ARTICLE 89-02
DRAINAGE OF WATER

Chapter

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CHAPTER 89-02-01
DRAINAGE OF PONDS, SLOUGHS, LAKES, SHEETWATER, OR ANY SERIES THEREOF

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89-02-01-01. Intent.

Repealed effective January 1, 2015.

89-02-01-02. Definitions.

Unless the context otherwise requires, the following definitions apply:

1. "Assessment drain" is defined in North Dakota Century Code section 61-16.1-02.

2. "Board" is defined in North Dakota Century Code section 61-21-01.

3. "District" means water resource district.

4. "Drain" is defined in North Dakota Century Code section 61-21-01.

5. "Emergency" means a situation that will cause significant damage to people or property if not addressed immediately and that would not occur under normal circumstances. An emergency may exist because of an extremely wet hydrologic cycle. Damages caused by deliberate acts may not constitute an emergency.

6. "Lake" means a well-defined basin that characteristically holds water throughout the year. Lakes go dry only after successive years of below normal runoff and precipitation.

7. "Lateral drain" is defined in North Dakota Century Code section 61-21-01.

8. "Maintenance" means removal of silt and vegetation from a drain. Maintenance does not include deepening or widening a drain.

9. "Parties of record" means each person named or admitted as a party or properly seeking and entitled to be admitted as a party.

10. "Pond" means a well-defined land depression or basin that holds water in normal years throughout the summer. Ponds generally go dry only in years of below normal runoff and precipitation.

11. "Pond, slough, lake, sheetwater, or any series thereof" means ponds, sloughs, lakes, or sheetwater that are hydrologically linked.

12. "Sheetwater" is defined in North Dakota Century Code section 61-32-03.

13. "Slough" includes two types:

    a. Seasonal slough: a depression that holds water in normal years from spring runoff until approximately mid-July. In years of normal runoff and precipitation, a seasonal slough is usually not tilled, but can be used for hayland or pasture. In low runoff, dry years, these

areas generally are tilled for crop production, but commonly reflood with frequent or heavy summer or fall rains.

b. Temporary slough: a shallow depression that holds water from spring runoff until approximately early June. In years of normal runoff and precipitation, a temporary slough is usually tilled for crop production. In years of high runoff or heavy spring rain, a temporary slough may not dry out until mid-July and generally would not be tilled, but may be used for hayland or pasture. A temporary slough frequently refloods during heavy summer or fall rains.

14. "Supplemental hearing" means a hearing held to review evidence not contained in the record of the state engineer's public hearing.

15. "Watercourse" is defined in North Dakota Century Code section 61-01-06.

16. "Watershed" means the area that drains into a pond, slough, lake, or any series thereof.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-03. Permit required.

In addition to North Dakota Century Code section 61-32-03, a permit is required for:

1. An assessment drain.

2. Construction of a lateral drain.

3. Modification of a previous permit, which includes deepening, widening, or extending a drain.

4. Pumping, gravity, or placement of fill.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-04. Permits for assessment drains.

Repealed effective February 1, 1997.

89-02-01-05. Exceptions to the need for a permit.

1. A drainage permit under section 89-02-01-03 is not required for maintenance of a drain.

2. The provisions of section 89-02-01-03 do not apply to any drain constructed under the direct and comprehensive supervision of the following federal or state agencies:

   a. The state water commission;

   b. The army corps of engineers;

   c. The natural resources conservation service for projects constructed under the Watershed Protection and Flood Prevention Act [Pub. L. 83-566; 16 U.S.C. 1001];

d. The bureau of reclamation for projects that are part of the originally (1965) authorized Garrison diversion unit authorized;

e. The state department of transportation for federal aid projects; and

f. The public service commission for surface mining projects.

However, these agencies must notify the state engineer of any proposed drainage projects under their direct supervision during the planning stages.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; April 1, 2004; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-06. Determination of watershed area.

The determination of the watershed area must be made using the best available maps or surveys. LiDAR information or a survey conducted under the supervision of a registered land surveyor are preferred. Published seven and one-half minute topographic maps may also be utilized. This information may be supplemented by aerial photographs of the watershed or by an onsite investigation requested by the applicant or board or if the state engineer determines it is necessary.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-07. Filing application.

Any person desiring a drainage permit must file an application with the state engineer on a form provided by the state engineer. If requested by the state engineer or the board, the applicant must provide an engineering analysis showing the downstream impacts of the proposed drainage. The analysis may need to include a determination of the drain's and receiving watercourse's capacities and a volume and timing comparison of predrainage and postdrainage flows. If the application is incomplete or the information is insufficient to enable the state engineer or board to make an informed decision on the application, it will be returned to the applicant for correction.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-08. Referral of applications to appropriate district.

Upon receipt of a properly completed application, the state engineer must determine whether the application involves drainage of statewide or interdistrict significance under section 89-02-01-09. The state engineer must attach to the application any comments, recommendations, and engineering data that may assist the district in making a determination on the application. The application must then be referred to the district within which a majority of the watershed of the pond, slough, lake, sheetwater, or any series thereof is found.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-09. Criteria for determining whether drainage is of statewide or interdistrict significance.

In determining whether the proposed drainage is of statewide or interdistrict significance, the state engineer must consider:

1. Drainage affecting property owned by the state or its political subdivisions.
2. Drainage of sloughs, ponds, or lakes having recognized fish and wildlife values.
3. Drainage having a substantial effect on another district.
4. Drainage converting previously noncontributing areas (based on the National Oceanic and Atmospheric Administration Atlas 14 twenty-five year event - four percent chance) into permanently contributing areas.
5. For good cause, the state engineer may classify or refuse to classify any proposed drainage as having statewide or interdistrict significance.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-09.1. Board procedure for processing applications to drain.

1. The board must use the following procedure to process a drainage permit application of statewide or interdistrict significance:

   a. Upon receipt of an application to drain, the board must set the date, time, and place for a meeting at which it will receive testimony pertinent to the application. At the applicant's expense, the board must give notice by mail at least twenty days before the date set for the meeting to:

      (1) The applicant.

      (2) All record title owners and holders of a contract for deed whose property the proposed drain would cross.

      (3) All downstream riparian landowners who the board determines have the potential to be adversely impacted.

      (4) Any board whose district would be substantially affected.

      (5) The state game and fish department.

      (6) The state department of health.

      (7) The department of transportation, county commissioners, or board of township supervisors if the proposed drain will affect or cross the right of way of any public highway, street, or road within their jurisdictions.

      (8) The state engineer.

      (9) The natural resources conservation service.

      (10) Any person who has made a written request for notification of the project and has advanced the cost of providing that notification.

b. Notice must be published in a newspaper of general circulation in the area of the proposed drainage once a week for two consecutive weeks. Final notice must be published between five and fifteen days before the date set for the meeting.

c. The notice must give the essential facts of the proposed drain, including:

(1) Name and address of applicant;

(2) Legal description of the area to be drained;

(3) Drain purpose;

(4) Watercourse into which the water will be drained;

(5) Legal description of the drain's confluence with the watercourse into which the water will be drained;

(6) The time, date, and place of the board's consideration of the meeting; and

(7) The location and date of availability of information regarding the project.

d. At least fourteen days before the meeting, the applicant must submit to the board all documentary information the applicant intends to present at the meeting. The board must immediately place the information in the board's office if the office is open for public access at least twenty hours each week. If the board's office is not open to the public at least twenty hours each week, the information must be immediately placed with the county auditor of the county in which the majority of the watershed of the drain will be built. The information must be available for public review. The board must notify the applicant of this requirement upon its receipt of an application to drain. If the information is placed in the auditor's office, the auditor must return the information to the board one working day before the meeting.

e. The board must allow submission of all relevant oral or written evidence.

f. In evaluating applications, the board must consider the factors in section 89-02-01-09.2.

g. The board must stenographically or electronically record the meeting at which it receives information concerning the application. If the board approves the permit application, the record and all documentary information the board received must be transferred to the state engineer. The board must provide a meeting transcript at the request of the state engineer. The cost of providing a transcript must be borne by the applicant.

h. At the meeting's conclusion, the board must announce that:

(1) The board's permit denial constitutes final denial. Appeals must be taken to the district court within thirty days.

(2) A board-approved application will be forwarded to the state engineer.

(3) Those who wish to be notified of the board's decision must provide their names and addresses in writing to the board at the end of the meeting.

(4) The board must send notice and a copy of the board's determination and rationale to all parties of record, anyone who has requested in writing to be notified, and the state engineer.

i. If the board denies the application, it must return the application to the applicant, along with a copy of the board's determination and rationale. A copy of the board's

determination and rationale must also be sent to all parties of record, anyone who has requested in writing to be notified, and the state engineer.

j. If the board approves the application, the approval must be noted on the application and a copy of the determination and rationale sent to the applicant. The board must send notice and a copy of the board's determination and rationale to all parties of record and anyone who has requested in writing to be notified. The application, a copy of the determination and rationale, and all information reviewed by the board in considering the application must be forwarded to the state engineer for review within twenty days of the determination. The board's decision approving the application must contain a determination of the location and surface acre size of ponds, sloughs, and lakes to be drained by the proposed drain.

k. The board's notice to an applicant must state that the application approval is not a permit to drain until the state engineer approves the application.

2. The board must use the procedure in this subsection to process a drainage permit application that is not of statewide or interdistrict significance:

a. The board must review the permit application and any supporting documentation and determine whether public and private interests would be better served by a specific public meeting to consider the project.

b. If a specific public meeting is necessary, the board must process the permit application under procedures established by the board.

c. If a specific public meeting is unnecessary, the board must consider the project under the criteria in section 89-02-01-09.2 and must deny or grant the application and any modifications or conditions based upon those criteria. Written notice of the board's decision must be provided to all parties of record, anyone who has requested in writing to be notified, and the state engineer.

History: Effective February 1, 1997; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-09.2. Evaluation of applications - Factors considered.

All applications to drain, must consider the following factors:

1. The water volume proposed to be drained and its impact upon the watercourse into which it will be drained.

2. Adverse effects that may occur to downstream landowners. This factor is limited to the project's hydrologic effects, such as erosion, flood duration, sustained flows impacts, and downstream water control device operation impacts.

3. The engineering design and other physical aspects of the drain.

4. The project's impact on flooding problems in the project watershed.

5. The project's impact on ponds, sloughs, streams, or lakes having recognized fish and wildlife values.

6. The project's impact on agricultural lands.

7. Whether easements are required.

8. Other factors unique to the project.

History: Effective February 1, 1997; amended effective April 1, 2000; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-01-26, 61-16.1-10(3), 61-32-03

89-02-01-09.3. Time for determination by board.

The board must make a determination on the application within one hundred twenty days of receipt. This time limit may be extended only with the written consent of the state engineer. A request for a time extension must be in writing to the state engineer and must set forth the reason for the request. If no determination has been made and no extension has been requested, unless the state engineer determines that a unique or complex situation exists, the application is void.

For applications involving assessment drains, the one hundred twenty-day time period does not begin until the date the assessments are established by the board and no longer subject to appeal.

History: Effective February 1, 1997; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-09.4. Evaluation of applications by the state engineer of statewide or interdistrict significance - Information to be used.

In the state engineer's evaluation of statewide or interdistrict significance applications, the state engineer must use all relevant documentary information submitted and oral testimony given for the board's consideration at its meeting. The state engineer may use any information in the files and records retained by the state engineer's office or engineering information developed or obtained through investigation of the project area by the state engineer's staff.

The state engineer may also request information or comment from independent sources, but is not required to delay the decision for more than thirty days from the date of request while waiting for comment from these sources. All information used must be relevant and is part of the record.

History: Effective February 1, 1997; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-06, 61-32-03

89-02-01-09.5. Procedure, availability, and contents of notice of state engineer's decision to grant or deny application of statewide or interdistrict significance.

1. The state engineer must provide a copy of the determination to the parties of record. Other members of the public may view the record at the office of the state engineer, 900 east boulevard, Bismarck, during normal business hours.

2. Upon written request, one copy of the determination may be provided to any person not provided a copy under subsection 1.

3. The notice of decision must include:

   a. The name of the drain;

   b. The applicant's name;

   c. Whether the application was granted or denied;

   d. The date of the decision;

e. The availability of the full text of the decision;

f. That a hearing may be requested on the project within thirty days of the date of service of the state engineer's decision; and

g. The request for a hearing must be in writing, specifically state facts from which the person requesting the hearing is factually aggrieved by the state engineer's decision, and what material facts or conclusions are believed to be erroneous and why they are believed to be erroneous.

History: Effective February 1, 1997; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-22, 61-32-03

89-02-01-09.6. Request for state engineer's hearing.

All requests for a formal hearing on a project must be made in writing to the state engineer within thirty days of the date of service of the state engineer's decision. The request must specifically state facts from which it is evident the person requesting the hearing is factually aggrieved by the state engineer's decision and must state which material facts or conclusions are believed to be erroneous and why they are believed to be erroneous.

History: Effective February 1, 1997; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-09.7. Notice of state engineer's hearing.

If the state engineer determines that a request for a hearing on an application of statewide or interdistrict significance is valid and well-founded, the state engineer must set a date for a hearing and publish notice in the official newspaper of the county where a majority of the drainage basin is located. Publication must be once a week for two consecutive weeks. One of the publications must be published at least twenty days before the hearing. The person requesting the hearing must give notice by certified mail to the state department of health, the state game and fish department, the state department of transportation, and all parties of record to the board's hearing at least twenty-one days before the hearing. If such notice is not provided, the hearing will not be held. The notice must give essential information about the proposed drainage application, including the date, time, and location of the hearing. All hearings will be held in Bismarck.

History: Effective February 1, 1997; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-05

89-02-01-09.8. Evidence at the state engineer's hearing.

Evidence at the state engineer's hearing may be confined to the matters raised by any request of hearing described in section 89-02-01-09.6.

History: Effective February 1, 1997; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-06, 61-32-03

89-02-01-09.9. Time for determination by the state engineer - Copies of decision.

Unless the state engineer determines the hearing raises complex or unique issues, the state engineer must render a decision within thirty days of the close of the hearing. A copy of the decision must be served on all parties of record either personally, or by certified mail, regular mail, or email. The

state engineer will retain a certificate of service indicating upon whom a copy of the decision was served.

History: Effective February 1, 1997; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 28-32-13, 61-03-13
Law Implemented: NDCC 28-32-13

89-02-01-09.10. Consideration of evidence not contained in the state engineer's record.

The record of the state engineer's hearing must be closed at the conclusion of the state engineer's formal hearing. It is in the state engineer's discretion to receive testimony and evidence not contained in the record. However, before considering any evidence not contained in the record, the state engineer must provide notice to the parties of record where the evidence may be obtained for their examination and comment. Written comment or a request for a supplemental hearing must be submitted to the state engineer within ten days after transmittal of the additional evidence. Any request for a supplemental hearing must provide sufficient information to allow the state engineer to determine if a supplemental hearing is warranted. If a supplemental hearing is warranted, ten days' notice by personal service, certified mail, or email must be given to the parties of record to inform them of the date, time, place, and nature of the hearing. All supplemental hearings must be held in Bismarck.

History: Effective February 1, 1997; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-07

89-02-01-09.11. Conditions to permits.

Unless otherwise specifically stated:

1. All permits must include the following conditions:

    a. The project and the rights granted under the permit are subject to modification to protect the public health, safety, and welfare.

    b. Construction must be completed within two years from the date of final approval or the permit is void. The two-year period does not begin until any appeal is complete.

2. All permits of statewide or interdistrict significance must include the following conditions:

    a. All highly erodible drainage channels must be seeded to a sod-forming grass.

    b. Vegetative cover must be adequately maintained for the life of the project or control structures must be installed.

    c. Receipt of a permit does not relieve an applicant from liability for damages resulting from any activity conducted under the permit.

The state engineer or board may attach other conditions to the permit if necessary.

History: Effective February 1, 1997; amended effective April 1, 2000; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-09.12. Extending time to complete construction of drain.

If the two-year period expires before construction is complete, the permit recipient may make a written request to the board for a one-year extension. Only two extensions may be granted. All requests for extensions must be made at least sixty days before the expiration date and must specifically state why construction has not been completed. If the request is for an extension relating to a permit of

statewide or interdistrict significance, the extension must be submitted to and approved by both the state engineer and the board.

History: Effective February 1, 1997; amended effective April 1, 2004; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-13, 61-32-03

89-02-01-10. District hearing on applications of statewide or interdistrict significance.

Repealed effective February 1, 1997.

89-02-01-11. Emergency drainage.

Repealed effective February 1, 1997.

89-02-01-12. Notice of district hearing.

Repealed effective February 1, 1997.

89-02-01-13. Content of notice of hearing.

Repealed effective February 1, 1997.

89-02-01-14. Affidavit of mailing and affidavit of notice.

Repealed effective December 1, 1979.

89-02-01-15. Time for determination by board of managers.

Repealed effective February 1, 1997.

89-02-01-16. Consideration by the state engineer and districts.

Repealed effective February 1, 1997.

89-02-01-17. Approval of drainage permit applications by district.

Repealed effective February 1, 1997.

89-02-01-18. Denial of application by the district.

Repealed effective February 1, 1997.

89-02-01-18.1. Notice by state engineer of public hearing on application of statewide or interdistrict significance.

Repealed effective February 1, 1997.

89-02-01-18.2. Evidence presented at the state engineer's public hearing.

Repealed effective February 1, 1997.

89-02-01-19. Consideration by state engineer of applications of statewide or interdistrict significance.

Repealed effective February 1, 1997.

89-02-01-20. Criteria to determine whether drainage will adversely affect lands of lower landowners.

Repealed effective February 1, 1997.

89-02-01-20.1. Time for determination by the state engineer.

Repealed effective February 1, 1997.

89-02-01-20.2. Consideration of evidence not contained in the record.

Repealed effective February 1, 1997.

89-02-01-21. Conditions to permits.

Repealed effective February 1, 1997.

89-02-01-22. Requirements for a valid permit to drain.

Repealed effective December 1, 1979.

89-02-01-23. Procedure upon complaint of violation.

Repealed effective February 1, 1997.

89-02-01-24. Enforcement action without receipt of complaint.

Repealed effective October 1, 1982.

89-02-01-25. Criminal complaint.

Repealed effective October 1, 1982.

89-02-01-26. Ditches or drains existing for ten years or more.

Repealed effective December 1, 1979.

89-02-01-27. Notice of drainage application denials to commissioner of agriculture.

Repealed effective August 1, 1994.

89-02-01-28. Landowner assessment appeal to state engineer.

A landowner's appeal to the state engineer claiming that the landowner will receive no benefit from the construction of a new drain must be made within ten days after the assessment hearing. The appeal must be in writing and must specifically state the facts upon which the claim is based.

History: Effective April 1, 2000; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-21-22