Natural Resources

Phone: 651-259-5555

Subject: Fiscal Impact of Proposed Rules for Establishing Criteria for Determining
Drainage Benefits to Consolidated Conservation Lands

Pursuant to the requirements of Minn. Stat. § 14.131, the Minnesota Department of Natural Resources (DNR) is requesting your consultation to help evaluate the fiscal impact on local units of government of proposed rules for establishing criteria for determining drainage benefits to Consolidated Conservation (con-con) lands in Aitkin, Beltrami, Koochiching, Lake of the Woods, Mahanomen, Marshall, and Roseau counties.

The proposed rules set forth criteria that will enable the DNR commissioner to determine if, and to what extent, a drainage project will provide benefits that are consistent with the purposes for which the con-con areas were established. The criteria set forth in the proposed rule provide the commissioner with the flexibility to consider a number of impacts, both positive and negative, from a proposed drainage project affecting state-owned con-con lands. The rules enable the commissioner to balance these impacts and make a determination as to benefits that is demonstrably neither arbitrary nor capricious. Additionally, the rules provide the commissioner with the flexibility to set conditions to modify a proposed project if it necessary to ensure that the project will benefit state-owned con-con lands.

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We have determined that the proposed rule will cause increased staff commitments and operating costs for DNR. When presented with a proposed drainage project within a con-con area, or with a proposed drainage project outside of a con-con area that could potentially assess benefits against state-owned lands within a con-con area, the DNR commissioner will be required to investigate the project using the criteria contained in the proposed rule and determine whether the project will benefit state-owned lands.

The DNR commissioner's determination of benefits to state-owned lands under the rules necessarily occurs subsequent to notification to the DNR commissioner of a drainage authority's proposed project affecting state-owned lands in con-con areas. The rules may impact local units of government, namely, counties, joint county drainage authorities and watershed districts acting in their capacities as drainage authorities in con-con areas. To the extent that the DNR commissioner determines that benefits to state-owned lands from a drainage authority's proposed project are less than the benefits as originally determined by the drainage authority, the drainage authority will either spread the costs of the proposed project to the other landowners or abandon the project.

Finally, drainage authorities will incur minimal costs associated with the requirement to notify the commissioner of drainage projects that would have an assessment within a con-con area.

Attached for your further review are draft copies of the proposed rule and Statement of Need and Reasonableness. Please contact Craig Engwall, Special Assistant to the Commissioner, (651) 259-5021, with any questions you may have regarding our analysis of fiscal impacts of the proposed rule on local units of government.



State of Minnesota
Department of Finance

400 Centennial Building
658 Cedar Street
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January 27, 2006

RECEIVED

FEB 01 2006

Assistant Commissioner
DNR

TO: Commissioner Gene Merriam
Department of Natural Resources

FROM: Marsha Battles-Jerks
Executive Budget Officer
Department of Finance

RE M.S. 14.131 Review of Proposed Rules for Establishing Criteria for
Determining Drainage Benefits to Consolidated Conservation Lands

BACKGROUND

The Department of Natural Resources (DNR) is proposing to adopt rules establishing criteria for determining drainage benefits to Consolidated Conservation (con-con) lands in Aitkin, Beltrami, Koochiching, Lake of the Woods, Mahnomon, Marshall and Roseau counties. Pursuant to M.S. 14.131, the DNR has asked the Commissioner of Finance to help evaluate the fiscal impact and fiscal benefit of the proposed rules on local units of government.

EVALUATION

On behalf of the Commissioner of Finance, I have reviewed the proposed rule and related Statement of Need and Reasonableness (SONAR) and consulted with DNR staff to explore the potential costs and benefits of the proposed rules on local units of government. My evaluation is summarized below:

- 1) The proposed rule establishes the criteria by which the Commissioner of DNR would determine the benefits or negative impacts of drainage projects on fish and wildlife habitat located on con-con lands. Con-con lands are located within only seven Minnesota counties.
- 2) MS 103E.005, subd. 11 already specifies similar notification and documentation requirements for all drainage projects. The proposed rule, written under the authority of MS 84A.55, subd. 9, expands the definition of "drainage project" to include repairs. As a result, counties, joint county drainage authorities and

watershed districts with authority over non-con areas will incur nominal cost increases to comply with the proposed rule with respect to proposed repairs.

- 3) Even if the Commissioner determines that the benefits of a proposed drainage project are less than those determined by the drainage authority, and the state reduces its assessed payment accordingly, the drainage authority could either spread the costs of the proposed project to other landowners or abandon the project entirely. It is also possible that counties could see increased payments from the state if cooperative project designs benefit wildlife habitat.

I believe the DNR has adequately analyzed the potential costs and benefits to local units of government of complying with the proposed rule. I concur with their assessment that such compliance is likely to be of insignificant fiscal impact.

Cc Tom Harren, Finance
Craig Engwall, DNR

