CHAPTER 89-02-04
DRAINAGE COMPLAINT APPEALS

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89-02-04-01. Scope of chapter.

This chapter contains the procedure for appealing the decision of a water resource board on a complaint of drainage constructed without proper approval.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-02. Definitions.

Unless the context otherwise provides, the following definitions apply:

1. "Affected landowner" means a person with any property interest, including a lease in land where the drain complained of is located or land that is affected by the drain complained of.

2. "Aggrieved party" means any individual or entity who participated in the state engineer's or board's consideration of an appeal and who is actually damaged by the board's or state engineer's decision.

3. "Appeal" means an appeal from the decision of a board concerning a drain constructed.

4. "Board" means the board of the water resource district in which the complaint is brought.

5. "Complaint" is a document which alleges drainage has been conducted without proper authorization. It is filed on a form supplied to the water resource board by the state engineer.

6. "Party" includes the petitioner and any respondent, the board from which the decision is appealed, and any entity or individual that participated in the complaint process in front of the

board. The designation as a party does not bestow standing to appeal a decision of the board to the state engineer or the decision of the state engineer to a court of law.

7. "Petitioner" means any aggrieved party who files a timely and proper appeal, or an affected landowner who files a timely and proper demand for hearing with the state engineer.

8. "Respondent" is a person who, within twenty days of notice of an appeal of a board's decision on a drainage complaint, files a notice with the state engineer of the person's intent to participate in the appeal. The person who filed the complaint, and the person against whom the complaint was filed, must be either a respondent or a petitioner. These persons and the board must be allowed to participate whether or not any notice of participation is filed with the state engineer. A person may not be a respondent to an appeal of a board's decision unless the person participated by providing information to the board for its consideration.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-03. Filing of complaint.

All complaints are filed with the water resource board in the county where the drainage is located. Complaints filed with the state engineer will be forwarded to the appropriate board, unless the complaint is filed because of the board's inaction on a complaint under section 89-02-04-04.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-04. Complaint to state engineer - State engineer's action when board fails to act.

If a board does not make a decision upon a drainage complaint within one hundred twenty days of its filing with the board, the person filing the complaint with the board may file a request for state engineer action with the state engineer. The request must include a copy of the complaint filed with the board and any documentation the landowner wishes the state engineer to consider. The state engineer must then determine whether to commence action against the board or conduct an investigation.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-05. Form of appeal.

If a board makes a decision on a drainage complaint, any appeal to the state engineer by an aggrieved party must be made within thirty days from the date notice of the board's decision was received in writing on the form prescribed by the state engineer, and must include:

1. The identity of all parties to the complaint.

2. Petitioner's interest in the water resource board's decision, including a statement of the impact the decision will have upon the petitioner.

3. The relief petitioner seeks.

4. A statement identifying the errors in the water resource board's decision that entitle the petitioner to the relief sought.

5. All facts presented to the water resource board that support the petitioner's position.

6. A legal description of the drainage area involved.

7. A map depicting the drainage area and identifying the drainage complained of.

8. A cashier's check to cover the cost of preparing a transcript of the proceedings before the board.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-06. State engineer's review of board's decision.

Upon receipt of a written appeal by an aggrieved party from a decision of a water resource district under North Dakota Century Code section 61-32-07, the state engineer must review the board's decision. In the review the state engineer will consider only:

1. Ownership of the land on which the drain is located.

2. Topographic maps and aerial photographs of the area.

3. Any existing surveys of the area.

4. The documentation and testimony given to the board for its consideration.

5. Any pertinent rules of the appropriate board.

6. The board's decision.

History: Effective October 1, 1988; amended effective January 1,2015.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-07. Sufficiency of information on appeal.

1. Once the state engineer's review under section 89-02-04-06 is complete, the state engineer will determine whether the information reviewed is sufficient to make a sound decision.

2. If the information is not sufficient, the state engineer will either conduct further investigations or return the record to the board for its further investigation.

3. If the information is sufficient, the state engineer must determine whether a drain, lateral drain, or ditch has been opened or established contrary to North Dakota Century Code title 61 or any rules adopted by the state engineer or the board. If so, the state engineer will take one of the three actions set forth in North Dakota Century Code section 61-32-08. If the drain has not been opened contrary to North Dakota Century Code title 61 or a drainage rule, the complaint will be dismissed. In either case the state engineer will notify all parties of the state engineer's decision by certified mail or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom the decision was served. The notice of decision will include the names and addresses of all parties.

History: Effective October 1, 1988; amended effective August 1, 1994; January 1, 2015.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-13, 61-32-08

89-02-04-08. State engineer's independent investigation.

After reviewing the board's decision and the items identified in section 89-02-04-06, the state engineer may conduct an investigation if the information is insufficient. The investigation may include an onsite inspection and survey of the property involved and other activities deemed appropriate by the state engineer. Any investigation the state engineer undertakes in response to a complaint filed with the state engineer because a board has not acted will be conducted under this rule.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-09. Demand for hearing by affected landowner.

Hearings demanded under North Dakota Century Code section 61-32-08 by an affected landowner must be made by certified mail within fifteen days of notice of the state engineer's decision. The affected landowner must also notify all parties by certified mail of the landowner's demand for hearing within fifteen days of the state engineer's decision. Hearings will be conducted as set forth in sections 89-02-04-11 through 89-02-04-23. The demand must state the issues to be addressed at the hearing.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-10. Request for hearing by others than affected landowners.

Any aggrieved party may request a hearing on the state engineer's decision. A request for a hearing must specifically state the reason for the request, and a copy of the request must be sent by certified mail to the state engineer and to each party within fifteen days after notice of the state engineer's decision. If granted, the hearing must be conducted as set forth in sections 89-02-04-11 through 89-02-04-23.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-11. Appointment of hearing officer.

Upon receipt of an appeal or demand for a hearing, the state engineer will appoint a hearing officer to:

1. Determine if the appeal is timely and proper.

2. Preside over the hearing.

3. Administer the prehearing activities.

3. Prepare a recommended decision.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-12. Purpose of hearing.

If the hearing officer determines a hearing should be held, one will be conducted to:

1. Obtain further testimony from the parties.

2. Allow the state engineer to examine other witnesses and evidence.

3. Provide the parties with an opportunity to cross-examine witnesses called by the state engineer.

4. Allow the parties to call other witnesses to present evidence.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-13. Qualifications of witnesses at state engineer's hearings.

Unless agreed to by both petitioner and respondent and allowed by the hearing officer, people who failed to participate in the water resource board's determination under North Dakota Century Code section 61-32-07 may not be called to present evidence or testimony for consideration. However, the state engineer may call witnesses on the state engineer's own motion without the agreement of any party if the state engineer feels information known by the person will assist the hearing officer in making a recommended decision.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-14. Notice of hearing.

When the hearing officer determines a date for a hearing, the hearing officer will notify the water resource board, the petitioner, and the respondent of the time and date of the hearing. In the case of a demand by an affected landowner under section 89-02-04-09, the hearing officer must give the notice of the hearing date within fifteen days of the demand. The notice must be given by certified mail at least forty-five days before the date set for the hearing. All hearings will be held in Bismarck, North Dakota.

The notice must state that parties may present testimony at the hearing, petitioner and respondent may call witnesses at the hearing, and of the hearing officer's appointment as hearing officer. The notice must also state that each party must identify the position it is urging the state engineer to adopt. Those urging the state engineer's decision should be affirmed must be designated respondents. Those urging reversal or modification of the state engineer's decision must be designated petitioners.

History: Effective October 1, 1988; amended effective August 1, 1994; January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-05, 61-03-22, 61-32-08

89-02-04-15. Issues limited to those contained in notice.

The notice of hearing will identify the issues to be addressed and identified in the demand or the request for a hearing. Evidence and testimony at the hearing will be limited to the issues set forth in the notice of hearing.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-08, 61-03-22, 61-32-08

89-02-04-16. Notice of witnesses at hearing - Time frame.

At least thirty days before the date set for the hearing, the petitioner must notify other parties, the board, the state engineer, and the hearing officer by certified mail of all witnesses the petitioner will call and the content of their testimony. At least thirty days before the date set for the hearing, the

respondent must notify other parties, the board, the state engineer, and the hearing officer by certified mail of witnesses to be called by the respondent and the content of their testimony. Within twenty days of the date of the hearing, the petitioner must notify the parties, the board, the state engineer, and the hearing officer by certified mail of any rebuttal witnesses to be called and the content of their testimony. The state engineer must notify the parties, the board, and the hearing officer of any witnesses the state engineer intends to call in the notice of hearing. However, if testimony or evidence not provided to the board and not considered in the state engineer's determination will be presented by others, the failure of the state engineer to identify a witness should not preclude the state engineer from providing other testimony and evidence of a technical nature.

History: Effective October 1, 1988; amended effective January 1,2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-17. Subpoena of witnesses.

If any party desires the hearing officer to subpoena any witness for attendance at the hearing, the hearing officer must be notified of the intent to subpoena the witness at least seven days before the date of the hearing. The hearing officer may not subpoena a witness unless the request for a subpoena:

1. Is written.
2. States the subject matter of the testimony to be given.
3. States the time and date that the witness is to appear.
4. Is accompanied by a certified check for the fees allowed by law for one day for the witness. The fees allowed by law include mileage to and from the hearing, per diem, and in the case of the state engineer's staff, the salary for that individual.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-05(13), 61-03-13
Law Implemented: NDCC 28-32-09, 61-03-05, 61-32-08

89-02-04-18. Prehearing conference.

A prehearing conference to clarify issues, resolve any conflicts, and stipulate to any matter will be held at least seven days before the date of the hearing. At the conference the parties must provide sufficient copies of exhibits to be presented to all parties, the board, the state engineer, and the hearing officer. The hearing officer may allow the prehearing conference to be held by telephone if exhibits are provided to all parties, the board, the state engineer, and the hearing officer at least three days before the prehearing conference.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-19. Order of presentation at hearing.

At the hearing the petitioner must present the petitioner's case first. The respondent then presents the respondent's case, followed by the board and the state engineer. After all participants have presented their case, a participant may present other evidence or testimony to rebut that presented by another participant.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-20. Cross-examination.

Oral cross-examination of adverse witnesses will be allowed by the petitioner and the respondent. The petitioner and respondent must designate one individual to cross-examine witnesses that side did not call. In addition, the state engineer and the board may cross-examine any witnesses they did not call. However, if a party demonstrates to the hearing officer that the party's position is not adequately represented by any other party it may be allowed to cross-examine witnesses on the party's own.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-21. Record of hearing - Consideration by hearing officer.

After the hearing is over the record will be closed. The hearing officer will consider only material contained in the record and will not accept and consider any information after the hearing unless the evidence was not provided at the hearing because of circumstances beyond the control of the party presenting the evidence. Information submitted after the hearing may be considered by the state engineer in making the state engineer's decision, but only under North Dakota Century Code section 28-32-25.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-07, 61-32-08

89-02-04-22. Recommendation of hearing officer.

After the hearing officer completes the consideration required under section 89-02-04-20, a written recommendation must be made to the state engineer.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-08

89-02-04-23. Decision of state engineer on record of hearing.

The state engineer will review the record, the hearing officer's recommendation, and any additional evidence received under North Dakota Century Code section 28-32-25, and make a final determination. If the conclusion is the drain, lateral drain, or ditch was constructed contrary to a board rule or title 61, the state engineer will take one of the actions prescribed by North Dakota Century Code section 61-32-08.

If the report concludes the drain, lateral drain, or ditch was lawfully constructed, the complaint will be dismissed.

History: Effective October 1, 1988; amended effective January 1, 2015.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-07, 61-32-08