

**FARM LEGAL SERIES****June 2015**

# Minnesota Water Law Basics

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## INTRODUCTION

Minnesota has an image of having an abundant water supply. That is good, since water is critical to agriculture. Without water, the production of crops and livestock would be impossible. But Minnesota's water resources are not evenly distributed. And increasing demands from population and economic growth, industrial usage and community water requirements have added pressure on existing water supplies and called attention to the importance of sustainable water usage by agricultural industries.

The allocation of water in Midwestern states is generally left up to each state with little, if any, federal intervention. The rules governing water rights vary depending upon the type of water resource. This fact sheet will address some of the basic questions about classification of water resources, allocation and regulation of water in Minnesota.

Because the law surrounding the use of water is constantly evolving and very complex, this fact sheet can provide an introduction to some of the issues which may be raised concerning water usage. The Minnesota Department of Natural Resources ("DNR") website (<http://www.dnr.state.mn.us/index.html>) contains valuable links and information. The Army Corps of Engineers website (<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>) can likewise provide specific information to landowners.

Water used in agricultural production generally comes from groundwater or surface waters. It is important to note at the outset that, under Minnesota law, all surface waters and groundwater, except those surface waters that are not confined, but are spread and diffused over the land, are "waters of the state." This includes all lakes, ponds, wetlands, rivers, streams, ditches, springs and waters from underground aquifers regardless of their size or location. As such, all waters of the state are subject to regulation by the State of Minnesota. In addition, it is generally required that any person which appropriates waters of the state must measure and keep a record of the quantity of water used.

Minnesota law also sets forth general priorities for water usage. These priorities, from highest to lowest are as follows: (1) domestic water supplies and power producers which have approved contingency plans; (2) uses of less than 10,000 gallons per day; (3) agricultural irrigation and processing of agricultural products consuming in excess of 10,000 gallons per day; (4) power production without approved contingency plans; (5) other uses in excess of 10,000 gallons per day; and (6) nonessential uses of water.

## SURFACE WATERS

Minnesota law sets water use limits for the use of surface water obtained from streams in order to protect downstream priority uses and to maintain the flow of streams. For

lakes, the regulations are intended to maintain a protective elevation for each lake established by the Department of Natural Resources (“DNR”). In addition, the total of all withdrawals from a lake may not be more than one-half acre-foot per acre per year (i.e., 6 inches of water taken off the surface of the lake). Surface water usage from a lake of less than 500 acres is discouraged by Minnesota law. Finally, the use of waters from designated trout streams is limited to temporary appropriations. A permit for the use of surface water is required unless the anticipated use is less than 10,000 gallons per day and no more than 1,000,000 gallons per year.

### NAVIGABLE WATERS

Under Minnesota law, when a stream is navigable, the State of Minnesota owns the bed below the natural ordinary high water level. A stream is navigable when it is used or may be used for travel. The natural ordinary high water level is the high level at which the water has remained long enough to leave its mark upon the land. Generally, it is the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial. On streams and rivers, it is the top of the bank of the channel.

Landowners who own property abutting water enjoy certain rights arising from the ownership of their property. These rights include the right to wharf out to a navigable depth; to take water for domestic and agricultural production; to use land added by accretion or exposed by erosion; to take ice; and to fish, hunt, boat and swim. The landowners have the right to use the water over its entire surface. However, riparian landowners may exercise their rights only so long as their usage is reasonable and does not interfere with the rights of other owners or damage the ecosystem. They may not interfere with, obstruct or render dangerous

waters used by the public. Should the public own property adjacent to a watercourse, such as a public access site, the public holds similar riparian rights.

The use of land adjacent to public waters is governed by local land use regulations which guide the development and land management of such property. These regulations generally fall into either floodplain or shoreland management regulations. Floodplain regulations seek to limit damage to property. Shoreland management seeks to maintain the ecological balance of shoreland areas. Since these regulations are adopted by local units of government, it is important to understand the limitations contained in such regulations before undertaking any development or other change in use of property which may be subject to them.

### GROUNDWATER

Much of Minnesota has a good supply of ground water. However, it is not necessarily available for use everywhere. In addition, in recent years, droughts have called attention to the supply of groundwater for both domestic use and for agriculture. As a result, the law in Minnesota is evolving to address the complex issues raised by competing uses of groundwater. In 2010, the legislature passed new sustainability provisions for groundwater appropriations and gave the DNR authority to establish groundwater management areas. In 2013, the legislature passed provisions for preliminary well construction approval and the authority to require general permits for small appropriations (i.e., those of less than 10,000 gallons per day or 1,000,000 gallons per year) within groundwater management areas. And in 2014, the legislature expanded the ability of the DNR to impose administrative penalties for failing to comply with the permitting requirements of Minnesota law and significantly increased the amount of

monetary penalties which may be assessed by the DNR for such violations.

Permits for groundwater appropriations are available only if the DNR determines that the groundwater use is sustainable to supply the needs of future generations and the proposed use will not harm ecosystems, degrade water, or reduce water levels beyond the reach of public water supplies and private domestic wells which are compliant with Minnesota law. In order to assess an application for a groundwater permit, the applicant must supply detailed information regarding the anticipated usage, groundwater quality, an inventory of nearby wells and the results of an aquifer test.

The DNR is required to respond to such applications within 150 days of its receipt of a complete application. Failure to obtain a required permit, or violating the terms of a permit, may result in administrative penalties up to \$20,000, depending upon the potential for harm and the nature of the violation. The DNR may also order the violations to be corrected.

Once issued, the water appropriation permit requires a person using groundwater to install a water flow meter and to record the quantity of water used on a monthly basis. Annual reports must be submitted to the DNR. Failure to keep and report on water usage may result in the termination of the permit.

All permits are subject to suspension in the event a water use conflict is suspected and probably due to the water use. The permit may be modified if necessary to resolve any such conflicts.

## WETLANDS

Under Minnesota's Wetlands Conservation Act, the draining or filling a wetland will generally require a permit or other authorization. Applicants will be required to

show efforts to avoid wetlands and to replace drained or filled wetland areas. Not all wetlands are subject to these requirements, however. "Public water wetlands" governed by the DNR are all Types 3, 4 and 5 wetlands as defined by the U.S. Fish and Wildlife Service that are 10 or more acres in size in unincorporated areas or 2.5 acres or more in incorporated areas.

"Draining" is defined as any method for removing or diverting waters from wetlands. This includes excavation of an open ditch, installation of drainage tile, filling, diking or pumping. "Filling" is defined as adding any solid material that would alter its cross-section, obstruct flow patterns, change the wetland boundary or convert the wetland to a non-wetland. No permits are required for taking action involving a wetland subject to such rules. Rather, the landowner will receive a determination as to whether the submitted replacement plan is acceptable to the applicable local governmental unit, the activity is exempt or the activity will result in no loss of wetlands.

Public water wetlands are subject to regulation by the DNR. Such wetlands have been inventoried by the DNR and are shown on the DNR's map of public waters and wetlands for each county. The DNR has authority to reclassify public water wetlands as public waters or wetland subject to the Wetlands Conservation Act discussed above. The rules of the DNR authorize several activities which may be conducted in public waters without a permit. However, they also set forth a variety of activities for which a permit will not be granted.

If a permit is required, an application may be submitted to the DNR. The application must contain all information necessary to show the basis for the permit under the DNR rule. Copies of the application must be served on the city, watershed district or soil and conservation district if applicable. The

application will be reviewed by the DNR which will generally make an initial decision on granting or denying a permit without a hearing. A contested case hearing may be demanded after the initial grant or denial of the permit by the DNR staff.

Because the failure to obtain necessary permits or determinations for wetland activities can result in criminal sanctions, it is important a landowner clearly understand which system of regulation is applicable.

Finally, a permit must be obtained from the United States Army Corp of Engineers for non-exempt discharges of dredged or fill material into waters of the United States. Under the applicable federal law, navigable waters are waters of the United States. While there are exemptions available for normal farming activities, it is important for a landowner to determine if a planned project is subject to the federal requirements before undertaking the project.

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**For more information:**  
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