

## CHAPTER 61-32 DRAINAGE

### **61-32-01. Legislative policy and intent.**

Repealed by S.L. 1995, ch. 599, § 3.

### **61-32-02. Definitions.**

Repealed by S.L. 1995, ch. 599, § 3.

### **61-32-03. Permit to drain waters required - Penalty.**

Any person, before draining a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more, shall first secure a permit to do so. The permit application must be submitted to the department of water resources. The department shall refer the application to the water resource district or districts within which is found a majority of the watershed or drainage area of the pond, slough, lake, or sheetwater for consideration and approval, but the department may require applications proposing drainage of statewide or interdistrict significance be returned to the department for final approval. A permit may not be granted until an investigation discloses the quantity of water which will be drained from the pond, slough, lake, or sheetwater, or any series of those water bodies, will not flood or adversely affect downstream lands. If the investigation shows the proposed drainage will flood or adversely affect lands of downstream landowners, the water resource board may not issue a permit until flowage easements are obtained. The flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. An owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required investigation. This section does not apply to the construction or maintenance of any existing or prospective drain constructed under the supervision of a state or federal agency, as determined by the department of water resources.

Any person draining, or causing to be drained, a pond, slough, lake, or sheetwater, or any series of those water bodies, which has a watershed area comprising eighty acres [32.37 hectares] or more, without first securing a permit to do so, as provided by this section, is liable for all damage sustained by any person caused by the draining, and is guilty of an infraction. As used in this section, sheetwater means shallow water that floods land not normally subject to standing water. The department of water resources may adopt rules for temporary permits for emergency drainage.

#### **61-32-03.1. Permit to drain subsurface waters required - Permit form - Penalty.**

1. Installation of a subsurface water management system comprising eighty acres [32.37 hectares] of land area or more requires a permit. A person that violates this section is guilty of an infraction. Subsurface water management systems that use surface intakes or lift stations must be permitted exclusively under this section.
2. For purposes of this section, a "natural watercourse" includes, in addition to watercourses defined in section 61-01-06, any waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map.
3.
  - a. The department of water resources shall develop an application form for a permit required under this section. A person seeking to construct a subsurface water management system shall submit a completed application to the water resource district board within which is found a majority of the land area for consideration and approval. The district may charge permit applicants a fee up to five hundred dollars. The fee must be paid before the water resource district may approve the application.
  - b. A completed permit application includes:
    - (1) A completed application form signed by an applicant and filed with the district;
    - (2) Evidence of ownership for each parcel to be tiled according to the tax rolls of the county in which the parcel is located;

- (3) A project design, including:
    - (a) A detailed drawing depicting the subsurface water management system's location overlain on an aerial photograph of the parcel;
    - (b) The system's location by legal description identifying either the relevant quarter, section, township, and range or the relevant block and lot number;
    - (c) The physical footprint of the system's layout;
    - (d) The tile-main sizes and locations;
    - (e) The laterals to the tile-main sizes and locations;
    - (f) Surface inlet sizes and locations; and
    - (g) Outlet sizes, locations, and types;
  - (4) A downstream flow map or depiction of the flow direction from each outlet location for one mile [1.61 kilometers] downstream which includes the location of the downstream parcels by legal description identifying either the relevant quarter, section, township, and range or the relevant block and lot number; and
  - (5) Evidence of ownership for each parcel within one mile [1.61 kilometers] downstream of each project outlet according to the tax rolls for the county in which the parcel is located, unless the distance to the nearest assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers] downstream of a proposed outlet, in which case the applicant shall provide evidence of ownership for each parcel between the outlet and the nearest assessment drain, natural watercourse, slough, or lake.
- c. Unless the district notifies an applicant the application is incomplete and provides a list of information required to complete the application within three business days after the day the district receives the application, the application is deemed complete.
  - d. Detailed drawings submitted pursuant to subparagraph a of paragraph 3 of subdivision b as part of an application for a permit under this section after May 3, 2021, are exempt records under section 44-04-18 and may be provided to individuals only as necessary to make a decision whether to approve the permit.
4. A district may attach conditions to an approved permit for a subsurface water management system if the conditions address:
    - a. Outlet locations including requirements for pump and control structures to be installed no closer than twenty-five feet [7.62 meters] from the top of the back slope of an assessment drain;
    - b. Installation and maintenance of proper erosion control at all outlets;
    - c. Re-establishment of disturbed areas to previous conditions;
    - d. The minimum distance from rural water supply lines. However, a district may not attach a condition requiring a system to extend beyond an existing easement for a rural waterline, or, if the rural waterline was installed under a blanket easement, requiring a system to extend beyond twenty feet [6.1 meters] from either side of a rural waterline;
    - e. Installation and operation of control structures at project outlets including requirements for control structures to be closed or pump outlets to be turned off during critical flood periods;
    - f. Requirements for a permittee to obtain an amendment to a permit for alterations to outlet locations, new outlets, or improvements resulting in drainage of additional acres;
    - g. If the subsurface water management system will discharge into the watershed area of an assessment drain, inclusion of the relevant property into the assessment district for the assessment drain in accordance with the benefits the property receives, provided the property is not assessed already for the assessment drain. The water resource district may include the new property into the assessment district, and determine the benefits and assessment amounts

- under chapters 61-21 and 61-16.1, without conducting the reassessment of benefit proceedings under sections 61-21-44 and 61-16.1-26, provided the property is not assessed already for the assessment drain.
- h. Requirements for a permittee to remove silt and vegetation, or repair erosion and scour damages directly caused by the subsurface water management system, up to one mile [1.61 kilometers] downstream from a proposed outlet, unless the distance to the nearest assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers] downstream of the proposed outlet, in which case the district may require silt and vegetation removal or erosion and scour damage repair between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. For purposes of this subdivision and subdivision i:
    - (1) Downstream damage repair does not include deepening or widening a road ditch or existing drain;
    - (2) The timing and method of silt and vegetation removal or damage repair in a county or township road ditch must be preapproved by the appropriate road authority; and
    - (3) The applicant shall follow any construction site protection requirements of the road authority.
  - i. If a downstream landowner or road authority presents substantial evidence a subsurface water management system directly has caused accumulation of silt, vegetation erosion, or scouring, the requirement or authorization of the applicant to remove the silt and vegetation or repair the erosion and scour damages directly caused by the system. However, the applicant may not spread silt, vegetation, or debris along adjoining land without the permission of all parties having a legal interest in the land.
5. A district shall approve a permit, including any permissible conditions, within thirty days after the district receives the completed application. If the district fails to approve the permit application within that period, the permit is deemed approved with no conditions.
  6. Upon approval of a permit, the district shall forward notice of the approved permit and the downstream flow map to the state engineer and to each landowner who owns property within one mile [1.61 kilometers] downstream of each project outlet according to the tax rolls of the county in which the property is located, unless the distance to the nearest assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers] downstream of the proposed outlet, in which case the district shall provide notice to landowners with property between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The district shall send copies of the notice by first-class mail, attested by an affidavit of mailing. The district does not need to provide copies of the permit application under this subsection.
  7. An amendment of a previously approved subsurface water management system permit must be made according to the provisions for approving a permit under this section.
  8. A water resource district board may not be held liable to any person for issuing a permit under this section.
  9. Approval of a permit under this section does not prohibit a downstream party unreasonably damaged by the discharge of water from a subsurface water management system from seeking damages in a civil action.
  10. This section applies only to subsurface water management systems that drain, in whole or in part, platted or unplatted lands used for raising agricultural crops or grazing farm animals.

**61-32-03.2. Smaller subsurface water management systems - Notification and conditions - Penalty. (Effective through December 31, 2022)**

1. A person may not install a subsurface water management system comprising less than eighty acres [32.37 hectares] of land area until the person has notified the board of the

- water resource district within which is found a majority of the land area of the system of the following information:
- a. The system's total acreage and legal description of the land being drained;
  - b. The outlet locations and types; and
  - c. The flow direction from each outlet location.
2. A person required to notify the board under subsection 1 shall install the subsurface water management system such that:
    - a. Pump and control structures at pump outlets are installed no closer than twenty-five feet [7.62 meters] from the top of the back slope of an assessment drain;
    - b. Proper erosion controls are installed and maintained at all outlets; and
    - c. Pumps and control structures at project outlets are closed or turned off during critical flood periods.
  3. If a subsurface water management system for which notification is required under subsection 1 will discharge into the watershed area of an assessment drain, the water resource board that receives the notice may require the relevant property to be included in the assessment district for the assessment drain in accordance with the benefits the property receives, provided the property is not assessed already for the assessment drain. The water resource district also may include the property in the assessment district and determine the benefits and assessment amounts under chapters 61-21 and 61-16.1, without conducting the reassessment of benefit proceedings under sections 61-21-44 and 61-16.1-26, provided the property is not assessed already for the assessment drain.
  4. The board of the water resource district within which the subsurface water management system is located may order the system's owner or operator to bring the system into compliance with subsection 2 if the board finds the system violates that subsection.
  5. A person that violates this section is guilty of an infraction.
  6. This section applies only to subsurface water management systems that drain, in whole or in part, platted or unplatted lands used for raising agricultural crops or grazing farm animals.
  7. This section does not apply to a subsurface water management system that discharges into a body of water completely encompassed by land owned by the person that owns the land drained by the system.
  8. The information that must be provided to a board of a water resource district under this section is an exempt record under section 44-04-18.

**61-32-04. Administration - Rulemaking authority - Guidelines.**

Repealed by S.L. 1995, ch. 599, § 3.

**61-32-05. Wetlands bank.**

Repealed by S.L. 1995, ch. 599, § 3.

**61-32-06. Uniform wetlands classification.**

Repealed by S.L. 1995, ch. 599, § 3.

**61-32-07. Closing a noncomplying drain - Notice and hearing - Appeal - Injunction - Frivolous complaints.**

1. Only a landowner experiencing flooding or adverse effects from an unauthorized drain constructed before January 1, 1975, may file a complaint with the water resource board. Any person may file a complaint about an unauthorized drain constructed after January 1, 1975. Upon receipt of a complaint of unauthorized drainage, the water resource board shall promptly investigate and make a determination of the facts with respect to the complaint. If the board determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to this title or any rules

adopted by the board, the board shall notify the landowner by certified mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if known. The notice must specify the nature and extent of the noncompliance and must state that if the drain, lateral drain, or ditch is not closed or filled within a reasonable time as the board determines, but not less than fifteen days, the board shall procure the closing or filling of the drain, lateral drain, or ditch and assess the cost of the closing or filling, or the portion the board determines, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing on the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may immediately apply to the appropriate district court for an injunction prohibiting the landowner or tenant from constructing or maintaining the drain, lateral drain, or ditch and ordering the closure of the illegal drain. Assessments levied under this section must be collected in the same manner as assessments authorized by chapter 61-16.1. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. If a complaint is frivolous in the discretion of the board, the board may assess the costs of the frivolous complaint against the complainant.

2. Following the closing or filling of an unauthorized drain, either by a water resource board or by a party complying with an order of a water resource board, the board may assess its costs against the property of the responsible landowner.

**61-32-08. Appeal of board decisions - Department of water resources review - Closing of noncomplying drains.**

1. The board shall make the decision required by section 61-32-07 within a reasonable time, but not to exceed one hundred twenty days, after receiving the complaint. The board shall notify all parties of its decision by certified mail. Any aggrieved party may appeal the board's decision to the department of water resources. The appeal to the department must be made within thirty days from the date notice of the board's decision has been received. The appeal must be made by submitting a written notice to the department, and the notice must specify the reason why the board's decision is erroneous. The appealing party also shall submit copies of the written appeal notice to the board and to all nonappealing parties. Upon receipt of this notice the board, if it has ordered closure of a drain, lateral drain, or ditch, is relieved of its obligation to procure the closing or filling of the drain, lateral drain, or ditch. The department shall handle the appeal by conducting an independent investigation and making an independent determination of the matter. The department may enter property affected by the complaint to investigate the complaint.
2. If the board fails to investigate and make a determination concerning the complaint within a reasonable time, but not to exceed one hundred twenty days, the person filing the complaint may file the complaint with the department of water resources within one hundred fifty days of the submittal date of the original complaint. The department, without reference to chapter 28-32, shall cause the investigation and determination to be made, either by action against the board or by conducting the investigation and making the determination.
3. If the department of water resources determines a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to title 61 or any rules adopted by the board, the department shall take one of three actions:
  - a. Notify the landowner by certified mail at the landowner's post-office address of record;
  - b. Return the matter to the jurisdiction of the board along with the investigation report; or
  - c. Forward the drainage complaint and investigation report to the state's attorney.

4. If the department of water resources decides to notify the landowner, the notice must specify the nature and extent of the noncompliance and state if the drain, lateral drain, or ditch is not closed or filled within a reasonable time as determined by the department, but not less than thirty days, the department shall procure the closing or filling of the drain, lateral drain, or ditch and assess the cost, against the responsible landowner's property. The notice from the department must state the affected landowner may demand in writing, within fifteen days of the date the notice is mailed, a hearing on the matter. Upon receipt of the demand, the department shall set a hearing date within fifteen days from the date the demand is received. If, in the opinion of the department, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. Upon assessment of costs, the department shall certify the assessment to the county auditor of the county where the noncomplying drain, lateral drain, or ditch is located. The county auditor shall extend the assessment against the property assessed. Each assessment must be collected and paid as other property taxes are collected and paid. Assessments collected must be deposited with the state treasurer and credited to the contract fund established by section 61-02-64.1. Any person aggrieved by action of the department under this section may appeal the decision of the department to the district court under chapter 28-32. A hearing by the department under this section is a prerequisite to an appeal.
5. If the department of water resources, after completing the investigation required under this section, decides to return the matter to the board, a complete copy of the investigation report must be forwarded to the board and it must include the nature and extent of the noncompliance. Upon having the matter returned to its jurisdiction, the board shall carry out the department's decision under this section.
6. If the department of water resources, after completing the investigation required under this section, decides to forward the drainage complaint to the state's attorney, a complete copy of the investigation report must be forwarded and must include the nature and extent of the noncompliance. The state's attorney shall prosecute the complaint under the statutory responsibilities prescribed in chapter 11-16.
7. In addition to the penalty imposed by the court on conviction under this statute, the court shall order the drain, lateral drain, or ditch closed or filled within a reasonable time period as the court determines, but not less than thirty days. If the drain, lateral drain, or ditch is not closed or filled within the time prescribed by the court, the court shall procure the closing or filling of the drain, lateral drain, or ditch, and assess the cost against the property of the landowner responsible, in the same manner as other assessments under chapter 61-16.1 are levied. If, in the opinion of the court, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners.

**61-32-09. Wetlands replacement fund - Continuing appropriation.**

Repealed by S.L. 1995, ch. 599, § 3.

**61-32-10. Exemption.**

The wetland replacement requirements of sections 61-32-01 through 61-32-11 do not apply to surface coal mining operations until reclamation of the wetland area begins pursuant to chapter 38-14.1.

**61-32-11. Application of prior law.**

Repealed by S.L. 1995, ch. 599, § 3.