

HOUSE BILL NO. 1202
with Senate Amendments
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Introduced by

Representatives Delzer, Porter, Zubke

Senator Schaible

1 A BILL for an Act to create and enact a new section to chapter 61-33 of the North Dakota
2 Century Code, relating to determinations of navigability; to amend and reenact sections
3 61-33-01 and subdivision e of subsection 3 of section 61-33.1-03 of the North Dakota Century
4 Code, relating to sovereign land management definitions; and to provide for a state engineer
5 review of determinations of navigability.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1. AMENDMENT.** Section 61-33-01 of the North Dakota Century Code is
8 amended and reenacted as follows:

9 **61-33-01. Definitions.**

10 As used in this chapter, unless the context otherwise requires:

- 11 1. "Board" means the sovereign lands advisory board.
- 12 2. "Board of university and school lands" means that entity created by section 15-01-01.
- 13 3. "Navigable waters" means waters that were in fact navigable at the time of statehood,
14 and that are used, were used, or were susceptible of being used in their ordinary
15 condition as highways for commerce over which trade and travel were or may have
16 been conducted in the customary modes of trade on water.
- 17 4. "Sovereign lands" means those areas, including beds and islands, lying within the
18 ordinary high water mark of navigable lakes and streams. Lands established to be
19 riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be
20 above the ordinary high water mark and are not sovereign lands.
- 21 4.5. "State engineer" means the person appointed by the state water commission pursuant
22 to section 61-03-01.

23 **SECTION 2.** A new section to chapter 61-33 of the North Dakota Century Code is created
24 and enacted as follows:

1 **Navigability determinations.**

2 1. Before making a determination that a body of water or portion of a body of water is
3 navigable, the state engineer shall:

4 a. Develop and deliver to the state water commission a preliminary finding
5 regarding the navigability of the body of water or portion of a body of water and
6 the legal rationale for the preliminary finding; and

7 b. Consult with the state water commission in an open meeting and demonstrate
8 the public need and purpose for the determination to be made.

9 2. After completing the requirements of subsection 1, the state engineer may proceed
10 with making a final determination of navigability by:

11 a. Providing reasonable public notice of the preliminary finding, legal rationale for
12 the preliminary finding, and opportunity for the public to provide comments for no
13 less than sixty days. The notice must:

14 (1) Include the address and electronic mail address to which public comments
15 may be sent and the deadline by which public comments must be received;

16 (2) Clearly identify the specific body of water or portion of a body of water for
17 which the finding of navigability is sought;

18 (3) State the state engineer will hold a public hearing regarding the preliminary
19 finding before a final determination of navigability is made, and provide the
20 date, time, and location of the public hearing;

21 (4) Be provided to the governing body of each soil conservation district, water
22 resource district, and county adjacent to the body of water or portion of a
23 body of water for which the preliminary finding was made;

24 (5) Be published in the official county newspaper for each county adjacent to
25 the body of water or portion of a body of water for which the preliminary
26 finding was made; and

27 (6) Briefly state the purpose of the hearing and describe the impact or effect a
28 determination of navigability will have on the property rights of persons who
29 own property adjacent to the body of water or portion of a body of water for
30 which the determination of navigability may be made; and

31 b. Holding a public hearing regarding the preliminary finding.

1 3. After completing the requirements of subsection 2 and making a determination of
2 navigability, the state engineer shall prepare a report regarding the determination,
3 including summaries of the information provided to the state water commission, the
4 public hearings held, and the public comments received. The state engineer shall
5 provide the report to the state water commission, send the report by certified mail to
6 any person that appeared at the public hearing required under subsection 2 or
7 provided written comments by the deadline, make the report available to the public,
8 including on the website for the office of the secretary of state, and provide public
9 notice of the report's availability. The report is final on the date it is provided to the
10 state water commission.

11 4. A determination of navigability may be appealed directly to a court of competent
12 jurisdiction in accordance with sections 28-32-42 through 28-32-46 and sections
13 28-32-50 and 28-32-51.

14 **SECTION 3. AMENDMENT.** Subdivision e of subsection 3 of section 61-33.1-03 of the
15 North Dakota Century Code is amended and reenacted as follows:

16 e. ~~Subsection 3 of section~~Section 61-33-01 and section 47-06-05, which provide all
17 accretions are presumed to be above the ordinary high water mark and are not
18 sovereign lands. Accreted lands may be determined to be within the ordinary high
19 water mark of the historical Missouri riverbed channel based on clear and
20 convincing evidence. Areas of low-lying and flat lands where the ordinary high
21 water mark may be impracticable to determine due to inconclusive aerial
22 photography or inconclusive vegetation analysis must be presumed to be above
23 the ordinary high water mark and owned by the riparian landowner.

24 **SECTION 4. REVIEWS OF NAVIGABILITY DETERMINATIONS DURING 2019-20**
25 **INTERIM.** During the 2019-20 interim, the state engineer may review any determinations of
26 navigability of a body of water or portion of a body of water made solely by the state engineer
27 before the effective date of this Act. However, if a court of competent jurisdiction has determined
28 a body of water or portion of a body of water is navigable or non-navigable, the state engineer
29 does not need to review any state agency determination regarding the body of water or portion
30 of a body of water. If the state engineer elects not to review any determinations of navigability of
31 a body of water or portion of a body of water made solely by the state engineer before the

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- 1 effective date of this Act during the 2019-20 interim, those determinations must be vacated
- 2 without prejudice to a subsequent determination of navigability under section 2 of this Act. In
- 3 conducting the reviews under this section, the state engineer shall comply with the
- 4 requirements in section 2 of this Act.