17.0745.03000

FISCAL NOTE

Requested by Legislative Council
02/20/2017

Amendment to: SB 2263

1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill relates to issuing permits for subsurface water management systems.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Senate Bill 2263, as amended, has no fiscal impact to the Office of the State Engineer.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

Name: Dave Laschkewitsch
Agency: ND State Water Commission
Telephone: (701) 328-1956
Date Prepared: 02/20/2017

17.0745.02000

FISCAL NOTE

Requested by Legislative Council
01/16/2017

Bill/Resolution No.: SB 2263

1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill relates to issuing permits for subsurface drainage.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1, subsection 3 requires the State Engineer to approve or deny permit applications for projects affecting property owned by the state or any state governmental entity. Subsection 5 allows the applicant to appeal the decision to district court. Although there would be a cost for defending the State Engineers decision we are unable to determine how often this could occur. We anticipate this would happen very infrequently, consequently this bill would have a minimal fiscal impact.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

Name: Dave Laschkewitsch
Agency: ND State Water Commission
Telephone: (701) 328-1956
Date Prepared: 01/18/2017

2017 SENATE AGRICULTURE

SB 2263

2017 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

SB 2263
1/26/2017
Job # 27505

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Bratteng

Explanation or reason for introduction of bill/resolution:

Relating to subsurface drainage permits

Minutes: Attachments: #1 - 25

Chairman Luick: Opened the hearing on SB 2263.

Senator Wanzek, District 29: Introduced Mr. Brian Hefty.

Brian Hefty, Agriculture PhD TV & Radio, Sioux Falls, SD: Provided the committee with information on tiling in ND (See Attachment #2).

(18:45) **Chairman Luick:** One of the dilemmas we have is how we are going to handle the upstream issues with downstream negative impacts. What are your suggestions or methods you have seen to handle that?

Brian Hefty: Some downstream landowners are concerned they are going to get flooded out. Initially in the first 2-4 weeks after tile is in the ground, there will be more water if that water table is high. After that point, it does not usually work that way; we usually see less water down streamline.
You can have any requirement you want but part of the problem is the downstream landowners many times do not understand what is going to happen and many times there is more fear about what is going to happen than what actually happens. You might want to encourage your university system and extension agency to put more information out there about tiling so the downstream people will understand what will happen.
The best thing is for people to continue to follow the natural course of where the water will go. As long as they do, we typically do not see any big issues anywhere around the country.

Chairman Luick: Are the number of people with concerns about tiling decreasing or increasing?

Brian Hefty: Ten years ago in SD, we went through some of the same things you are going through in ND. That fear has subsided as systems have been put in and are operational. If

the farmer is raising more crop, he is going to pull more water out of the system so there is typically less water going downstream rather than more.

(22:24) **Senator Piepkorn:** What percentage of tile installation is not done correctly?

Brian Hefty: I speak out against when someone wants a riser or a pipe that goes to the soil surface to connect their below ground tiling system because more contaminates can enter that tile line. We also have to make sure we are keeping water in the same watershed and leading it on the same path it is going to follow down to the river. I have seen very few bad tiling projects and for the most part, tile is going in the ground in the right fashion.

Senator Piepkorn: Do you have data on the water tables rising?

Brian Hefty: Yes, water tables go up and down. But while working with thousands of farmers across ND, we have had many more complaints and questions on how to deal with the high salt area and how to deal with the high water table area. I do not have specific data other than the state's rainfall records which have been rising over time.

Senator Klein: The extension center came out and said one of the opportunities to help soil was to tile. What happens if someone does not follow the natural water ways? Are you susceptible to litigation?

Brian Hefty: You are susceptible to litigation. If you are in MN or IA, you may have to deal with the water board if you wanted to tile into a county tile line or ditch. There is always a threat of litigation which is what keeps people honest and helps farmers work together. Drainage is important for soil health.

Senator Myrdal: You touched on education; can you speak to education efforts in other states?

Brian Hefty: In MN and IA, there isn't a tremendous push today on education because tile has been done for generations. One of the leading experts on drain tile is Gary Sands, University of MN. Extension agencies usually don't have a lot of money to do workshops all winter long. It is to farmer's advantage to make sure it is done right because if it is done wrong, tiling is shut down for everyone.

Senator Wanzek: Thanked Mr. Hefty. Senator Wanzek provided the committee with testimony from Representative Belter (See Attachment #3). Senator Wanzek Introduced SB 2263 (See Attachment #1 and #22).

(34:05) **Chairman Luick:** Did you have salinity issues?

Senator Wanzek: Some on the South East corner (See Page 10, Attachment #1). Senator Wanzek continued with his testimony (See Attachment #1).

(47:30) **Senator Klein:** If we are just clarifying language we created in 2011, have we gone too far? Are we still in the education process? It is conflicting when we are just trying to clarify what we thought we had in law but then we see a room full of people full of concerns.

Senator Wanzek: I am not trying to throw this in anyone's face; it is important to farmers and to me. Apparently there was more room for interpretation than I had thought, and I am willing to try and improve it. I doubt we are going to come out with some foolproof legislation but hopefully we make it more clear and get the intention of the legislature out there. I agree we want to do the steps to make sure it is done right but we do not want to get in the way of farmers who want to improve the soil conditions of their land or the productivity of their assets.

50:15 **Representative Headland, District 29:** Testified in Favor of SB 2263. The biggest issue is that the subsurface drainage laws are not being applied by the water districts in a uniform fashion. I do not think there is any other areas of law that legislators sit by without taking action to clarify their intent. I don't think there is any other section of law where we would allow different departments or districts to apply the law differently.

Senator Klein: I heard Senator Wanzek talk about an Attorney General's opinion. You were asking the Attorney General to apply the law evenly throughout the state. Here you are trying to make sure that happens?

Representative Headland: Yes. There was some disappointment from the group who had made their request to the Attorney General that he didn't want to tackle it. What his opinion said was that some of our statutes needed some clarification.

Chairman Luick: Mr. Hefty said certain states do not have tiling regulations but they rely on downstream negative impacts to be addressed by litigation. What are your thoughts on that?

Representative Headland: I think the producers in those states have a very large advantage over our producers. If there are legal issues that need to be resolved because of a subsurface drainage system, I don't know what better place to resolve those issues but in a court of law. HB 1390 will also help clarify things to the different water districts.

(54:45) **Senator Dotzenrod, District 26: Testified in Support of SB 2263.** I am a sponsor of the bill but I have found some difficulties with the bill. We did a second draft of the bill before we turned it in. I have six changes to offer the committee at a later time.
Senator Dotzenrod listed a couple of concerns with the bill's language. He wanted to ensure that those who may be experiencing downstream impacts do not have to spend money to provide technical evidence. He also thought 30 days may not be enough time to provide technical evidence.

(57:45) **Daryl Lies, NDFB President:** Testified in Support of SB 2263. Mr. Lees said his members supported water management and it was important to have the law clarified. He said it was not a bill for one company; it is for the enhancement and improvement of agriculture in ND.

(1:02:00) **Senator Larsen:** Do you have the statistics on the nitrate leaching that goes through the soil and ends up in the tiling and the holding ponds?

Daryl Lies: I do not have the technical information but we have other experts in this room.

(1:03:14) **Chad Weckerly, Board Director, ND Farm Bureau; Agronomist, Hefty Seed Company:** Testified in Support of SB 2263 (See Attachment #4). Mr. Weckerly provided the committee with information on testing he had done on water quality after tiling (See Page 5, Attachment #4).

(1:08:30) **Senator Piepkorn:** For the project you needed the $1,000 application for, what would the total cost of the project be?

Chad Weckerly: We would intend to install it ourselves or a hire a contractor. The material cost should we install it ourselves would be around $450 an acre.

Senator Piepkorn: How many acres and what would the total cost be?

Chad Weckerly: It varies by field. We have some patterned tile projects where the whole quarter would be tiled. We also have other properties where we only tiled 40 acres.

Senator Piepkorn: So what is the cost? How many acres would your largest project be in the county where you would have to pay the fee?

Chad Weckerly: In Sheridan county, we would be looking at projects that could cover a section. Currently we have a tile plan assembled to tile one section of property. It's all currently surface drained—we are not changing anything on the property other than the fact we would like to move the water in a subsurface form instead of a surface form and eliminate the erosion and maintenance costs associated with having to clean the surface drains.

Senator Piepkorn: For a section project, $1,000 dollars probably wouldn't be too much of a deterrent but I could see it could be a pain for forty acres.

Senator Klein: But the $1,000 is for an application fee; that does not necessarily mean it will be approved. The $1,000 is nonrefundable even if your application is denied, correct?

Chad Weckerly: Correct.

Senator Larsen: When you submit the fee, do they provide you with an itemized bill on where the $1,000 goes?

Chad Weckerly: No; they are charging the fee whether they have any expense or not.

Senator Myrdal: Are you aware of how many tiling projects have been accomplished in this county that charges a fee?

Chad Weckerly: Two small projects. I am also aware of other neighbors who have applied but cannot get an answer. It seems the policy has become to table a motion with a tile permit with no intention to bring it off the table to make a decision. That is the reason I think the bill before you which puts a 60-day timeline on a response is necessary to ensure those who apply for a tile permit get an answer in a reasonable amount of time. 60 days is plenty of time for them to research and assemble and it is a necessary information.

Senator Larsen: We have the Souris and Devils Lake river basin near Minot; do those surrounding counties charge fees?

Chad Weckerly: I do not know.

(1:13:45) **Andy Peterson, Greater ND Chamber of Commerce:** Testified in Support of SB 2263 (See Attachment #5).

(1:16:30) **Edwin Erickson, Jr., Farmer, Sargent County:** Testified in Support of SB 2263. Mr. Erickson shared his experience with his tile project being put on hold because of perceived downstream impacts. He said Houston Engineering out of Fargo did a study and proved to the water board that there was not enough water coming to warrant placing the project on hold. Mr. Erickson said not only was his project put on hold but the water he is not allowed to drain is impacting the roads.

(1:19:30) **Chairman Luick:** How big is this pipe and what are the flows?

Edwin Erickson: I think it was an 8-inch pipe, I don't have the flow information.

Chairman Luick: Was it dual or single wall?

Edwin Erickson: Dual wall.

(1:20:12) **Mark Formo, ND Grain Growers Association, Farmer, Littchville, ND:** Testified in Support of SB 2263 (See Attachment #6).

(1:22:29) **Carson Klosterman, ND Corn Growers Association:** Testified in Support of SB 2263 (See Attachment #7).

(1:23:10) **Senator Klein:** Drainage used to be just creating channels and tiling maintains soil health much better. Am I incorrect?

Carson Klosterman: You are correct. I also sit on the production and stewardship at the national Corn Growers level. We have seen sustainability on our farm as we have gone from more aggressive tillage to more of a conservation tillage and we feel the subsurface drainage has allowed us to be better stewards.

(1:24:30) **Representative Brandenburg:** Testified in Support of SB 2263. Representative Brandenburg said tiling helps with water salinity. He said the bill gives the law clarity for the water boards and county commissioners.

(1:26:30) **Craig Olson, ND Soybean Growers Association:** Testified in Support of SB 2263 (See Attachment #8 and #9).

(1:30:00) **Richard Gramlow, Farmer, Dickey County:** Testified in Support of 2263. Mr. Gramlow shared his experience shifting from federal crop insurance to tiling to manage weather risks (See Attachment #24).

(1:36:55) **Jim Bahm, Member of the Executive Committee, Agriculture Coalition:** Testified in Support of SB 2263. (See Attachment #10) Mr. Bahm gave examples of saline issues he had experienced in his farming career.

(1:40:30) **Senator Larsen:** You were talking about the increase of participation this winter. Are you responsible for the management of the surface water on your property and should you also be responsible for your subsurface water management?

Jim Bahm: I believe every land owner and farmer would consider himself as a conservationist.

Senator Larsen: It is confusing why we have to ask for the management of the subsurface water when there are no permits for the rain or slough water draining off our property.

(1:42:10) **Brain Vculek, Farmer, Sargent County:** Testified in Support of SB 2263. Some of my tiling projects have required a state wide significant permit. I believe that is burdensome which is one of the reasons I support SB 2263. It removes that burden from most of the projects I have been involved in. I do support the idea that the downstream person would have to provide technical data that showed impact.

(1:43:55) **Committee Discussion:** Senator Piepkorn asked Mr. Vculek to briefly describe the problems he had encountered with the statewide regulations. Mr. Vculek said he had been involved in the Jackson improvement which is a-5-million-dollar legal assessment project. The state water commission changed their rule to rule state-wide significant which lengthened the project to 5 years. Mr. Vculek said he had been involved in another state-wide significant ruling which he was able to get reversed; but it takes time and money.
Senator Piepkorn asked about the criteria for moving a project to the state-wide significance level. Mr. Vculek believed when a farmer applies for a permit, the county water resource board forwards it to the state water commission and they decide if it is state-wide significant.

Gary Knutson, ND Agricultural Association: Testified in support of SB 2263. Mr. Knutson said enhancing crop production is a priority to their members. He said this bill gives a basis to stand on to limit the scope of WOTUS.

(1:47:24) **Levi Otis, Argusville ND, Ellignson Companies:** Testified in Support of SB 2263. Mr. Otis shared his experience with tiling in ND and said SB 2262 would help farmers work with the farm bill. He provided the committee with Walsh County's subsurface drain conditions (See Attachment #20). Mr. Otis said he was unsure of whether it should be required that a downstream person get an engineering report because the water boards have engineers. He said that in MN, there are no downstream complaints because they have to bring technical evidence. Mr. Otis provided the committee with a copy of the Attorney General's opinion stating that water boards do not have the right to assess any fees (See Attachment #21).

(1:55:20) **Senator Larsen:** If the Attorney General's opinion says the water boards are not supposed to assess fees, should we put requirements in this legislation that those fees have to be reimbursed?

Levi Otis: There has been a lot of talk about this and I do not think the counties could afford to pay back those fees but what we see is so much inconsistency. Some counties charge a fee and some do not. If there were a court case, the counties would probably have to pay back the fees to whatever the statute of limitations is.

Senator Wanzek: Introduced Tom Scherer, NDSU Extension Agricultural Engineer.

Tom Scherer, NDSU Extension Agricultural Engineer: Testified Neutral on SB 2263 (See Attachment #23). Mr. Scherer informed the committee that it was difficult to separate the flooding impact due to tile from surface runoff.

(2:03:45) **Senator Larsen:** If you have all that data and information, why are the water boards asking the landowners to provide the same information you have?

Tom Share: The project was a four year monitoring project and we concluded it in 2013 and the previous version of this bill was passed in 2011. We did not have all the information accumulated at that time. The information is on our website and we have shared it at a number of venues.

Senator Klein: We have seen the value of tiling. You have shown through all you research that this is a valuable tool for soil improvement.

Tom Share: That is correct. Part of those site years was collecting water quality data and the primary concern was the dissolved salts in the soil that accumulate because of the high water table and we could document that the tile is slowly removing those salts. They do go into the receding water and they end up somewhere, so that can be a concern but the purpose of the tile is not only to allow air into the soil but also remove the dissolvable salts. We could document that the tile is slowly removing the salt. Some salt goes into the receding water.

Chairman Luick recessed the committee for floor session.

Chairman Luick resumed the hearing on SB 2263 Thursday, January 26th, 2 pm.

(2:07:30) **Mike Dwyer, ND Water Resource Districts Association:** Testified in Opposition to SB 2263. The problem with making the counties uniform is that county water issues are not all the same. In the 1970s, there was a lot of surface drainage. In 1973, the legislature said there needed to be a water resource district in every county because there was a bunch of litigation to the point where the ND Supreme Court used a reasonable use rule to determine whether an upstream farmer could drain unto a downstream farmer. There is a requirement for a provision that water boards can impose conditions. The letter I passed out form the Pembina County board talks about the conditions they impose. They have approved 15,000 acres of tile drainage in their county since 2011. They indicate in their letter than they have not denied a single permit (See Attachments #11a and #11b).
The current law allows the water board or downstream landowner to do an investigation. It does not require an investigation by an engineering firm, it just says an investigation. If water boards are going to impose conditions, they will probably ask their engineer to do an analysis

for them. It is not required because a lot of these permits do not require an investigation—it is obvious it will not cause impacts.
SB 2263 says if there is a technical investigation, it has to be by an engineering firm which is more difficult. There could be improvements to the existing law and we are willing to help pass improvements. We do not think there should be a law that prohibits water boards from imposing conditions. Some of those conditions include staying away from water lines. We think the current law that Representative Belter and others developed is very straight forward.

Mr. Drywer said one of the projects discussed was a surface water drain project which a longer process to approve.

(2:21:20) **Arvard Burvee, Red River and Dickey County Water Resource District:** Testified in Opposition to SB 2263 (See Attachment #12). In the county, I could count on one hand the number of tile applications we have ever held up for any length of time.

(2:31:45) **Senator Klein:** You had issues that went beyond the current law. In 2011, people came to the legislature because no one knew what the rules were. The rules we made were an attempt to make rules we would be able to apply across the state so the county rules would be the same. That didn't happen.
I am hearing you do not like the current law or this bill but if there were changes to the bill you would approve it. Are you saying this bill can be fixed or no?

Arvard Burvee: It depends on how it is fixed and if it can be improved then I would support it. If it continues in this current nature, we are opposed to it.

Senator Klein: Where is the Red River Water District?

Arvard Burvee: The Red River Water Resource District is all the counties in the Red River watershed.

Senator Klein: How does MN get by with almost no regulation while we are concerned about the rules in ND?

Arvard Burvee: With this bill, you are going to take the work of the water resource board and turn it over to the district judge. Like you heard, if the people in IA or MN have issues with the upstream drainage, they can sue. In my opinion, people will rarely sue. They may be offended but they will likely put up with it.

Senator Klein: That is my point--we over regulate and states right next to us suggest neighbors work together because of concern of litigation. Why do we need this regulation while states next to us can get by with little or no regulation?

Arvard Burvee: I cannot speak for MN or IA but in speaking for myself, the current drain tile law in ND could be simplified and it could be made easier for water resource boards to work. SB 2263 goes too far the other direction in removing too much regulation. We think there is a need for balance between regulation and land owner rights. People who want to tile have a right to improve their property as long as they are not adversely affecting the downstream

landowner who also has rights. There are times where we will act as advocates for the applicant.
Mr. Burvee gave an example where a downstream landowner was unhappy with an upstream landowner's tile.

(2:40:20) **Senator Larsen:** As a follow up on the question of the downstream landowner—How was he affected? Did it cost him a hardship or was he just upset that the upstream landowner tiled his land?

Arvard Burvee: It was probably a combination of the two. There also needs to be work between the upstream and downstream landowners to ensure there is maintenance on the drains.

Senator Klein: When you told the downstream landowner nothing could be done what happened? Have you heard if he has been truly affected?

Arvard Burvee: I have no feedback.
Mr. Burvee introduced his board members.

(2:43:00) **Monica Zentgraf, Secretary-Treasurer, Richland County Water Resource District:** Testified in Opposition to SB 2263. Miss Zentgraf gave a review of how the water resource district reviews applications. Miss Zentgraf said that although MN does not have many laws, they pass the authority to the MN watershed districts (See Attachment #13). Miss Zentgraf provided the committee with a letter of Richland County's concerns (See Attachment #14).

3:00:20 **Senator Myrdal:** The counties fund the local water boards, correct? A prior speaker said 100-dollar fee was not enough and you are decreasing the requirements to 20 acres. This seems to be an undue burden on the applicants.

Monica Zentgraf: When we start talking about 20 acres and $100, we are talking about minimal numbers. We are not in this to make money.

Senator Myrdal: It seems like an undue burden to decrease to 20 acres and require higher fees. What are your suggested parameters for a fair complaint of a downstream landowner? Should what is considered a legitimate complaint be at the full discretion of the water board? It seems that without this bill, the downstream person could be difficult with no parameters.

Monica Zentgraf: The water managers have experience and they have seen this. When a tile application goes before the board, they consider it. The board can recognize a frivolous complaint and perhaps we would then require technical evidence. If the board feels it is truly a legitimate complaint, the tile applicant should provide that evidence. In Richland county, we have only required technical evidence once so I don't know if technical evidence is always required every time there is a complaint.

Senator Myrdal: Doesn't this bill provide for parameters and freedom for the landowner upstream to be protected from a potential frivolous charge?

Monica Zentgraf: We see more legitimate complaints than frivolous. We do not always need an engineering report to figure out if something needs to be done.

Chairman Luick: Have you seen any cases where the downstream landowner has taken an upstream person to court?

Monica Zentgraf: No. They are just upset and it creates neighbor tension.

Chairman Luick: In the district, what is the worst case you have seen as far as downstream negative impacts?

Monica Zentgraf: The water board members would be better to answer that since they conduct the inspections. A lot of the things in our counties have been issues like the ditch needs to be cleaned out or the culvert is too high. These have not been huge battles; we have worked out these issues but it is facilitated by the downstream landowner and the applicant often with the board involved as well. There are answers beyond litigation.

Senator Klein: Wasn't there anger when farmers put in drain tile under 80 acres? When people went down to 80 acres, were they just concerned they would not get a permit?

Monica Zentgraf: The anger wasn't about the drain tile but if this bill passes, we will start to see that anger.

Senator Klein: If all these farmers are circumventing the rule now, there must be a lot of downstream people getting upset.

Monica Zentgraf: We hear complaints. But since the law is currently less than 79 acres, we cannot help the people with the complaints.

Senator Myrdal: We heard today most farmers putting in drain tiles are doing it responsibly. Are there really that many farmers putting drain tile in so irresponsibly that the downstream landowners are severely affected? If so, I have yet to hear what affects are severe enough to be of concerned.

Monica Zentgraf: Miss Zentgraf shared an experience with a culvert that was too high and the water came out on their property. She said there are people who will justify multiple tiling projects because it is under 80 acres without considering the fact they will only have one outlet. Miss Zentgraf expressed concern that 30 days would not be enough time to provide technical evidence in the winter because of weather limitations and engineers would be inaccessible in the busy season.

Senator Larsen: Are you in favor of changing the ruling from 80 to 160 acres or do you want to decrease the acreage?

Monica Zentgraf: I would like it to decrease to 20 acres.

(3:13:50) **John Paczkowski, Assistant State Engineer, Office of the State Engineer/State Water Commission:** Testified in Opposition to SB 2263 (See Attachment #15)

(3:20:00) **Eric Lindstrom, National Manager of Agriculture Policy, Ducks Unlimited, Inc:** Testified in Opposition to SB 2263 (See Attachment #16)

(3:30:00) **Senator Osland:** Do you have data from NDSU on their water testing qualities?

Eric Lindstrom: I can send you the information. I do not have the data now but I know they have done quite a bit of research. I know they were looking at a phase one project and they are also looking at another phase two project but I do now know what the status of phase two is.

Senator Osland: They have been testing that for a number of years.

Senator Larsen: You were talking about flooding; do you think increased tiling would reduce or increase flooding?

Eric Lindstrom: I think it is complex. There is research that shows more water in the soil column but there is other evidence that shows there is extended duration and frequency of peak flood period.

Senator Larsen: You were talking about nitrates. In this bill, would you want to see saturation beds put at the outlets?

Eric Lindstrom: That is a good question. Saturated buffers are not my area of expertise but I would say the wetlands on the landscape already provide that function and our interest would be ensuring those wetlands stay intact and continue to provide that service.

Chairman Luick: A few years ago, there was supposed to be a different way of identifying wetlands and it has altered some through the NRCS. If a farmer has a slight depression in a field, do you think it is better for the farmer to have the ability to tile that and get rid of it rather than compromising the integrity of the wetland because of the seed, fertilizer, and chemical applied over that wetland? There is a food source that I have been told is put in those wetlands for migratory birds but even with that with the concentration of chemicals those benefits are lost. Why wouldn't we encourage tiling and draining to eliminate those low spots in order to have a bigger wetland out of the way?

Eric Lindstrom: I would add this is a complex issue. Not all of ND wetlands are classified the same; we have some deep semi-permanent basins and we have small, shallow temporary wetlands. I would submit that if ducks just need water, we would be fine. But what we have lost in places like MN and the Red River Valley are those small seasonal depressions you are talking about. When water fowl come back from their wintering grounds and they settle across the landscape, those small shallow wetlands are their breeding habitat. Ten 1- acre wetlands will support three times as many breeding pairs as one 10-acre wetland. So we do not support consolidation of wetlands because of that reason.

Senator Myrdal: Where does your organization stand on WOTUS?

Eric Lindstrom: We want to support the best science to help determine that rule and we want to maintain current agriculture exemptions currently under the law.

Senator Klein: Did you comment on that rule before the EPA?

Eric Lindstrom: We have submitted some scientific evidence related to the rule, but it is not our responsibility to develop the final rule. We want the best science available to determine that decision and we want to maintain current agriculture exemptions in the current law.

(3:37:18) **Mike McEnroe, ND Wildlife Federation:** Testified in Opposition to SB 2263 (See Attachment #17). Mr. McEnroe responded to earlier questions: 1. One of the reasons why IA does not have drain permit laws is because most of IA was drained 100 years ago. 2. If tile drainage costs $450 per acre, it is going to cost $288,000 to tile drain a section. A $1,000 permit fee is change compared to a tile drainage budget which is extensive.

(3:39:56) **Senator Larsen:** This issue with nitrates in Iowa, do you know if there are saturation beds on the outlets of those tile drains using a medium that will capture nitrates?

Mike McEnroe: I do not know what the situation is. I know that Iowa and Des Moines have a serious problem with nitrates in the water supply.

(3:41:00) **Erik Volk, Executive Director, ND Rural Water Systems Association:** Testified in Opposition to SB 2263. (See Attachment #18).

(3:45:45) **Senator Klein:** How often have you had water breaks in a tiled field and how have you worked through that?

Erik Volk: It does happen quite often. Most of our rural water systems were started in the eastern part of the state in the population center and most of those were put in the early 1970s and the technology they used was faulty so there are a lot of issues with water leakage out there. Rural water systems are put in differently than an urban area so if you have a water leak in one area you cannot just shut of the problem spot and reroute the water.

Senator Klein: The water leaks are not caused by tilers ripping up the lines, correct? Are people working with you before they install tile so they are not ruining water lines?

Erik Volk: We have heard of some issues but I do not know of any specific instances. There are some instances where if a rural water system has a break, they have to track things down with the landowner and the contractor but nothing too serious.

(3:48:45) **Scott Mahrer, Forman, ND:** Testified in Opposition to SB 2263 (See Attachment #19).

(3:49:48) **Chairman Luick:** Could you describe the negative impacts you are having?

Scott Mahrer: I currently have 25 acres underwater.

Chairman Luick: Do you think it is absolutely as a result from the tiling and it has nothing to do with surface water?

Scott Mahrer: Correct. It has all been tiled in through a county road ditch.

Chairman Luick: What kind of rapport do you have with the upstream landowner?

Scott Mahrer: They never got permits or contacted us that they were tiling.

Chairman Luick: Do you know how many acres were tiled in that field?

Scott Mahrer: The landowner went to the water board in 2012 and asked what to do if he needed permits. The water board told him if the project was under 80 acres he did not need a permit. The project wound up being more than 80 acres. Last time I talked to him he was looking at a proposal of 570 acres to tile.

Chairman Luick: Would that come your direction also?

Scott Mahrer: It would all come south, yes. Hopefully they would modify it so it would go east instead but currently it will come towards my land.

Chairman Luick: What county do you live in?

Scott Mahrer: Sargent county

Senator Klein invited Kale Van Bruggen to address the committee.

(3:52:35) **Kale Van Bruggen, Rinke Noonan Attorneys at Law:** Mr. Van Bruggen provided the committee with information on drafting SB 2263. I worked with Senator Wanzek to develop language to draft this bill. To be fair to those who are before and against this bill, I want to offer some information and actual statutory reading to address some of the comments that were made.
My practice is 60% in ND, 30% in MN and the rest in Iowa. I am licensed in all three states. I am a native of Lamoure County, I grew up in Litchville, ND. The firm I work with is in St. Cloud but 100% of my practice is related to water law. Most of my clients are public drainage authorities: In MN, that is counties and water shed districts that construct and manage public drains (we call these legal drains in ND) that landowners pay for with their property tax assessment. I do represent as general counsel in ND the Bottineau County Water Resource District Board and as special counsel for the Foster, Wells, and McLean County water district boards. The rest of my clients are farmers. I represent them on regulatory issues dealing with water particularly with NRCS conservation compliance, US Fish & Wildlife services, easements, EPA, WOTUS, enforcement actions under Section 404 of the clean water act, and I do also take private cases which are neighbor to neighbor disputes. In those disputes there is attachment of civil liability on the upstream person who is doing the draining on the downstream person. I have been on both sides of those cases representing both the downstream landowner and the upstream landowner.

I would like to go through some of the points that were made and talk about what the existing law says and what the bill does to address some of those points. We heard from the state engineer's office, from the Richland County Board, and from Ducks Unlimited that this bill shifts the burden of technical evidence on the downstream landowner. If you go to the current law which is 61-32-03.1, it says "If an investigation by a water resource district or a downstream landowner within one mile shows that the proposed drainage will flood or adversely affect lands of a downstream landowner within one mile, the water resource district may require flowage easements before issuing a permit." So the idea of the flowage easement is that the downstream landowner has come to the upstream landowner and the water board and they have shown, through an "investigation" (the word currently in statute) that they are going to be flooded or adversely affected. If the board finds that, they have the authority under the existing law to require that easement. If that landowner does not give that easement, the landowners project may not be able to go forward because the board has found that civil liability might attach to you. Some say this bill shifts the burden to provide technical evidence but current statute already provides that. SB 2263 keeps that same burden; it just identifies what may be required in an investigation. It talks about technical evidence and what level you might have to prove in that investigation.

It has been interesting to hear about the permitting fees. My opinion of the current law in ND is that there is zero authority to charge permitting fees and this bill opens up for the first time since 2011, authority for water boards to recoup some of the costs of the permitting process. I will leave the policy of what that level should be for you to debate in your committee work but I want to read to you a couple phrases from the January 10th, 2012 Attorney General Opinion, 2012-L-01 (See Attachment #25). Mr. Fleming asked the Attorney General if water boards could asses costs for the investigation (Attorney Generals' response: Paragraph 3, Page 4-5, Attachment #25). This proposed bill gives the water resource districts authority to charge for those permitting fees. You have heard testimony today and you know that it is already going on but neither I nor the Attorney General's office agree with those who say we are now restricting that ability to assess permitting fees.

(4:00:30) **Senator Piepkorn:** Are you now employed or representing any individual or company related to this bill?

Kale Van Bruggen: Yes, Ellingson Companies is one of my clients so I work with tiling contractors. I was invited by Senator Wanzek, the sponsor of the bill. I want to provide the citations and information rather than telling you what your policy should be. These are citations to current laws in this state and that is the information I was asked to make sure the committee had as part the hearing today.

There has been a lot of talk about the timeline and I want to make sure we are clear what the existing law says versus what the proposed bill says. Existing law 61-32-03.1 says there must be a thirty-day notice to downstream property owners within one mile. The proposed bill states that you file your permit application with the water board and you file it currently with those downstream landowners and then thirty days has to pass before anything else can happen. The law says the board is not required to look at your permit until the next water board meeting after 30 days has passed. Let me give you an example: it is two weeks before my water board meeting and I go into file my water permit application. The water boards next meeting is two weeks later and they do not hear my permit application at that meeting

because thirty has not passed. I expect it would not be unreasonable to interpret that if I go file my permit application and I do not show proof that I also filed notice with the downstream landowners, that that thirty-day time period has not yet kicked in. SB 2263 would ensure the application is reviewed within the thirty-days. The state engineers' office had said thirty-days is not enough; again, current statute requires that permit applications that are forwarded to the state engineers office must be referred to the state engineer for consideration and approval and the state engineer shall make a determination within thirty days. So nothing is changing on the thirty-day period for the state engineer's office.

I offered the language on the 60 days saying that if you do not act on a permit in 60 days it is by default approved. I took that from MN statute 15.99 which applies to all local governments and all state agencies in the state of MN for that same purpose. It is how MN decided to ensure the application goes forward if the board does not want to take action on the application. There was testimony about Bois de Sioux Watershed District; they are subject to MN statute 15.99 which says if I file a permit application for tiling with that board and they don't hear it within 60 days, it is default approved. I don't need to go back to them, I don't need the physical permit back, I just need to show I filed it and that they did not take an action on it within 60 days. Again, the committee will debate what is an appropriate timeframe but it is one way that one state has dealt with it.

One final comment I want to make is to address the question on intakes. I know the Ducks Unlimited testifier stated that what this bill says is that you don't need a permit to drain wetlands. That couldn't be farther from what the language actually says. It is difficult sometimes to differentiate how we should address surface drains versus subsurface drains when your project includes a riser, Hickenbottom, or one of those stand pipes. The idea behind the proposed bill was to say, if you are using a stand pipe or an intake on your subsurface drain tile project to drain one of those large surface body waters that a pond or slough or lake that has an 80-acre watershed to it, then it probably does not make sense that you should bear that burden like we expect of our surface drainers to show what the impact is downstream. A big part of that 2011 amendment and the joint resolution that Senator Wanzek testified about promoting tiling was to say drain tile is different because rather than being uncontrolled drainage, it's now something that is controlled. And we want to address it differently. So a big difference between the surface drain statute in 03 and the subsurface drain statute in 03.1 is who bears the burden in the permitting process to show that something further needs to be done than just a rubber stamp. The current state of the law is that if it is a surface drain, the applicant bears that burden. If it is a subsurface drain, the downstream landowner bears that burden. I do think the intake language is confusing; it's hard to understand and right now it is because it refers to the words in the surface drain statute rather than just citing to that statute. But what it is saying is if you are using your tile as an intake to act like what a surface ditch does and drain one of those large bodies of water, then we want you to be permitted under the process of that surface drain statute. But if what you are doing is putting in an intake somewhere outside of a wetland body or somewhere to act as a catch basin for the end of a grass waterway or something other than draining an 80-acre watershed, then now you have a tiling system that regulates that discharge rather than what a surface rain ditch does so it is fair to say that it is still a tile system so it gets permitted under the subsurface drain statute.

We had a conference call with Pembina County water resource district a couple days ago; they offered what I thought was a great suggestion to change that language. They brought up the issue of the drainage coefficient. Drain coefficients may be regulated so if someone wants to use a greater coefficient, we are now more concerned about the downstream impact so we could consider permitting under the surface drains statute where a little more is expected from you before you get your permit application.

(4:08:20) **Senator Klein**: Are we creating an undue burden for the downstream person to provide technical evidence? Can you talk about current law versus what we have in this new law?

Kale Van Bruggen: I tell applicants who call me that if a downstream person comes to the board meeting without evidence, then the applicant has to decide whether to wait and see if the board will grant the application or go to court to ask the water board to follow the process. In my opinion, if a downstream landowner shows up and has done an investigation to present evidence, then the board should grant the permit and not require a flowage easement. If you had no permitting law, that is who the burden of proof would be on. Once my drain tile project is done on my property, that downstream landowner has an option if he believes I have violated what is called the reasonable use rule. All water board managers should know that rule because that is the standard by which the courts force you to apply what the property right is. If they show up at that meeting and have not provided evidence to talk about that standard and the board still won't give you a permit the board is now limiting what the courts have said is a property right to do reasonable drainage off of your land.

(4:11:05) **Senator Myrdal:** Can you clarify what the word "investigation" means in the current code?

Kale Van Bruggen: I wish that I could. It is not defined in statute; it is not defined in regulation. My opinion is that most judges are going to agree that investigation is something more than voicing your opinion that you are opposed to a project. I think common sense would imply that investigation means you have done some kind of quantification of the impact. In MN, ND, or IA, when I get a call form a downstream landowner saying someone drained onto their land whether they had a permit or not, getting a permit to do drainage does not protect you from liability if you are the upstream landowner. The permitting process does not take away that downstream landowner's right to say they are doing an unreasonable amount of drainage. The first thing I tell them is that I cannot show up in court to file a complaint if you have not hired an engineer who can help quantify this for the judge because no judge will hear that case. I am not saying you have to put it in policy that they have to hire an engineer. However, the most common scenario is that an engineer will say there was a surface drain running there before the tile system and I have to disclose in court how much water ran off that property when it was saturated and full. The downstream landowners who often have merit in court are landowners with areas that were cropped and the ponding duration is now longer.

Chairman Luick: Do you have any documentation as far as the differences of what you think should be in here versus what our old language is?

Kale Van Bruggen: I did help in writing that first draft with Senator Wanzek and legislative council, so the current bill was my first attempt at this. I will tell you that in this state I have been trying to get my opposing counsel on water boards to the table to help address these issues for two years. I couldn't do it which is why I think a bill got dropped without that discussion ahead of time. The most helpful phone call I have received in the last five years I have been practicing in this area is the one I was on with the Pembina water board a couple days ago. They discussed some ideas and I told them that permitting in their county must be running smoothly, because no landowner in Pembina County has ever called me to say they could not get a permit. We have talked about some amendments and I would be happy to share them with Senator Wanzek to give the committee.

Senator Myrdal: Pembina county is my district.

Senator Piepkorn: Do any of the other landowners or groups have an attorney or representative you wish to present?

Senator Klein: I want to get back to the 30-day limit. After listening to you, it sounds like we have more than thirty days because it's how the timing of the board lines up, correct?

Kale Van Bruggen: Correct. I am basing that on page 2, line 26 of SB 2263.

(4:16:58) **John Paczkowski:** We do have an attorney here and we can work with the committee later on alternative language.

Mike Dwyer: I do represent ND's water resource districts and I would like to mention that I never heard from Mr. Van Bruggen about amendments or changes to the statute. We would certainly like to work on that as well.

Chairman Luick: Closed the hearing on SB 2263.

2017 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

SB 2263
2/9/2017
Job # 28139

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Leatherg

Explanation or reason for introduction of bill/resolution:

Relating to subsurface drainage permits.

Minutes: Attachment: #1

Chairman Luick: Provided the committee with amendments on SB 2263 (See Attachment #1).

Committee Discussion: The committee discussed the schedule for the next week.

Chairman Luick: Adjourned the committee meeting.

2017 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

SB 2263
2/16/2017
Job # 28442

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Brotherson

Explanation or reason for introduction of bill/resolution:

Relating to subsurface drainage permits

Minutes: Attachments: #1 - 2

Chairman Luick: Opened the discussion on SB 2263. He provided amendments to the committee (See Attachment #1).

Senator Piepkorn: So this is a hog house amendment?

Chairman Luick: If this amendment is acceptable to the committee, it would take the place of the bill. If it is not, it won't be adopted.

Senator Klein: I have brought this amendment to some of groups as well as the prime sponsor. The way it is written, they would ask for a Do Not Pass not only on the amendments but also the bill should the amendments be adopted. They're concern was that we only tweak a couple of issues I the bill but we know have a hog house bill before us changing a lot of issues. I am working with the prime sponsor on some amendments. I know we are running out of time but I do not want to pass a bill the prime sponsor is totally opposed too.

Senator Piepkorn: So there are amendments coming to the original bill?

Senator Klein: We are working on the bill; the hog house has not been introduced or passed so at this time, we are still on the bill.

Senator Larsen: Did we vote on the amendments from February 9th (.02004)? On page 1, line 7 I wanted to take out drainage and put in water management and this amendment speaks to that water management.

Chairman Luick: I incorporated the language of water management into this amendment.

Senator Myrdal: I concur with Senator Klein on this hog house. The original bill sought to clarify the 2011 legislation. These amendments go backwards for the landowners. We need to go back to the original intent of this bill because the water resource boards did not have

clear direction on how to apply the law and there was not uniformity across the state. The original bill addressed that.

Senator Larsen: There was a discussion about the fees; is that addressed in these amendments?

Chairman Luick: The fee is at a maximum of $750. The reason for the fee is because there are applications who come in from individuals who do not know how to put their application together and the water resource board has to take the extra time and manpower to put it together. There are also cases where man power is required and they have to get an engineer or a surveyor to look at something and that is why they asked for it to be raised.

Senator Myrdal: I think a fee is unacceptable. The permits are more of a notification so that rural water and water management understand where it is going and can care of the downstream concern. Landowners will be double charged for improving their own land because they already pay taxation to the county resource boards. That is a concern to my constituents.

Senator Klein: In the .007 amendments, I thought it couldn't exceed $500?

Chairman Luick: That is correct, I misspoke. The $500 was a compromise.

Senator Piepkorn: When you say you are concerned about the landowners; you are talking about landowners who want to tile their land as opposed to the downstream landowners?

Senator Myrdal: I think it is the responsibility of the water resource board to do that work because when a landowner improves their land, it ultimately improves the property value which means more funds to the county water boards.

Senator Piepkorn: The main concern you are getting from your constituents is just about the fee they have to pay for the permit not the other issues surrounding the terms of the permitting? So you are just hearing from people who want to tile rather than downstream landowners who are concerned about the effect of tiling?

Senator Myrdal: I represent a tri-county area and our experience is that the bad actors can be on both sides of the issue. I think landowners have responsibility to make sure they don't do damage to downstream. I am concerned that we set parameters. The original intent of the bill was to make a uniform application across the counties. I think the original bill had some issues but we need to get back to finding a uniform way of applying what was intended in the original law.

Senator Larsen: In testimony, it was clear and evident that there were two counties side by side and the farmer was easily getting tiling done in the one county and when he was faced with the other county with a $1,000 permit fee and restriction, there was no tiling in that county. We also heard the attorney general opinion that there shouldn't be any fee. We have counties that are charging these people and I don't they should be charging them at all.

Chairman Luick: My concern is that they are using a couple different methods stopping the projects from moving forward. One of those ways is deeming something statewide significance if it's necessarily there and the other would be the exorbitant fee that is unnecessary unless there is extra work that has to take place to get the technical evidence. If there is a need for technical evidence, it is up to the discretion of the board to determine what the fee will be.

Senator Klein: There will be a $500 fee in my amendments.

Chairman Luick: I think that fee is reasonable. I don't expect the boards will do something above what they are supposed to be doing. The fee is nothing compared to the expense of the project and I don't expect other landowners to pay for improvements on my land.

Committee Discussion: The committee continued to discuss the proposed amendments.

Senator Piepkorn: When it comes to the wording in the amendment page 3, paragraph b, we are talking about the approval of the water board. I am wondering about the landowner versus the renter. Let's say a land owner gets a letter from the renter who wants to tile their land; the owner of that land isn't necessarily involved in that, correct?

Chairman Luick: The renter has to issue a document which gives them the authority to do whatever they deem necessary for the property.

Senator Piepkorn: If someone is renting property for a year and he sends the notarized letter of approval; that letter is good for perpetuity?

Chairman Luick: If he has the authorization to do that.

Senator Piepkorn: That sounds tenuous.

Chairman Luick: It could be. Again it goes back to the relationship between the landowner and the renter.

Senator Osland: This is a foreign issue to the counties that have not tiled before but they will get used to the process. We have some issues that are coming with water we will have to address. From the practical standpoint, where we are doing this already there is not an issue but where we aren't doing it, it is an issue.

(24:30 – 30:55) **Committee Discussion:** Senator Larsen and Senator Osland talked about the history of tiling. Senator Piepkorn said he believed that there was a place for regulation in tiling and he was concerned that there was nothing in the bill addressing water quality. Chairman Luick said the amended addressed water quality concerns because it gave the drain boards the authority to install water control structures. Senator Osland asked how much nutrient control machinery cost and Chairman Luick and Senator Larsen provided information on the systems.

Senator Klein: All the bill is trying to do is provide clarification for counties on the current law. We need to get back to making this bill as easy as possible and if we can't get to that,

let's go back to the current law and not allow districts to charge any fees and the attorney general could suggest that all those permits they did charge for they have to repay.

(32:18 – 37:00) Committee Discussion: In response to a question from Senator Larsen, Chairman Luick clarified the language on page 3, line 5. Senator Piepkorn asked about the difference of the State Engineer's responsibilities between the amendment and the original bill. Chairman Luick said that under current law, the State Engineer has provided the application and they determine if the project has statewide significance. Senator Larsen asked about time delay and Senator Klein said that page 4, line 5 deals with the denial of permit.

Senator Piepkorn: Who determines what has statewide significance?

John Paczkowski, Assistant State Engineer, Office of the State Engineer, State Water Commission: Prior to the 2011 legislation, it was the role of the State Engineers to review all applications (whether surface or subsurface) would come into our office and we would make the determination whether it was of statewide significance or not and it would get sent the water board. The water board then becomes the permitting authority. If it is of statewide significance, it is still sent to the board, there is just a public hearing, there is further notice provided and then the board makes a decision. If they deny it, its denied. If they approve it, the State Engineer has final opportunity for approval.
After 2011, that process still works for surface drainage but the State Engineer's office is taken out of subsurface drainage and the applications go directly to the water boards and each of the water boards look at the criteria and they determine statewide significance.

Chairman Luick: The reason that was changed is because the amount of water that comes out of a subsurface drainage versus a surface drain is significantly less.

Senator Larsen: I think the time frame was on page 4, line 8-10.

Senator Piepkorn: Can you briefly describe what the criteria of state wide significance is?

John Paczkowski: That criteria are listed in administrative code and there are four criteria to be looked at.
Mr. Paczkowski read the criteria from administrative code 89-02-01-09 (See Attachment #2).

(42:05) **Senator Larsen:** As far as research on this, I've heard that in areas where it is vulnerable to flooding that if tiling is incorporated it actually reduces that. Have you been discussing nationwide projects that are prone to flooding where tiling has been implemented that reduces the flooding?

John Paczkowski: There was actually an independent study conducted by a gentleman named Chuck Fritz who oversees the International Water Institute. They did a two-year study and collected experts in the field and did a two-year research study and they agreed they wouldn't make a recommendation unless everyone agreed. In the end, they said it depend on the situation. Itdid a two year research study. They agreed they wouldn't make a recommendation unless everyone agreed. It does matter when and where the flooding occurs. The argument that is made that it opens up the land to soak up flood waters is

negated in instances where you have flooding occurring in the spring and the ground is frozen. At that time when everything is running off and the drains are contributing, that could be problematic. On the other hand, in the summer it reduces the runoff in a slow rain.

Senator Piepkorn: Do you see the state's current role as the State Engineer being in the right spot with the water boards as far as making these determinations?

John Paczkowski: In 2011, we were removed from that process. The problem with that is consistency as you alluded to before. The vast majority of the tile drains are not of statewide significance so therefore if all of them were sent to our office and we made the statewide significance determination, then it would be county a does it this way, county b does it that way. The other thing that was missing according to one of the authors of the bill, is the fact that in the end, those permits come to the State Engineer's office and we file them in a data base so if anyone has questions, regardless of where they're at, there is a central clearing house. That language was removed from the original SB 2263 which was an oversight rather than their intent. In the vast majority of cases, the water boards are the permitting authority rather than the state. Some of the discussion that takes place isn't quite on the up and up in my opinion.

Senator Piepkorn: If it was an oversight, did they ask to have that language put back in?

Chairman Luick: We will look at the new amendments.

Chairman Luick: Adjourned the discussion on SB 2263.

2017 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

SB 2263
2/16/2017
Job # 28457

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Crotteau

Explanation or reason for introduction of bill/resolution:

Relating to subsurface drainage permits

Minutes: Attachment: #1

Chairman Luick: Opened the discussion on SB 2263.

Senator Klein: Provided the committee with the Christmas Tree version (See Attachment #1) as his amendments were being prepared by legislative council. Senator Klein said he had worked with the sponsor to craft the amendments. He said the intent of the bill was to clean up the language and make the law clear. He said the sponsor was amiable to the $500 although he had $100 in the bill initially but $500 was the compromise since there was discussion of $750.

Senator Piepkorn: The $500 is more of a philosophical issue; it is not going to be a financial burden.

Senator Larsen said he was unhappy with the fee.

Senator Piepkorn: So what we have here are amendments to the original bill and this is what we are going to consider.

Senator Larsen: On page 3, line 24 (See Attachment #1) there was some testimony about this technical evidence and how they have to obtain it. For some clarity, I thought someone said they have all the evidences and there was some frustration that the landowner had to provide the technical evidence. Isn't the evidence already with the state?

Chairman Luick: Technical evidence could be collected for or against each party and someone has to decide which party pays for it.
Chairman Luick gave an example of a case that would require technical evidence.

Senator Myrdal: I did ask at the original hearing about that because I thought it was ambiguous. So on page 3, lines 9-11 we take that out of the equation which takes the potential unreasonable cost out, but line 12 gives more specifics. Even though it is a small

amendment to overstrike that, I think it could have huge implications as far as potential cost that would be up against the water management applicant.

Senator Klein: Do address Senator Osland concerns about the ditch and cattails, paragraph c is related to that. They have to have reasonable conditions, pay for that permit, and maintain that area in a neat and professional manner as determined by the water board.

Senator Myrdal: This language is also keeps anything under 80 acres at notification status to alert rural water. Hopefully we will have something down the road that is uniform.

Chairman Luick: On line 10-12, page 4 how do we handle this situation?

Senator Klein: Is that in the original bill?

Chairman Luick: Yes.

Senator Klein: I don't have that answer.

Senator Larsen: On the very last sentence where it says "draining", I think that should be "water management." This is clarification of the definition of what we are doing. We are managing subsurface water, not draining it.

Committee Discussion: The committee discussed when they were going to take action on the bill.

Chairman Luick: Adjourned the discussion.

2017 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

SB 2263
2/16/2017
Job # 28470

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Brotherg

Explanation or reason for introduction of bill/resolution:

Relating to subsurface drainage permits

Minutes: Attachment: #1 - #2

Chairman Luick: Opened the discussion on SB 2263. The committee discussed Senator Klein's and Senator Luick's amendments (See Attachment #1 and #2).

Senator Klein: I changed the word draining to subsurface management. I also spoke to legislative council about adding the reports to the water commissioner. We are also trying to figure out what language to put in so districts don't drag their feed but I wasn't able to put that language in the amendment.

Chairman Luick: In your amendment, Senator Klein, did you touch on anything about the intakes of a project or any of the requirements of coefficients?

Senator Klein: No and it wasn't in the original.

Senator Myrdal: Could you point to that particular issue in your amendments?

Chairman Luick: It is on page 4. The reason it is in there is because if you limit the amount of flow that comes out of these systems, you have the opportunity to control downstream impacts, you also have the ability to open it up to these systems using the surface inlets into the systems and then the drain boards don't have to worry about how to permit a 79 acre or a larger system because the drainage coefficient takes care of that.

Senator Larsen: Is your amendment different than the original version of the bill?

Chairman Luick: Yes. It goes back to the water management process rather than just providing clarification to existing law.

Senator Larsen: If we adopted Senator Klein's amendments, where would we insert number 10?

Chairman Luick: If we inserted that, it could actually take the place I believe line 22, subsection 6 is actually duplicated in here. I think that statement is already in the original language but I would have to check.

Senator Klein: This is not from legislative council; these are things we worked through. Until we have the amendments in hand, we can't take action.

Committee Discussion: The committee discussed when they would take action on the bill. Senator Larsen said he would like to overstrike the $500 fee.

Chairman Luick: Adjourned the discussion on SB 2263.

2017 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

SB 2263
2/17/2017
Job # 28499

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Brotherg

Explanation or reason for introduction of bill/resolution:

Relating to subsurface drainage permits

Minutes: Attachments: #1 - 2

Chairman Luick: Opened the discussion on SB 2263.

Senator Klein: Provided the committee with a copy of his amendments (See Attachment #1).
Senator Klein also provided the committee with a copy of an additional amendment (See Attachment #2).

Chairman Luick: We do have some changes I foresee coming from the house side.

Senator Klein: We had taken out the 3/8 coefficient in the original bill but this amendment puts it back into the bill (See Attachment #2).

Committee Discussion: The committee discussed the amendments.

Senator Klein: That was another issue we discussed about the new terminology of water management which will now require 180 changes in the code. I suggested she do the minimum and as we work through the project, it can be changed as we go.

Senator Larsen: I totally agree. I remember as we revised other agriculture code, it was an evolution. Code revision takes time and there's no problem with starting the process of updating the code.

Committee Discussion: The committee discussed amendment language.

Chairman Luick: The amendment would go subsection b right where subsurface water management begins. By limiting this to 3/8 coefficient, it simplifies things for the drain boards and farmers because you are limiting the flow out of the systems.

Senator Myrdal: You are saying in the middle of that section b that starts with subsurface down the end is going to be overstruck? Will it include 80 acres?

Chairman Luick: The 80 acres is in material either way.

Senator Larsen: Is this part in the additional amendment (Attachment #2) just dealing with agricultural properties not commercial properties?

Chairman Luick: Correct. I don't know if we should address commercial drainage or not. The method for commercial drains is completely different.

Senator Klein: Moved to adopt amendment 17.0745.02008 along with the drain coefficient amendment.

Senator Myrdal: Seconded the motion.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent.

Motion carried.

Chairman Luick: I have a concern that the amendment allows water to be drained from one county into another and the drain boards do not want that because another county is receiving the negative impacts.

Senator Klein: What is in current language?

Chairman Luick: The current language in code matches the amendment.

Senator Klein: So the amendment doesn't change current code but your concern is that it should be changed?

Chairman Luick: Correct. What happens is the other district does not have any say on the negative impacts that happen in their district.

Senator Larsen: When we had the hearing, no water boards came forward with that concern.

Committee Discussion: The committee continued to discuss the effects of the amendments to the bill.

Senator Klein: Moved Do Pass As Amended.

Senator Myrdal: Seconded the motion.

Senator Larsen: I would like to add cutting page 3, line 8.

Senator Klein: The sponsor agrees with you Senator Larsen but he suggested as the bill works through the process, we can work on that.

Senator Myrdal: I also talked with the sponsor and I agree with Senator Larsen but I understand the urgency to get this bill out and I am willing to work with the other chamber to remove that part.

Senator Klein: I agree. We can keep working on the fee.

Chairman Luick: I am concerned about the language on page 2, line 7 of the amendment the problem is that the drain boards are interpreting this differently.

Senator Klein: It has to be at least thirty days after receipt of the application. It provides enough time for the board to get the technical assistance they need. We don't want to put a restriction of within thirty days because it puts too much pressure on the board. This allows them to get the application, have the time to look at it. This gives them 6-8 weeks.

Senator Myrdal: The landowner is responsible to send the application in a timely manner.

Chairman Luick: On that same line, should "receipt of application" read "completed application?"

Senator Myrdal: Is "completed application" not covered in a different area?

Senator Piepkorn: Why is line 17, page 4 have to be in included in here?

Chairman Luick: I think that is covered in another area.

Senator Piepkorn: I am just wondering why it is necessary that it be in there.

Chairman Luick: It is there because the amount of water that comes out of a subsurface water system is so meniscal so it is harder to prove that damage comes from a subsurface system.

A Roll Call Vote Was Taken: 5 yeas, 1 nay, 0 absent.

Motion carried.

Chairman Luick will carry the bill.

Senator Piepkorn: I would like the record to show that I voted no because I thought Senator Luick's amendment was more fair to the water boards, landowners, etc. I have more concerns about the state engineer's role in the project more than the downstream landowner. I hope the water boards and local commissions have their role in the it.

Senator Klein: I would add that the application portion was put in by request of the water boards.

Chairman Luick: Adjourned the meeting.

ET
2-17-17
p-1 of 3

17.0745.02009
Title.03000

Adopted by the Agriculture Committee

February 17, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2263

Page 1, line 2, replace "drainage" with "water management system"

Page 1, line 6, overstrike "**Permit to drain subsurface waters**" and insert immediately thereafter "**Permits for subsurface water management systems**"

Page 1, line 7, after "1." insert "a."

Page 1, line 7, remove "a"

Page 1, line 7, overstrike "subsurface drainage system"

Page 1, line 7, after "~~comprising~~" insert "a subsurface water management system"

Page 1, line 8, remove "A person seeking a"

Page 1, remove lines 9 through 11

Page 1, line 12, remove "[32.37 hectares] or more."

Page 1, line 12, replace "of a drainage" with "drained by a subsurface water management"

Page 1, line 12, remove "without surface"

Page 1, line 13, remove "intakes"

Page 1, after line 14, insert:

"b. Subsurface water management systems that use surface intakes must be permitted exclusively under this section if the system will have a drainage coefficient of three-eighths of an inch [0.95 centimeters] or less. Subsurface water management systems that use surface intakes must be permitted exclusively under section 61-32-03 if the system will have a drainage coefficient exceeding three-eighths of an inch [0.95 centimeters].

c. A person that installs a water management system that encompasses less than eighty acres [32.37 hectares] shall notify the water resource district within which is found a majority of the land comprising the water management system of the installation before it occurs, but no permit for the installation may be required."

Page 1, line 16, replace "issued" with "required"

Page 1, line 17, overstrike "drainage" and insert immediately thereafter "water management"

Page 2, line 19, after "submission" insert "via certified mail"

Page 2, line 20, replace "drainage" with "water management"

Page 2, line 25, after the underscored period insert "The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection."

ET
2-17-17
p. 2 of 3

Page 2, line 26, remove "At the next meeting of the water resource district board which is at least thirty days"

Page 2, remove lines 27 through 31

Page 3, remove lines 1 through 4

Page 3, line 5, remove "4."

Page 3, line 5, remove "If property owned by the state or a state governmental entity would not be"

Page 3, line 6, replace "affected by the system for which a permit application is submitted, the" with "The"

Page 3, line 7, after "application" insert "at its next meeting that is at least thirty days after receipt of the application"

Page 3, line 8, replace "one" with "five"

Page 3, line 11, replace "drainage" with "subsurface water management"

Page 3, line 13, replace "drainage" with "subsurface water management"

Page 3, line 13, remove "and signed by a licensed, professional"

Page 3, line 14, remove "engineer"

Page 3, line 14, remove "engineering"

Page 3, line 15, remove "drainage"

Page 3, line 21, replace "drainage" with "subsurface water management"

Page 3, line 23, replace "flowage easement" with "notarized letter of approval"

Page 3, line 24, remove "The applicant shall file a flowage easement in the office"

Page 3, line 25, remove "of the recorder of the county in which the easement is situated."

Page 3, line 26, replace "flowage easement" with "letter of approval"

Page 3, line 26, replace "drainage" with "a system that outlets"

Page 3, line 29, after "c." insert "A water resource district may attach reasonable conditions to an approved permit for a subsurface water management system that outlets directly into a legal assessment drain or public highway right-of-way. For purposes of this subsection, "reasonable conditions" means conditions that address the outlet location, proper erosion control, reseeding of disturbed areas, installation of riprap or other ditch stabilization, and conditions that require all work to be done in a neat and professional manner.

d. A water resource district may require a subsurface water management system granted a permit under this section to incorporate a control structure at the outlet into the design of the system and may require the control structure be closed during critical flood periods.

e."

Page 3, line 31, replace "drainage" with "water management"

ET
2-17-17
P-3d3

Page 4, line 1, replace "flowage easement" with "notarized letter of approval"

Page 4, line 8, replace "d." with "f."

Page 4, line 11, replace "5." with "4."

Page 4, line 16, replace "6." with "5."

Page 4, after line 17, insert:

"6. A person that installs a subsurface water management system requiring a permit under this section without first securing the permit is liable for all damages sustained by a person caused by the subsurface water management system."

Renumber accordingly

Date: 2/17
Roll Call Vote #: 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2263

Senate Agriculture Committee

☐ Subcommittee

Amendment LC# or Description: 17.0745.02009

Recommendation: ☑ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen. Klein Seconded By Sen. Myrdal

Senators	Yes	No	Senators	Yes	No
Senator Luick	✓		Senator Piepkorn	✓	
Senator Myrdal	✓				
Senator Klein	✓				
Senator Larsen	✓				
Senator Osland	✓				

Total Yes 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 2/17
Roll Call Vote #: 2

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2263

Senate Agriculture Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☑ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☑ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen. Klein Seconded By Sen. Myrdal

Senators	Yes	No	Senators	Yes	No
Senator Luick	✓		Senator Piepkorn		✓
Senator Myrdal	✓				
Senator Klein	✓				
Senator Larsen	✓				
Senator Osland	✓				

Total Yes 5 No 1

Absent 0

Floor Assignment Sen. Luick

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2263: Agriculture Committee (Sen. Luick, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2263 was placed on the Sixth order on the calendar.

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Renumber accordingly

2017 HOUSE AGRICULTURE

SB 2263

2017 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Peace Garden Room, State Capitol

SB 2263—hearing a.m.
3/16/2017
Job #29334

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Pe Mae Kuehn

Explanation or reason for introduction of bill/resolution:

Relating to subsurface water management system permits

Minutes: Attachments 1-8

Senator Terry Wanzek, Sponsor: (Attachment #1)

(20:30)
Representative Hogan: Do we have records on how many permits have been denied?

Senator Terry Wanzek: I am not aware of them. The subsurface water permits are done by the local water districts. They don't have a collective data. There are delays.

Representative Satrom: How do you handle the designated wetlands?

Senator Terry Wanzek: You have to stay away a required number of feet. Ours was 150 feet away from any wetland. We still had some wetlands that remained. If you convert a wetland, you will lose your farm program payments. There is an opportunity to include a wetland but then it has to be mitigated. Farmers have a lot of pressure to not drain wetlands.

As a potential downstream landowner, I am less concerned now that I know about it.

Representative Headland: There has been an Attorney General's opinion about water resource districts' ability to apply a permit fee. Where did the $500 fee come from in this bill?

Senator Terry Wanzek: It is the Attorney General's opinion that they cannot be charging a permit fee. By adding it in there I am giving the water resource districts something they don't have today. I am willing to recognize there is some expense. They should be allowed to permit up to a certain amount to cover expenses. The other side is those who weren't charging may now think about charging.

One water resource district charged a farmer $1,200 for a permit fee.

Representative Headland: Water Resource Districts also charge a mill levy authority.

Representative Howe: Page 2, subsection b, it says "the applicant shall give notice to the downstream landowner." Cass County Water Board sends out the notification. Is that something to amend in this bill?

Senator Terry Wanzek: I wouldn't object to that. I am hoping we have something that protects the downstream landowner.

Representative Skroch: Wetlands can't be tiled. When you tile you get a more even distribution of subsurface. Does that also prevent additional water going into the wetland?

Senator Terry Wanzek: When you put the tile in, the water comes back up after several feet out. Most of the water is going down stream now.

Representative Skroch: You say it is an economic development opportunity. Have you seen any effect on property tax collection?

Senator Terry Wanzek: Land value is based on productivity. NDSU puts together data that shows production by county. If I am producing more, the land value goes up. We got $150 more per acre. When farmers do well, the rural communities do well.

Representative McWilliams: Page 1 of the bill says subsurface water management system that "drains 80 acres or more requires a permit." How is the 80 acres determined?

Senator Terry Wanzek: It is the footprint. In this bill anything tiled under 80 acres doesn't need a permit. We are requesting that notification be given to the Water Resource Districts.

Representative McWilliams: Is that a universally accepted way to measure the acreage?

Senator Terry Wanzek: It is an engineering project.

Representative McWilliams: Is there room for misinterpretation. Should there be clarification in the law of how we measure the acreage drained?

Senator Terry Wanzek: We are trying to make it clear that it is the footprint not the water shed.

Representative Skroch: What would stop a landowner that owns a section and does 79 acres every year?

Senator Terry Wanzek: If he adds to that outlet line, he needs a permit. The reason is he would be over 80 acres going into the same outlet.

Chairman Dennis Johnson: It is the entire acreage going into that watershed. What is next to it is included.

Representative Skroch: That doesn't have to be spelled out?

Senator Terry Wanzek: The water all has to drain in one direction. When attached to the same outlet, you need a permit. Tiling slows the speed of water.

Representative Schreiber-Beck: What is the cost per acre for tiling?

Senator Terry Wanzek: $700 per acre on our project. It depends if there are control structures added in or a lift station.

(43:50)
Mike Dwyer, Representing all of North Dakota's Water Resource Districts:
(Attachment #2)
We agree with everything Senator Wanzek said.

In answer to Representative Hogan's question, all permits have to be forwarded to the State Engineer. There is a documented system. There have been almost 800 permits issued since 2011. The current law requires a review of statewide significance. That has been taken out in this proposal. There have been nine of those.

This bill does provide opportunity for conditions dealing with erosion control, outlet structures, and operation.

The original bill placed the burden on the downstream landowner. Many times the landowner doing the tiling has no problem providing the evidence to support the project. The Senate amended to provide clarification.

We do have technical amendments for consideration. Attachment #2 has suggestions for amendments.

Page 2, lines 8 & 9, add back in "Water resource districts must forward copies of all approved permits to the state engineer."

Page 3, line 6, add by certified mail receipt

Page 3, line 8, we would like the technical evidence to be generated by the board. Of the 776 permits issued many have not had to provide technical evidence.

The word "hydraulic" to replace "hydrologic." Hydraulic deals with the flow of water whereas hydrology is the study of rainfall.

Page 3, line 23, you cannot require notarized letters of approval for tile drainage that outlets directly into a natural water course or assessment drain.

Page 3, line 28, since we are allowing conditions on the outlet, it should also be the operation of that outlet because there is a provision for shutting that down in flood conditions.

Page 4 at the top has a condition for rural water systems.

In 2011 when the law was passed, we had a day-long seminar with the Hefty Brothers doing a presentation along with others. We made a DVD of it and that was provided to every water manager. Most water managers are farmers and also have tile drainage.

Representative Hogan: Can you get us the data on the permits that have been issued and the delays from the time of application to the time the permit is issued?

Mike Dwyer: There have been 776 permits issued. But I don't know about the delays.

Chairman Dennis Johnson: Did you have good participation from across the state at the seminar?

Mike Dwyer: We have about 300 water managers. It was a summer meeting. There were about 100 in attendance. That is why we made a DVD of it.

Representative Skroch: Page 1, line 20, it says that a person installing a water management system less than 80 acres shall notify the water resource district. Is there a penalty if a notice is not filed?

Mike Dwyer: This would be a new requirement. In the language there is no penalty. Water Resource Districts will not be spending time looking for those not following the provision. I would assume most would follow the requirement.

Representative Boschee: In our previous bill that is now in the Senate we are changing language from flowage easements to a notarized letter. Why do you support the letter rather than the easement?

Mike Dwyer: A lot of times landowners are reluctant to give flowage easements but will give a notarized letter of approval. An easement attaches to the land and goes to the next generation.

Representative Boschee: Would you envision that the letter has terms for the length of time?

Mike Dwyer: It would be a written document. Once the system is in, it is a permanent system.

Representative Headland: Give an idea of what the board would do in collecting technical evidence. It could be a mechanism to allow the board to slow down the process.

Mike Dwyer: We are not proposing to change the timing. Most of the permits are with a water district that has an engineer on staff.

Representative Headland: They will have their engineer look at the project anyway. We don't want a reason to slow down the project.

Mike Dwyer: We want the burden on the water board or the applicant to provide the evidence. It is almost impossible to provide that within 30 days.

The Attorney General's opinion was on a different subject--assessment projects. He added no fees on tile projects.

(1:00:56)
Gary Thompson, Chairman of Red River Joint Board, Representing 11 Counties: We support the above amendments. We have a small mill levy in Traill county. It isn't fair to operate from the general fund. The fees cover those expenses such an engineer and legal fees. Please support the fee process. A maximum fee is problematic. Not every permit is exactly the same. We would like to have the notification if under 80 acres. We have never denied a permit.

Vice Chair Trottier: We heard that property taxes do go up when drain tile is installed. In my area property taxes are not influenced by drain tile. What is it in Traill County?

Gary Thompson: I think it is according to the soils.

Representative Blum: Isn't that why we have mill levies in the first place?

Gary Thompson: When it benefits one landowner, it makes sense to have them pay for that fee.

Chairman Dennis Johnson: Have you tiled?

Gary Thompson: I have not.

Chairman Dennis Johnson: It is quite investment but they see better yields.

(1:06:50)
Monica Zentgraf, Richland County Water Resource Board: We strongly support installation drain tile. Richland County has approved 535 applications since drain tile started for 72,000 acres. We are pleased there is language included to allow the districts to act on applications immediately when signed notarized letters come in. We have been asking for that.

(1:08)
We support the bill with the amendments. We ask for changes to page 3, where it asks for technical evidence must be submitted within 30 days of receipt of the permit application by the board. The issue is applications that are submitted during the winter and there is snow. In the winter the surveying can't be done. But the bill only allows 30 days. We would like it to say, "if seasonal weather conditions prohibit submission of technical evidence, the water resource board may defer the matter until conditions allow."

On other issue, if an applicant knows there are downstream concerns, they will come in during January because then the downstream landowner can't prove his case.

If you make that change, there is another section that would need an adjustment. Page 4, line 17 deals with applications that can't be denied after 60 days. We suggest adding, "If the application is deferred due to seasonal weather conditions, the Water Resource Board may not deny a permit more than 30 days after receipt of the technical evidence."

Representative Headland: Is there only one way to collect technical evidence? We have maps.

Monica Zentgraf: I asked our engineer that same question. He said there are cases that need a survey or on-site inspection. An example is if a landowner says the water isn't going to drain. That needs survey work.

Representative Headland: Would a poor location of a culvert be considered technical evidence?

Monica Zentgraf: Yes. Someone has to go out and look at the culvert.

Representative Skroch: You were referring to weather conditions prohibiting the gathering of technical evidence. In those cases where LIDAR (Light Detection and Ranging) could be used in the dead of winter there would be no delay in the permitting process. Do you see this as being limited circumstances? Have there been many instances where the permits were submitted in January?

Monica Zentgraf: If LIDAR can be used, we move the application through. Where you need the survey work, you can't do it when the ditch is full of snow. The snow will come out of the ditch before the farmer is putting in the drain tile. We need to protect everybody.

Representative Skroch: Can you give a percentage of permits that needed surveys?

Monica Zentgraf: There are some, not a lot.

Representative McWilliams: With the delay of permits because of snow in the ditches, how far in advance does work need to be scheduled with the drain tile companies?

Monica Zentgraf: That is better answered by the tile company. Sometimes companies are looking for work.

Vice Chair Trottier: Are there many conflicts from your experience?

Monica Zentgraf: There are always some. The fighting has improved over the last 20 years.

Representative Headland: It appears Richland County is in front of the issue. Do you see cases where neighbors are tying projects together to get the water moved?

Monica Zentgraf: Yes. We now have a call that will involve six property owners. We haven't had issues. If you have a project under 80 acres and more is added, it now needs to be permitted even if the tile is already in the ground.

Representative Headland: Do you do a field visit after the project is done?

Monica Zentgraf: Rarely.

Justin Johnson, Civil Technician, Richland County Water Resource Board: (Works with Monica) The permits are good for two years. Involving LIDAR, if it was flown five years ago, it doesn't give down to half a foot accuracy. Sediment and ditch blocks will not be shown.

Representative Headland: Would a culvert poorly located be technical evidence to stop a project?

Justin Johnson: Most of the time we have contacted the landowners and they have worked it out. It could hold it up if the culvert is high. LIDAR doesn't show if the culverts heave in the middle. You have to look into the culvert.

Representative Headland: Your job is to look into that culvert?

Justin Johnson: I do inspections in the spring. If we find problems, we try to address them.

Dan Wogsland, Executive Director of North Dakota Grain Growers Association: (Attachment #3) We support without the amendments.

(1:29:40)
Representative Headland: Do you have an opinion of the up to $500 permit fee?

Dan Wogsland: We would support the elimination of the fee.

Paul Mathiason, North Dakota Ag Coalition Chairman: (Attachment #4)

(1:32)
Scott Rising, North Dakota Soybean Growers: Also in support. Effective water management is critical to soil health.

Representative Mike Brandenburg, District 28: I am in full support of this bill. Drain tiling works.

Gary Knutson, North Dakota Agricultural Association: We represent about 450 crop production dealers across the state. The issue of the Waters of the U.S. is not going to go away. This would be a proactive approach for the crop production industry to take. We support a better balance of flow of overland water.

(1:35)
Eric Volk, Executive Director North Dakota Rural Water Systems: (Attachment #5) Most of our older systems are in the eastern part of the state. We support this bill if we can get similar language that is in HB 1390. That is a requirement to locate a project a minimum distance from rural water supply lines. Most of the time we try to stay as close to the edge of the field as possible. We suggest using the language on page 2 of Attachment #5.

Our older systems were put in with glued pipe which now leaks. The newer systems have a PVC gasket pipe. Now many don't even have a seam. There is about 6,000 miles of old pipe.

When the project is in the planning phase, it is helpful if the landowner would make a quick phone call to the rural water system. If there isn't a permit involved, their only notice is the 48-hour one call. By that time, it is too late to discuss any options. We had an application in Pembina County that listed the rural water system as a downstream landowner. That helps us to make it work on both sides.

Chairman Dennis Johnson: Do you have plans to replace the old pipe?

Eric Volk: The rural water has no taxing authority. It is the burden of the users. To replace that line, a mile is $30,000 to $40,000.

Chairman Dennis Johnson: With newer technology, there has to be a plan on how to fix it.

Representative Headland: If drain tile does a good job of hiding the rural water leaks, what is the recourse for the property owner that has massive leaks?

Eric Volk: All pipeline was put in with 40 foot sticks. The large leaks will eventually come to the surface. The only ill effect to the landowner would be if they are without water.

Representative Skroch: In the conditions you wanted us to consider, the third condition is that all system water line crossings with drain tile will be seamless. What is happening now when tiling systems cross over your existing lines?

Eric Volk: Those are things going on in one county. What we are looking for is in the bold at the top of page 2.

Representative Skroch: This is a current practice.

Eric Volk: In one county it is. We are not asking for language to be put into law for that.

(1:46)
Chad Weckerly, Farmer and Ag. Retailer from Hurdsfield: When I started these projects you might be spending $800 to $1,000 per acre. When we install on our own, we spend around $400 per acre for materials.

We have a section with 550 tillable acres and 60 acres of wetland. I am not going to touch the 60 acres with drain tile. The 550 acres grew amazing wheat. It ran 120 to 140 bushels per acre. We soil tested those with more than 100 bushel per acre. Then we tested spots with less than 40 bushels per acre and those with 75 bushels per acre. We had 112 acres that produced more than 100 bushels per acre. 92 acres in the same field could not make 40 bushels per acre. That leaves 346 acres producing in the middle.

My yield barrier is water management. Affecting yield is a build up with sodium. A small amount of salt can have disastrous effects to the soil. If affects kernel fill and grain development.

I am trying to build up the soil by building up organic matter. The idea of cover crops is to make the soil healthier but it still needs air.

We have tiled about nine quarters of land in Wells County. Some it is with pattern tile. That is putting a tile in every 40 feet or whatever the soil type demands. We have also installed in a targeted tile situation. Some land has 100 feet elevation change with side hill seeps and it needs target tile. It may only need 30 acres out of a quarter. The return on investment is higher with targeted tile than pattern tile.

When we submit a tile application, we need easements from downstream landowners? I am not changing the water given. I am just trying to do it in more of a controlled structure.

The other county I farm in is Sheridan County. There is a lot of bad press in Sheridan County. They have a $1,000 application fee for a permit. The burden to get approval from everyone three miles downstream is costly.

I ask that you pass this without amendments.

Representative Satrom: How do you feel about the fee in this bill?

Chad Weckerly: In my area there is so much elevation change, most permits should be able to be approved easily. With more contour in the soil then the more the LIDAR data matches up. I can upload LIDAR data that draws out the watersheds. I look at that when installing a project. A permit fee is probably unnecessary.

There was a question of tying projects together. We worked with an upstream landowner to make the size of the pipe larger. He was able to hook into it. It was beneficial to me because his water didn't have to resurface over mine.

(2:04:40)
Aaron Carranza, Chief of the Engineering and Permitting Section for the Office of the State Engineer: (Attachment #6)
Listed concerns. Additional to handout is on page 2, lines 8 & 9, "copies of all approved permits to be submitted to the State Engineer's office" has been overstruck. As Representative Hogan has questioned, that is a good tracking mechanism and helps to plan future projects. Suggested changes to the bill are highlighted in yellow.

In the Senate hearing there was a comment made regarding what Minnesota does in regards to drain tile. The state legislature there has not identified a policy. The individual watershed districts all have drain tile permitting processes. We are not out on a limb saying that permits are required. We need the tools to address, manage, and permit subsurface management projects to the benefit of all and address concerns.

Representative Headland: Can you give an example of managing water in a natural water way?

Aaron Carranza: With the development of land, "natural" has to be taken with a grain of salt. If a project goes in and discharges into a natural waterway, studies have shown that drain tile projects may reduce rates but volumes do increase. It is about a 5 to 15% increase in volume.

Representative Headland: In the case of a severe event, does the volume of water change if it is surface runoff?

Aaron Carranza: You have tile systems that operate before snow melt is off. There are multiple issues and one size doesn't fit all.

Representative Hogan: What happens when there is a project that has statewide implications? Can you give an example of what would be a statewide issue?

Aaron Carranza: The criteria of a statewide project are such as whether or not an area that would not provide flow during a 25-year event or drainage of a water body that has fish and wildlife features. The 8 or 9 subsurface water projects designated with statewide significance all had wetland drainage components. What that means for the applicant is that the water resource district requests more information with a more rigorous review. To date not a single statewide project has made it through the process.

Rachel Grosz with North Dakota Farm Bureau: Water management is important to our members. Several of our members have experienced lack of uniformity in terms of what they were allowed to do, the costs assessed, and the time they are waiting for their permit.

This bill seeks to provide faster permitting and defines the rules for each water district.

Kayla Pulvermacher, North Dakota Farmers Union: We are in support also. Our members are looking for uniformity which this bill provided.

Arv Burvee, Richland County Water Resource Board: We have never denied a tile application. LIDAR is a tool to aid the technical evidence process. But it doesn't give the detail to determine downstream conditions. It was flown in 2008. A lot has changed since. There is still a need to do field investigations.

I support a smaller fee. We use the fee to cover the administrative cost to process applications. When you want to rely on the water board taking care of the costs of application, it isn't fair. Most of our applications don't need engineering work or legal work.

We charge $125 fee. We have had some applications that needed legal or engineering work. Then the applicant should pay for that. It shouldn't be the county taxpayers.

In regards to the culvert downstream, we work to get the culvert set correctly. It would not stop the applications.

I have always felt the letter of approval is the way to go because most landowners don't like to have easements placed on their property. They are usually not willing to give an easement because it is on that land forever. A letter of approval can be worked out between the applicant and the downstream landowner.

Representative Skroch: There are instances where the standard fee for a permit is $1,500. Is there a situation where that would be reasonable?

Arv Burvee: Their reasoning was the anticipation of engineering and legal costs. I have heard they are returning what is not used of that fee.

I am fully in support of SB 2263. I think Monica Zentgraf's amendments are just good common sense ideas.

(2:25)
Levi Otis, Ellingson Companies, Drainage Contractor: Today we are talking about a bill in a battle that was lost by opponents in 2011.

I was hired a few years because landowners were afraid to go to their water boards when there was a dispute because of fear of retaliation. We have found inconsistencies and interpretation issues between counties. Due to interpretation of North Dakota drainage laws there are differences. Stutsman County's Attorney's response was "it may be legislative intent but that is not how I interpret it." We need to stick to technical evidence. Requiring someone to sign an easement when there is no technical evidence, why would you require an easement. When we go to a letter of intent, it is a simpler way.

In Rolla County our survey team staked out the project. The crews were going to start work in the morning. The Chairman of the Water Board called our salesmen at 11:00 p.m. and said he is pulling his name off of the permit. He did end up signing the permit. We need to eliminate the frivolous angst against each other.

Opposition:

(2:34)
Carmen Miller, Director of Public Policy, Ducks Unlimited: (Attachment #7)

We think HB 1390 as passed by the House is better. We have three issues: wetlands, water quality, and downstream landowners.

We are also concerned about the possible detriment of many to the benefit of one.

NDSU did a study of water quality at 18 sites. Twelve exceeded nitrate levels for drinking water

(2:40)
Mike McEnroe, North Dakota Wildlife Federation: (Attachment #8)
Also favors HB 1390.

Representative Skroch: We have state agencies present information to us. Are you a federal agency or privately funded?

Mike McEnroe: I represent a coalition of sportsmen's and wildlife clubs across the state. We have 19 clubs with most in the eastern part of the state with about 1400 members.

Representative Skroch: So you don't receive taxpayer dollars?

Mike McEnroe: No taxpayer dollars other than grants from state or federal agencies.

Chairman Dennis Johnson: Will continue in the afternoon.

2017 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Peace Garden Room, State Capitol

SB 2263—hearing p.m.
3/16/2017
Job #29367

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to subsurface water management system permits

Minutes: Attachment 1

Opposition continued:

Leroy Becker, Anamoose, President of Sheridan County Water Board:
I went through the engrossed bill and have 12 items that I disagree with:

1. Page 1, line 2, "surface water management" used to be called "draining." Changed because it sounds better to the public?
2. Page 1, line 10, "80 acres" I would like to see 20 acres. If there are 10 people you have almost 800 acres.
3. Page 1, line 10, "watershed area drained by subsurface water management system may not be used" should be attached if the area needs to be done.
4. Page 2, lines 4-25 are overstruck to be deleted—water districts should be able to attach certain areas. This bill seems to take authority away from the water boards. The water board is a local board. They know what is going on.
5. Page 2, line 14, one-mile distance—that is a real problem. What about liability beyond that? Where is the water going down stream? Cropland seems to have priority over pastureland.
6. Page 2, lines 29 & 30, "assessment drain, natural watercourse, slough, or lake. . ." In Sheridan County we are landlocked. If you drain your land, you are draining onto someone else's land.
7. Page 3, line 2, "notice requirement waived"—many that claim the paperwork is not processed, we didn't get the paperwork.
8. Page 3, line 7, "not to exceed $500"—the Century Code gives us the authority to levy the expenses. The Attorney General's opinion was just an opinion. It was based on something else. Not this case. In our Sheridan County water stipulation, it says that "anyone who applies for a drain application upon his return to the courthouse must submit a check or cash in the amount of $1,000. This is fee not refundable."
   It should be at least $1000 because of the distance to travel. We will still refund it even though it is stated that we don't.

9. Page 3, line 24, there is a lot of difference when you are draining into a pond or slough or a lake compared to a river or a stream.
10. Page 3, line 28, public highway right of way. If you drain water into a ditch, what if someone drives their car in and drowns, there is a lawsuit. We don't use ditches in our county to drain.
11. Page 4, line 17 and 19, "60 days if not done, deemed approved." What about the weather?
12. If you take away local control, it won't be inspected. It has to be inspected while the project is being done.

(23:46)
Representative Headland: You have provided the most information as to why we need to pass this bill. You don't understand the limitation to your duties as a water board member. They are listed in the Century Code. But yet you believe that you have the ultimate authority to make whatever law you want.

You said you have the right to assess any fee you want. But our Attorney General says you don't.

Vice Chair Trottier: How much drain tile do you have in your county?

Leroy Becker: We only have four in our county.

Vice Chair Trottier: Of all the applicants, how many were not permitted.

Leroy Becker: None. One was under 80 acres. Two haven't given us any information.

We have refunded two out of the four.

Representative Blum: Would you be able to provide the committee with verifiable cases of individuals being harmed by drain tile?

Leroy Becker: One of our county commissioners has lost 200 acres.

Kevin Vietz, Sheridan County Water Resource District: Somebody reported that drain tile was put in. They said they were going to give us paper work. But we haven't received it because they said it was under the 80 acres. We are in the process of giving the second applicant's money back.

Leroy Becker: If you take the local jurisdiction away from the counties you are going to lose a lot of good people doing the groundwork.

Chairman Dennis Johnson: What are we taking away from counties? We took it away from the State Water Commission a few years ago to give back to local government.

Leroy Becker: Page 2, lines 4 to 25 had good rules that are now overstruck.

Chairman Dennis Johnson: Many projects seem to be going well.

(35:00)
Kevin Vietz, Sheridan County Water Resource District: I am the member from the water board that is against draining. Be careful about the downstream landowners.

(38:00)
Kale Van Bruggen, Attorney with Rinke Noonan Law Firm: (Attachment #1) Represents various water boards and wrote the bill along with the language of the amendments.

Representative Headland: It was expressed that questions of statewide significance should be put back into the bill. There were nine that went to the water commission. They didn't act on them because they all contained drainage of wetlands. Why should that remain out of this bill?

Kale Van Bruggen: I refer to statewide significance as "regulatory purgatory." The Century Code says water boards cannot deny a permit unless one of two things happens.
1. They deem the permit to be of statewide significance.
2. A downstream flowage easement is needed and it can't be obtained.

We haven't heard the data on the number of landowners who have chosen a 79-acre project because they don't want to go through the burdensome permitting process.

We haven't heard the number of landowners who have abandoned their projects because of the complications they have with the water boards. Or the number of landowners who were told go get a flowage easement but can't.

Of the nine that are of statewide significance, I represented five. The current Century Code says if the water resource district board determines that the drainage is of statewide significance, it then goes to the state engineer for consideration and approval. The state engineer's opinion determines if it is of statewide significance. If it is, it then goes back to the county for a hearing under a provision of the North Dakota Administrative Code. That provision is related to the surface drain permitting process.

Prior to this legislature adopting a special statute for drain tile in 2011, people were not even sure if they needed a permit for drain tile. One of the water boards asked for an Attorney General's opinion. The opinion said that a permit is needed for drain tile if you are draining a watershed greater than 80 acres. The permit application has to disclose the quantity of water. The statewide significance is being used to flip what the legislature did by changing the process for tiling. Statewide significance is being treated like a surface drain permit. My clients with the five permits asked the water board attorney and engineer what it would cost to get the report in just to hold the hearing. There is no guarantee that after the hearing they will get a permit. The answer was about $20,000 to $50,000. The amount is uncertain because no one had gone through it.

The arguments given by the State Engineer's office for statewide significance are if you are draining wetlands with recognized fish and wildlife values and you are turning areas that otherwise would retain water and make them contributing into the watershed. Wetlands when they are full contribute water into the watershed. If you drained the wetland you are

now contributing more water to the watershed that never got there before. I find that to be untrue. So if they didn't want to approve a permit, the option was to put it in a place that doesn't allow for the permit to be given. That is why I took statewide significance out of this draft.

Representative Headland: What is your opinion to remove "hydrologic" and replace it with "hydraulic."

Kale Van Bruggen: Hydrologic is related to water pressure. Hydrologic is the correct word. It is currently used in North Dakota agency regulations.

Representative Headland: We are asking the downstream property owner to provide the technical evidence. Would that be a tool to slow down authorizing a permit?

Kale Van Bruggen: I do have concerns with the water resource boards being the investigative body. The Century Code says if an investigation by a water resource district board or a downstream landowner discloses unreasonable harm. The burden currently is on the downstream landowner or the board on its own initiative to do the investigation. The Attorney General's opinion is just like the drain tile statute; you don't have the authority to assess those investigation costs. I told the board that if they want to do that it is a public policy decision they are making to spend county taxpayer dollars investigating the downstream impact on every permit.

(48:14)
On the third page of Attachment 1 there is reference to the Martin vs. Weckerly case. This was the first case in North Dakota at the Supreme Court level where the courts adopted what is the rule in this state for the management of water between two neighboring landowners. They adopted the same rule that almost all of the eastern states have which is called the reasonable use rule. It says an upstream landowner has a property right to remove excess waters off of their land as long as it is done without causing an unreasonable amount of harm downstream.

Tile contractors have to watch their outlets for their clients. The system has to be designed so that it outlets into something that can carry it away. Water boards not requiring technical evidence to look at these factors is what led to this bill. I see water boards as a great opportunity to play a neutral body. You have a property right to do drainage. If a water board requires easements where these standards are not being violated, you are flipping that property right and taking that away. If a letter of permission or an easement is required and conditions are allowed that infringe on property rights where the project is reasonable, that property right is taken away to improve the land.

Representative Headland: Is there anything else in this bill that we should look at besides cleaning up the gray areas?

Kale Van Bruggen: You cannot alleviate interpretation. The grayest area is how you calculate the 80 acres. I tried to write some language. I found out I was looking for a solution to a problem that didn't exist anymore. We all understand it is the footprint. Tile

has a scope and affect. It is based on the size of the tile, depth, and soil type. The scope and affect means how far on each side of the tile line it pulls in water.

Representative Headland: It is your opinion, aside from the fee, that this bill is in good shape.

Kale Van Bruggen: I feel this bill is clear. Water board members will be able to understand it without needing an attorney or engineer.

Representative Hogan: Did you work with the state about changing the administrative rules for statewide significance?

Kale Van Bruggen: I engaged the prior state engineer about this legal interpretation of how statewide significance works. I feel they missed what the legislative history showed which is if we wanted statewide significance to be part of this, we could have kept the permitting process that we had on surface drain statutes and wouldn't need this amendment. When the legislature says we have an existing permitting process, we are going to carve out a special exception for permitting drain tile and change the standard for the burden of proof, that is important for the courts when they are interpreting the legislature. The reading of the Century Code regarding statewide significance says you send it to the state engineer for consideration and approval "of the permit" not "of the decision that it is statewide significance." If it is important to the state, why is the county deciding when it gets sent back down to them? To me it was a clever argument to take applications that the board wasn't ready to approve because of wetland impacts or perceived watershed concerns and say it was statewide significance with a process that no one has been through because it is so burdensome and expensive.

Representative Hogan: Could we change this bill to put in the language you suggested for administrative rule and keep statewide significance?

Kale Van Bruggen: That is not necessary. If the State Engineer's office hasn't identified clearly for landowners how to successfully go through a permit process of statewide significance, it serves no purpose other than to stop the project from going forward.

I am not sure what project of a drain tile capacity would be of significance to the entire state. The Supreme Court said they find it hard to believe there is recognized fish and wildlife values of significance to the public on private prairie pothole wetlands that there is no public access.

If you find projects of significance, a state officer should make that decision not the county.

Representative Magrum: Are you alright with Mike Dwyer's amendment?

Kale Van Bruggen: I am okay with some of them. The ones that concern me—giving water resource districts investigative power again. To me that means you are going into the lion's den when filing an application rather than getting a fair unbiased tribunal that will weigh both sides of an issue that is permitting a property right that landowners have.

There has been discussion on the change in the timeline. This bill says unless you have signed waivers from downstream landowners, the permit application doesn't come up until the next meeting after 30 days have expired. There could be some flexibility. What is more important is the deadline to say you have to make a decision. You can't just keep tabling an application.

Representative Magrum: In item 5 & 6 of the bill, the water resource district board isn't liable and state engineer isn't liable. The person who installs a subsurface management system is only liable if he doesn't get a permit. Are you referring back to the case of Martin vs. Weckerly where the upstream landowner was liable?

Kale Van Bruggen: Section 6 on page 4 of the bill was already part of the existing Century Code. That says if you are required to get a permit under this statute and you don't, then you are liable if damages are sustained. That is the enforcement mechanism.

Subsection 5, if a water board doesn't follow the permitting process they can be sued under a declaratory judgment action. The court can be asked to order the water board to follow the procedure. It is helpful to spell out what is in common law. People don't research cases, they read the Century Code.

Representative Magrum: Who would be responsible if someone drains 75 acres and the downstream landowner loses 60 acres of grazeable land?

Kale Van Bruggen: It is a civil action case. If the downstream person proves that the upstream person has exceeded their reasonable use, the upstream landowner is responsible for the damages. Successive damages year after year allows the courts to afford injunctive relief. The downstream landowner doesn't have to ask for damages every year, the upstream landowner is ordered to modify or shut off the system. If the upstream landowner can show the system is designed within the reasonable use rule factors, then there is no liability. It is a judgment call made by a jury.

Representative Magrum: If I am the person with the flooded land, can I go to the States Attorney for help or do I have to hire a lawyer.

Kale Van Bruggen: The responsibility for protecting your property rights is a cost that you bear.

Representative Magrum: That is what is hard about this bill. They may not be able to afford a lawyer.

Representative Skroch: Page 3, line 16, in reference to the technical evidence and the water board having to investigate that technical evidence within 60 days. Would there be wording as a way of accommodating seasonal issues?

Kale Van Bruggen: I am very opposed to amending this bill in a way that uses more words that don't have definitions. That is how we got here today. I would encourage an amendment for specific time frames. It is difficult to argue whether the seasonal time period ends in March or in April. I will not represent a landowner without technical evidence

done by an engineer. My turnaround time from the engineer experts is often a week to a week and a half. I ask for three things: the volume of water, rate of flow, and the ponding duration. Then I can do an analysis on the court factors of whether or not it will survive the reasonable use statute. Much of that can be done by LIDAR. The culvert elevations are already recorded with the road authority. If not, it doesn't take much with GPS to measure elevation without shoveling out the snow. I don't see the concern that a downstream landowner is disadvantaged just because the application was filed in a winter month.

Representative Skroch: So you don't feel that is a serious enough of a concern to spell out in this bill?

Kale Van Bruggen: The courts don't care about the season for reasonable use cases.

Representative Headland: Have you litigated a case where someone can prove damage from a subsurface drain system?

Kale Van Bruggen: No. When downstream landowners come for representation for damage, I tell them to get a technical expert who can look at the data. Their money can be spent to work it out or to hire an attorney.

Representative McWilliams: If a family hit a ditch with water, would the water board or county be liable?

Kale Van Bruggen: You first have to show that it wasn't the negligence of the driver. If the water is in the ditch because of a landowner, that is where the attorneys will assign blame. Road authorities need to remember that roads are obstructions to drainage. Without a culvert a ponding water problem is created. The road authority is liable as an inverse taking of the land flooded because of the obstruction.

Aaron Carranza, Office of the State Engineer: Statewide significance is a tedious process for a reason. It is not "regulatory purgatory." The large projects with surface drains have gone through the process and are now operating. Currently Mr. Van Bruggen's opinions on the applicability of statewide significance to subsurface drainage projects is pending litigation with the State Engineer's office regarding the Dickey County Water Resource Board on how that law is being interpreted.

There are certain wetlands that have high basin boundaries where significant rainfall events can be entrained within the system. Some areas can sustain a large scale event and not discharge anywhere.

Hydraulic deals with pressurized systems but also open channel flow.

Representative Skroch: You mentioned litigation in projects of statewide significance. Can you explain the issues?

Aaron Carranza: The Dickey County Water Resource District found a series of subsurface applications to be of statewide significance. They were forwarded to the state engineer's office. The state engineer processed the applications. The landowner took exception to

the process and took both the Dickey County Water Resource District and the State Engineer's office to court.

Representative Headland: Would you say nuisance wetlands are also of statewide significance?

Aaron Carranza: There is a three-part test on whether a wetland being drained would trigger statewide significance. First, it has to be complete drainage of the wetland. Second, is the contributing area to that wetland over 80 acres? Third, is it an identified wetland by the NRCS.

Representative Headland: NRCS has indicated on my maps that rock piles are wetlands. I don't know why NRCS would come into play in determination of statewide significance.

Aaron Carranza: What I was referring to is a process called State Offsite Methods. We use a combination of rainfall in the preceding months, if the wetland appears on aerial photography, and if the watershed exists that can contribute to it.

Senator Luick, Sponsor, Senate Agriculture Chair: Explained what happened on the Senate side. An amendment was brought to the committee but due to an error, Senator Luick's amendment was not considered.

My efforts are to educate how beneficial tiling is. The downstream impacts are where there is concern. If you have a parcel of land that is naturally surface draining today, and that parcel has an outlet for surface water that water is going somewhere. A tiled parcel of land doesn't create more water. It deals with the water that is in the profile of that soil. If a downstream impact is occurring because of surface water impacts, the impacts will be less if it is now soaking into the profile of the soil.

I am hoping this committee will work with the Senate and come up with proper language for HB 1390 or SB 2263 to make this work.

Chairman Dennis Johnson: Closed the hearing.

2017 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Peace Garden Room, State Capitol

SB 2263—Committee Work
3/24/2017
Job #29679

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Pe Mae Kuehn

Explanation or reason for introduction of bill/resolution:

Relating to subsurface water management system permits

Minutes:

Representative Headland: This bill is important for the future of subsurface water management.

Representative Headland: Moved Do Pass

Vice Chair Trottier: Seconded the motion

Representative Headland: This is going to help clarify for local water resource boards the rules that we set in place back in 2011. We also passed HB 1390 that is in the Senate with changes. Then it will come back to the House for our concurrence.

The fee of up to $500 needs a discussion. If it is the only piece of legislation for tiling, it is important to get it passed.

Chairman Dennis Johnson: If there are amendments, we can look at them in conference committee.

Representative McWilliams: I have emails asking if we could move the notice from one mile to two miles.

Chairman Dennis Johnson: We want to keep this bill clean and those amendments can come up in a subcommittee meeting.

Representative Headland: That mile was put into place in the original draft passed in 2011. We just want to clean up what we have in place. I would reject any new language that changes the rules from where we were. That is not the intent of the sponsors of either HB 1390 or SB 2263.

Representative Boschee: I'll be resisting the motion because we heard from water resource districts that they support the bill with these amendments. Some should be discussed such as technical evidence and receipt of certified mail.

Representative Headland: The water boards wanted to change who provides technical evidence. They wanted to be the ones to provide the technical evidence rather than the downstream property owner. That changes the law we have today and that is not the intent of either bill.

A Roll Call vote was taken: Yes 12, No 2, Absent 0.

Do Pass carries.

Representative Headland will carry the bill.

Date: 3/24/2017

Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2263

House **Agriculture** Committee

☐ Subcommittee

Amendment LC# or Description:

Recommendation:
☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐

Motion Made By Rep. Headland Seconded By Rep. Trottier

Representatives	Yes	No	Representatives	Yes	No
Chairman Dennis Johnson	X		Rep. Joshua Boschee		X
Vice Chairman Wayne Trottier	X		Rep. Kathy Hogan		X
Rep. Jake Blum	X				
Rep. Craig Headland	X				
Rep. Michael Howe	X				
Rep. Dwight Kiefert	X				
Rep. Jeffery Magrum	X				
Rep. Aaron McWilliams	X				
Rep. Bill Oliver	X				
Rep. Bernie Satrom	X				
Rep. Cynthia Schreiber Beck	X				
Rep. Kathy Skroch	X				

Total Yes 12 **No** 2

Absent 0

Floor Assignment **Rep. Headland**

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2263, as engrossed: Agriculture Committee (Rep. D. Johnson, Chairman) recommends **DO PASS** (12 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2263 was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

SB 2263

Testimony
Senate Bill 2263
Senator Terry Wanzek

Good morning Mr. Chairman and members of the Senate Agriculture Committee. My name is Terry Wanzek, Senator from Jamestown representing district 29. Senate bill 2263 is about subsurface drainage or tiling farmland and the legal process of authorizing and permitting tiling projects for farmers in ND.

Before I get into the details of the bill, let's talk a bit about the benefits of sub-surface water management of farmland.

There are two main types of drainage systems employed in agriculture, (1) surface drainage and (2) sub-surface drainage. They are not necessarily the same. The surface drainage systems, start functioning as soon as there is an excess of rainfall or snow melt, etc. Surface drainage is conducted, like it says, on the surface, to remove surface water that exists above ground. It is accomplished by digging ditches or trenches to get water to flow off the land by gravity on top of the surface. It results in water heading down stream in a hurry or in more of a rush than subsurface drainage.

Subsurface drainage, otherwise commonly known as drain tiling, is burying perforated poly pipe into the ground for the purpose of managing the below ground water table. This helps to enhance plant growing conditions in the field. Drain tiling is not an attempt to remove all the water in the soil, but rather only the excessive water to create optimum growing conditions for plant root development. That is accomplished by gravity. Soil is like a sponge. It will hold a certain amount of water but when faced with excessive moisture it will not soak in and it will runoff. It is not about draining wetlands or ponds etc... it's about making the land we are already farming more productive. In many cases it results in no more water going downstream than it would without tiling. In most cases, there is at least a slower rate of water flow-age downstream than surface drainage, or even without drainage after a major rain or snow melt. It can actually result in less flooding downstream. Also control structures can be implemented into the system of tile pipes to control the flow of water from subsurface drain tiling.

Specific advantages of tile drainage are:

1. More consistent yields
    - allows for more efficient use of resources
    - Reduces financial risk
    - Increases local economy

2. Earlier and more timely planting
    - Can get into field sooner and soil temps warmup faster for planting
3. Improved harvesting conditions
4. Less wear and tear on equipment
    - More conducive to minimum and no till
5. Less power required for field operations
6. Better plant stand
    - Better weed control – herbicides work better- need less applications
7. Less plant stress
8. Fewer plant diseases
9. Less soil compaction
10. Improve soil health –
    - reduces soil salinity
    - Reduces soil erosion

Another major advantage of tile drainage is the increase in sale value of the land. Subsurface drainage is a long-term investment. The investment is made up-front but the benefits are spread over many future years. Farmers are willing to pay the investment.

Now to the bill. In the 2011 session, a group of legislators (myself included) worked together on legislation that created a separate section of law for subsurface drainage, distinct from surface drainage law. Subsurface drainage has its own section of law. Many of those individual legislators who helped draft the 2011 legislation will tell you our intention was to help farmers, by making drain tiling easier, less onerous, not more difficult. The legislative intent was to promote subsurface drainage. If you doubt this see SCR 4019 adopted in the same 2011 session. We thought our intent was clear. But apparently it is not.

I understand that many water resource districts are following the law and legislative intent. For instance, in personally seeking our first permit last year, I believe our water board, in my county, followed the law correctly and in accordance with legislative intent. But I am told there are water resource boards that are not. Take for instance, some district boards are requiring a local permit for projects under 80 acres. The law says a permit is required if the footprint is over 80 acres but not required under 80

acres. I've been told some districts are charging a $1000 permit fee plus sending large attorney invoices to farmers who are seeking a tiling permit. Others are not charging any fees. I've also heard there are long waits or delays by some boards in addressing [redacted]ng permits. I've even been told that at least one county water resource board has members who said "as long as I'm on this board there will be no tiling, I hate tiling". And I am told that is mild to what was actually said. Well that certainly is not within the intent of state law!

So, we need clarification on what the law says and how to administer it. I considered an attorney general's opinion last summer, but in visiting with the attorney general, he recommended we do it legislatively. So here is the bill... It is our belief, that being those legislators who helped draft the 2011 legislation, that this bill is a clarification of what is believed to be the law today and within the original intent of the legislature.

I'll be the first to admit maybe the bill goes a bit too far in some situations. Take for instance, the downstream requirement to provide technical evidence by a licensed or professional engineer might be a bit steep. After all, any of us farmers can be either the one seeking a permit or the downstream landowner. But what we are trying to address are those situations where there is a general objection by a downstream landowner, with no proven scientific evidence to the contrary, just because he or she does not like tiling or the individual seeking the permit. Right now in current law there seems to be a low level of evidence required by an objector. An unreasonable [redacted]ownstream individual, with no evidence based analysis, appears to have veto power over a tiling project. We need to find that balance.

In summary, we are trying to provide clarity to our current law for farmers and water resource districts. Farmers need more uniformity, continuity. and consistency from the water resource districts in administering this law. Our intent has always been to streamline the process, to enhance the opportunity of our farmers to drain tile their land and increases productivity. Our intent is to encourage subsurface drain tiling. Subsurface drainage, done right, provides economic development to the farmer, community and state, improves soil quality and is an environmental benefit. We want to encourage farmers to look at the investment, the potential benefits and consider subsurface drainage and then do it right.

The golden rule of drainage: drain only the amount necessary to create adequate field conditions and retain water that may contribute to healthy soil and plant growth!

pg. 4

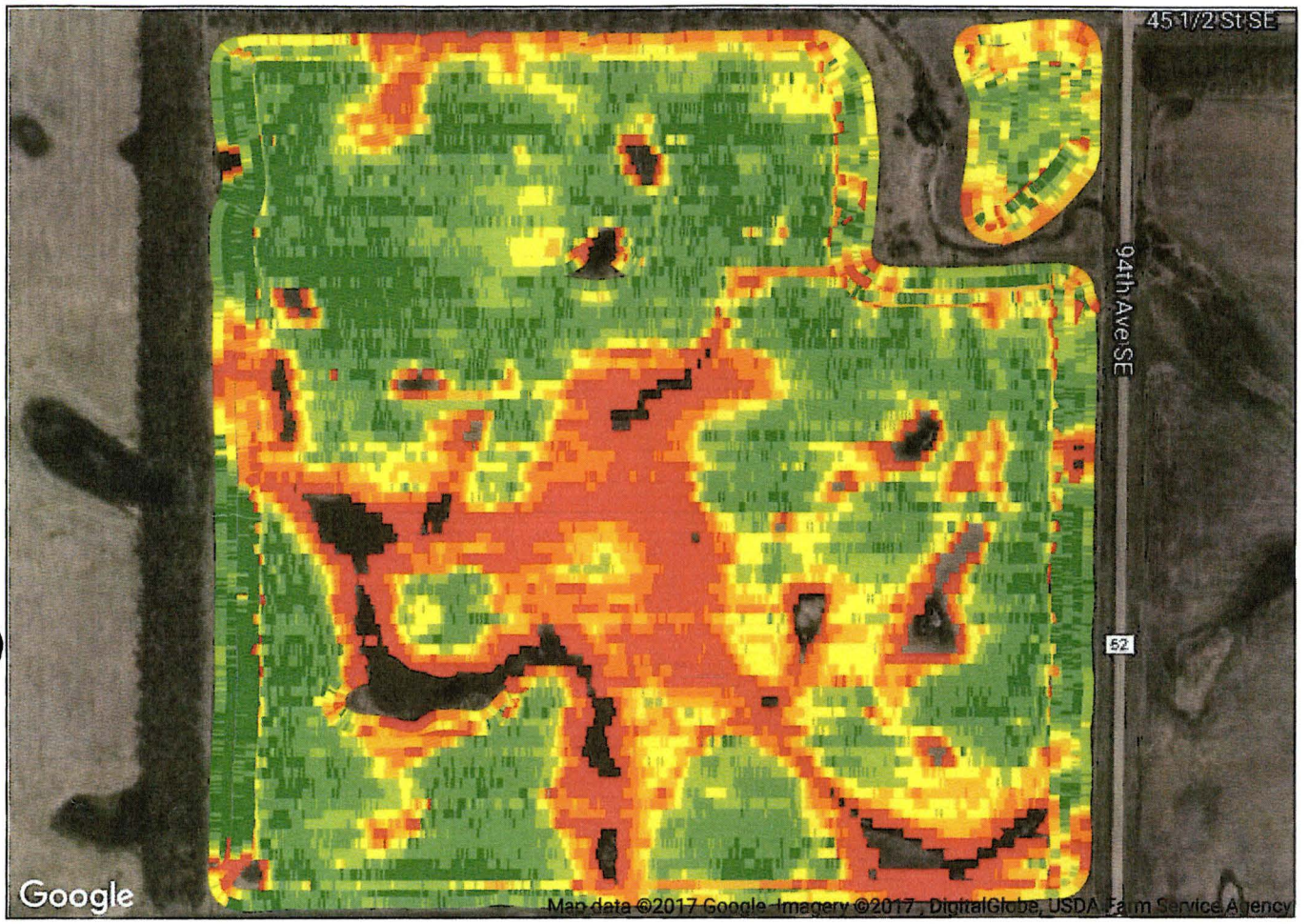
JOHN DEERE Before tile Operations Center

2015 Corn: Harvest

3

Layer: Yield

Josh Graves | Ypsi Land



Operation Dates: 10/28/2015 - 10/29/2015

AGRONOMIC DATA
TOTAL YIELD 17,114.62 bu
AVG. YIELD 120.61 bu/ac
AVG. MSTR 15.92 %
AREA WORKED 141.9 ac
WET WEIGHT 969,134.64 lb
AVG. WET WEIGHT 6,829.7 lb/ac

LEGEND

181	15 %
159	27 %
132	16 %
98	11 %
60	9 %
25	9 %
0	13 %

After tile

Dry Yield

TMT FARMS - Graves - 3

APEX Farm Management Software

ent Information:

Client: TMT FARMS

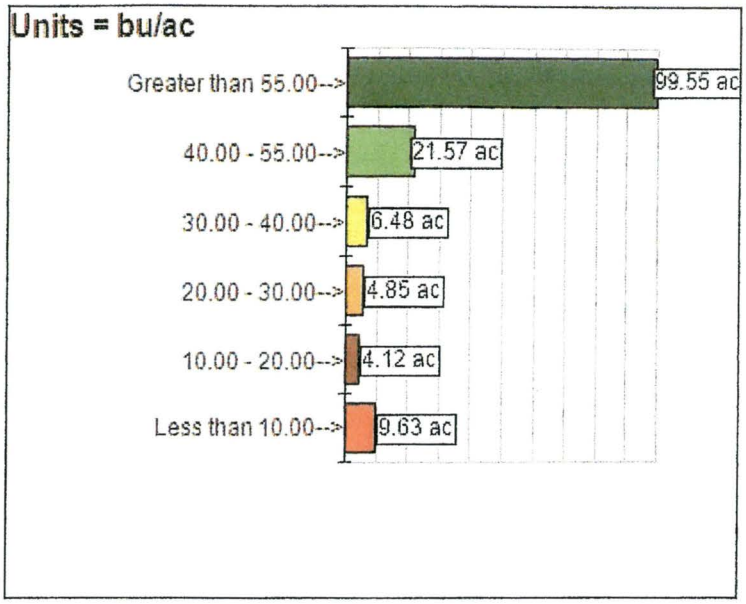
Farm: Graves

Field: 3

Field Information:

Crop:	Soybeans
Start Date:	10/13/2016
Product:	Soybeans
Elapsed Time:	10.741 h
Area:	146.20 ac
Average Yield:	61.4 bu/ac
Average Dry Weight:	3,683.3 lb/ac
Total Yield:	8,973.6 bu
Total Dry Weight:	538,501 lb
Average Moisture:	13.73 %
Productivity(area/hour):	13.61 ac/h

Legend Information:



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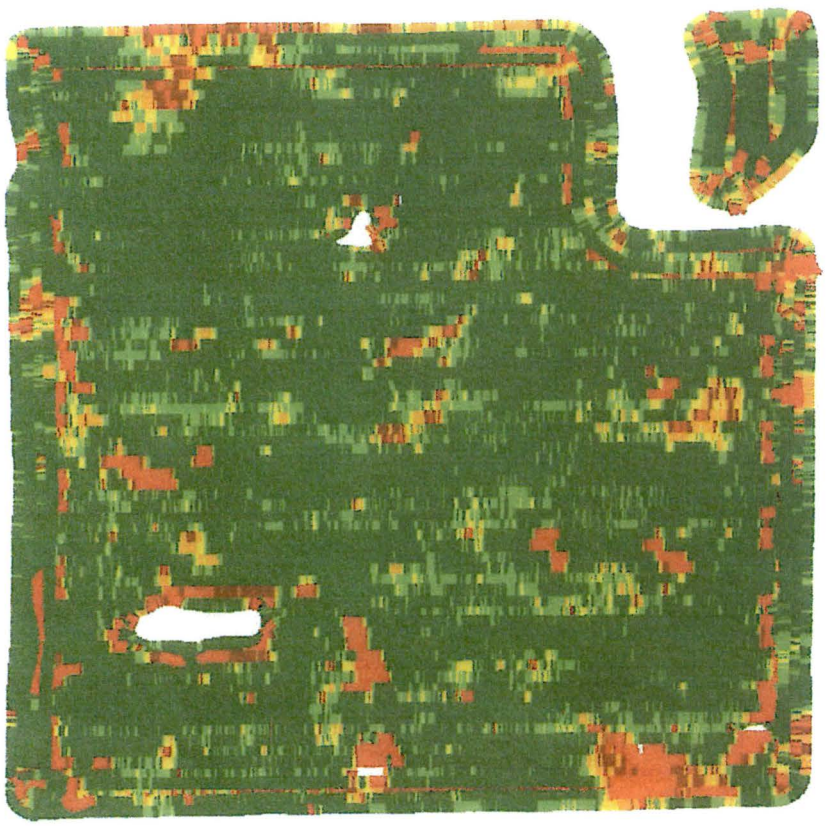

1000 ft

N W E S

Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011

SENATE CONCURRENT RESOLUTION NO. 4019
(Senators Wanzek, Luick, Uglem)
(Representatives Belter, Headland, D. Johnson)

A concurrent resolution recognizing the benefits of subsurface drain tile projects and urging the State Water Commission, State Engineer, Natural Resources Conservation Service, and water resource districts to recognize the beneficial attributes of and to promote drain tile projects in this state.

WHEREAS, drain tile projects have proven beneficial to agricultural production by increasing agricultural productivity and property values; and

WHEREAS, drain tile projects alleviate downstream flooding by providing additional storage of water; and

WHEREAS, drain tile projects improve the soil by reducing salinity of the soil;

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF NORTH DAKOTA, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN:

That the Sixty-second Legislative Assembly recognizes the benefits of subsurface drain tile projects and urges the State Water Commission, State Engineer, Natural Resources Conservation Service, and water resource districts to recognize the beneficial attributes of and to promote drain tile projects in this state; and

BE IT FURTHER RESOLVED, that the State Water Commission, State Engineer, Natural Resources Conservation Service, and water resource district boards pursue the investigation and approval of drain tile projects; and

BE IT FURTHER RESOLVED, that the Secretary of State forward copies of this resolution to the Governor; Agriculture Commissioner; each member of the State Water Commission; State Engineer; state executive director, Farm Services Agency, United States Department of Agriculture; and state conservationist, Natural Resources Conservation Service, United States Department of Agriculture.

NDSU EXTENSION SERVICE
NORTH DAKOTA STATE UNIVERSITY

Making a difference

2013 Subsurface Water Management Education

The Situation

Subsurface drainage systems (tile) are being installed in farm fields throughout the Red River Valley watershed as well as other parts of North Dakota. The general public and government officials may have heard of this technology but do not always understand the principles of tile or why farmers have so rapidly adopted this farming practice. The wet spring of 2013 along with decreased crop production in saline fields, high crop and land values prompted many farmers to invest in tiling their current land rather than buy new. Many producers want help with design of subsurface drainage systems plus information on controlled drainage and sub-irrigation.

Extension Response

During 2013 we, either together or separately, gave presentations on various aspects of tile drainage at over 20 meetings and field days throughout North Dakota and the Red River basin area of Minnesota. We cooperated with the NDSU Soil Health Team, agents in 13 counties and several businesses to conduct subsurface water management seminars. We cooperated with SDSU Extension and the University of MN Extension to organized three, 2-day, tile-drainage design workshops. One was held in North Dakota, one in South Dakota and one in Minnesota. Total attendance for the three workshops was over 180.

Impacts

Subsurface water management education was provided to over 1,450 people this year. Each of the three tile design workshops was evaluated with an "end of the course" survey. One of the questions we asked was "If you were to place a dollar value on the information you received (when you apply the knowledge you learned in your business and not the price you paid today) what would it be?" When the responses from participants were tallied, they indicated the perceived value was well over 3.5 million dollars. In October, 600 copies of Extension bulletin AE1690, "Frequently Asked Questions about Subsurface (Tile) Drainage" was published, by December another 500 copies had to be printed to satisfy the demand.

Feedback

One of the farmers participating in the tile design school stated: "I have come to the realization that this (installing tile) is much more complex than I ever dreamed. All information is/was greatly useful and this was one of the better workshops I have been at in recent years." Another attendee wrote: "I'm not a farmer but this training was invaluable to me."

One other farmer said that the most important thing he learned was the importance of considering how tile layout may affect or limit management strategies. He also stated: "The team did a good job of tailoring training to recognize local issues." The following question was on the evaluation: "How useful was the information presented at this meeting?" 60% stated "very useful," and 40% stated "useful."

Contact

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NDSU Extension Agronomist Broadleaf Crops
Department of Plant Sciences
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pg. 8

Drain Tile

SB 2263

Before Tile

Field Analyzer - Operations Center

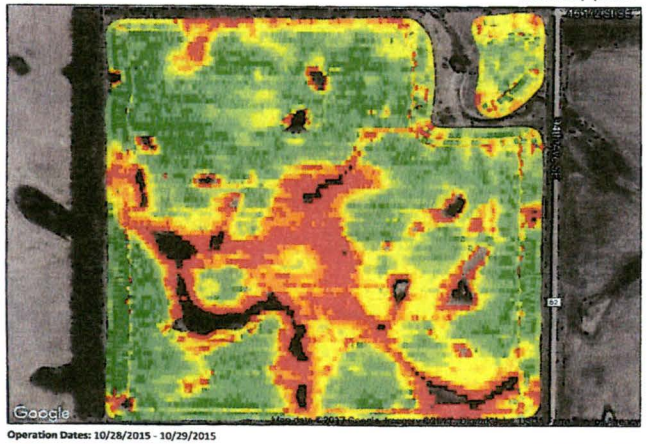
Page 1 of 1

JOHN DEERE Operations Center

2015 Corn: Harvest 3

Layer: Yield

Josh Graves | Ypsi Land



Operation Dates: 10/28/2015 - 10/29/2015

AGRONOMIC DATA	
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AVG. YIELD	120.61 bu/ac
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LEGEND	
181	15 %
159	27 %
132	16 %
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25	9 %
0	13 %

https://my.deere.com/map

1/19/2017

After tile

Dry Yield

TMT FARMS - Graves - 3

AMEX Farm Management Software

Client Information:

Client:	TMT FARMS
Farm:	Graves
Field:	3

Field Information:

Crop:	Soybeans
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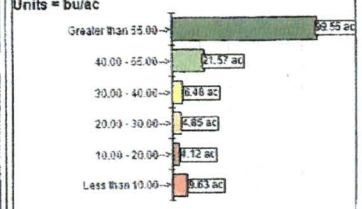
Legend Information:

Units = bu/ac



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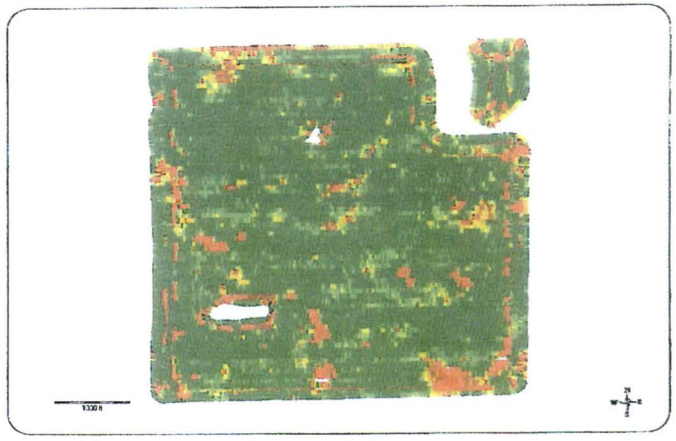

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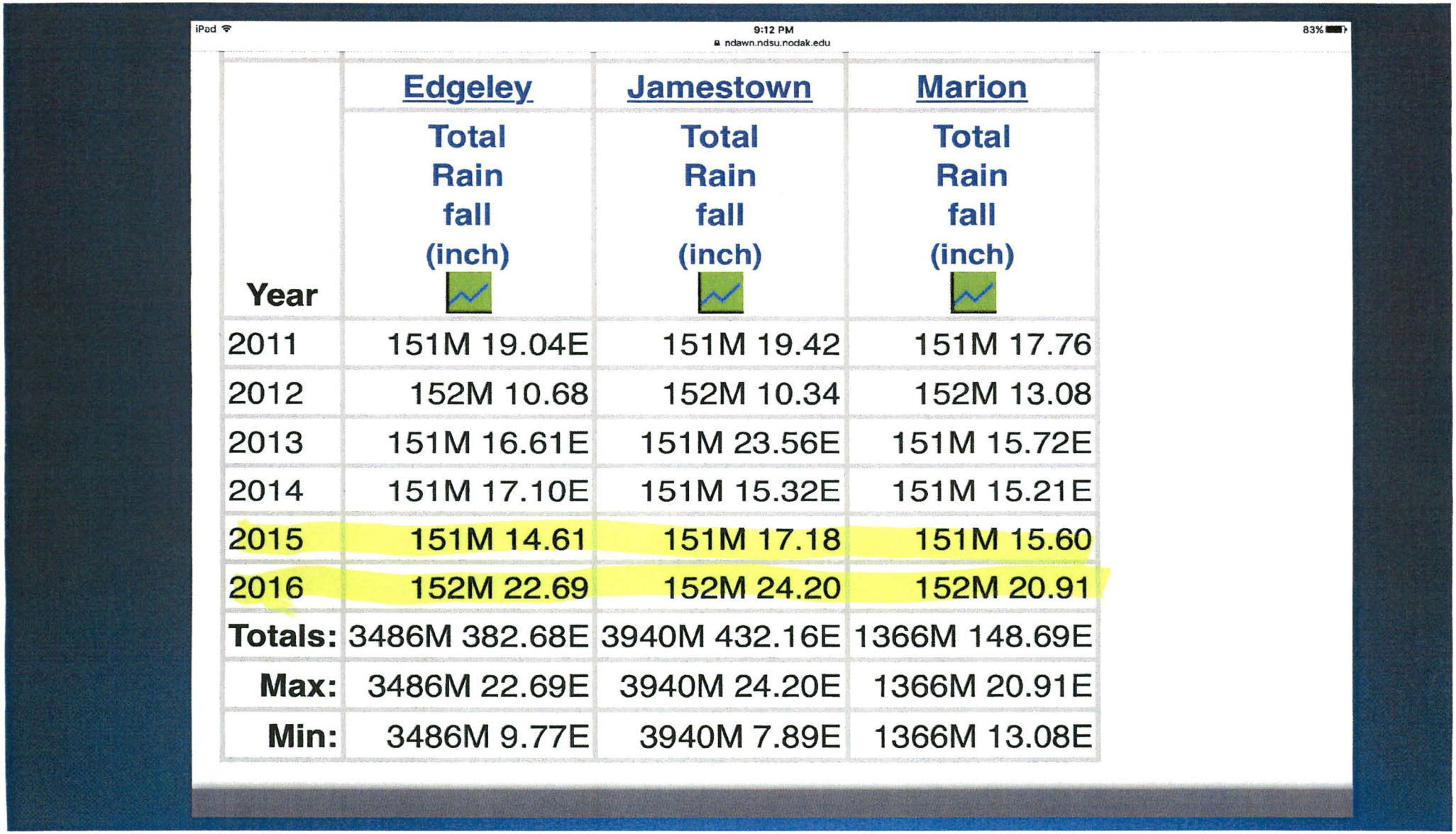
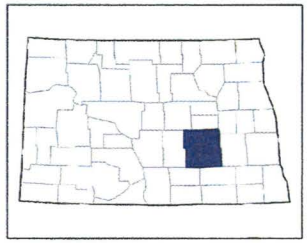
Page 1 of 1



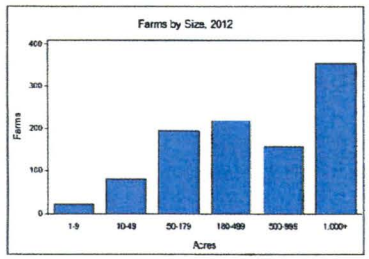
Year	Edgeley Total Rain fall (inch)	Jamestown Total Rain fall (inch)	Marion Total Rain fall (inch)
2011	151M 19.04E	151M 19.42	151M 17.76
2012	152M 10.68	152M 10.34	152M 13.08
2013	151M 16.61E	151M 23.56E	151M 15.72E
2014	151M 17.10E	151M 15.32E	151M 15.21E
2015	151M 14.61	151M 17.18	151M 15.60
2016	152M 22.69	152M 24.20	152M 20.91
Totals:	3486M 382.68E	3940M 432.16E	1366M 148.69E
Max:	3486M 22.69E	3940M 24.20E	1366M 20.91E
Min:	3486M 9.77E	3940M 7.89E	1366M 13.08E

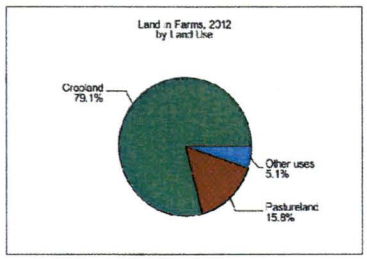
2012 CENSUS OF AGRICULTURE
COUNTY PROFILE

Stutsman County
North Dakota



	2012	2007	% change
Number of Farms	1,028	1,043	- 1
Land in Farms	1,302,623 acres	1,193,231 acres	+ 9
Average Size of Farm	1,267 acres	1,144 acres	+ 11
Market Value of Products Sold	$464,568,000	$198,283,000	+ 134
Crop Sales $418,246,000 (90 percent) Livestock Sales $46,321,000 (10 percent)			
Average Per Farm	$451,914	$190,108	+ 138
Government Payments	$13,278,000	$13,790,000	- 4
Average Per Farm Receiving Payments	$16,494	$15,564	+ 6



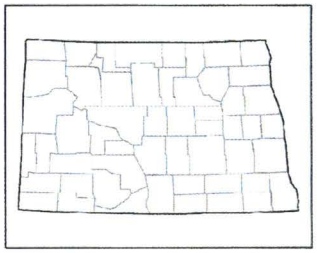


USDA US Department of Agriculture
National Agricultural Statistics Service
www.agcensus.usda.gov

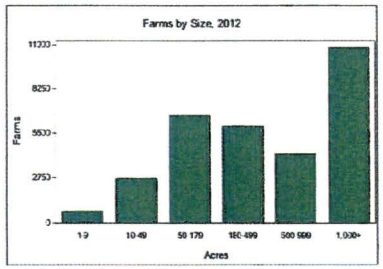
pg.14

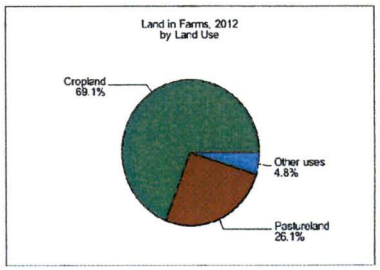
2012 CENSUS OF AGRICULTURE
STATE PROFILE

North Dakota



	2012	2007	% change
Number of Farms	30,961	31,970	- 3
Land in Farms	39,262,613 acres	39,674,586 acres	- 1
Average Size of Farm	1,268 acres	1,241 acres	+ 2
Market Value of Products Sold	$10,950,680,000	$6,084,218,000	+ 80
Crop Sales $9,664,285,000 (88 percent) Livestock Sales $1,286,395,000 (12 percent)			
Average Per Farm	$353,693	$190,310	+ 86
Government Payments	$381,710,000	$359,532,000	+ 6
Average Per Farm Receiving Payments	$15,398	$13,462	+ 14





USDA US Department of Agriculture
National Agricultural Statistics Service
www.agcensus.usda.gov

Golden Rule of Tile Drainage

- Drain only that amount necessary to create adequate field conditions and retain water that may contribute to healthy crop production.

AgPhD

Tiling in North Dakota

Brian Hefty, Ag PhD TV & Radio

AgPhD

Brian's Background

- Lifelong farmer near Sioux Falls, SD
- Part-owner of Hefty Seed Company. 7 of our 40 stores are in North Dakota (Pembina, Hillsboro, Hurdsfield, Wilton, Webster, Mohall, and Lisbon)
- Co-host of Ag PhD since 1998, the nation's most-watched agronomy TV show
- Agronomist, working with farmers throughout the U.S. to produce better crops, more farm income, a healthier environment, and more food for the world
- I have personally designed and installed tile systems on our own farm and for over a decade have trained farmers on how to do the same thing

AgPhD

5 Key Points

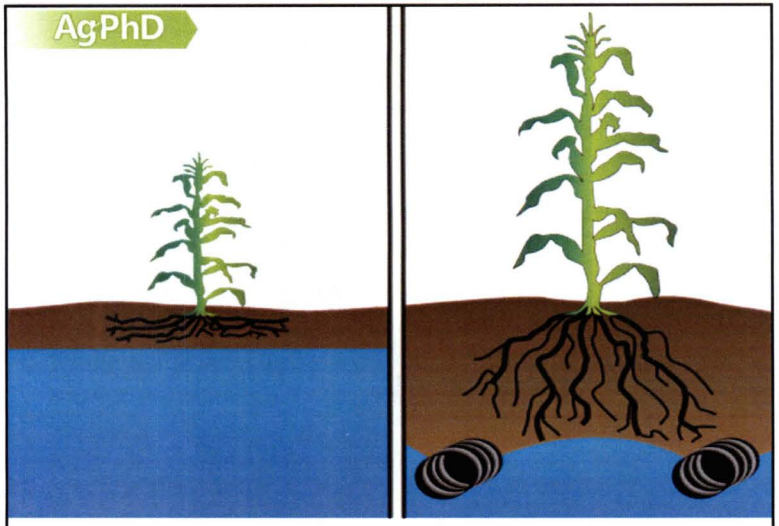
- All tiling does is lowers the water table in the soil. When the water table is too high it kills plants and almost all soil life due to lack of oxygen. A high water table also brings salt to the soil surface, which eventually severely damages the ground.
- Adding tile does NOT increase the total amount of water that eventually leaves the field. It just changes the timing.
- The state of North Dakota has LOTS of GREAT soil, but much of it is getting damaged today by high water tables.
- As an agronomist & farmer, I can tell you that all the other things we do to improve crops don't work very well when drainage is poor.
- This legislative change is a minor one. The current law on the books, from what I've seen the last 6 years, has been good overall.

AgPhD

How Does North Dakota Benefit from Tiling?

- Increased crop yields – that means more income for farmers, more tax for the state, and increased investment in rural communities
- Fewer prevent plant acres (ND has had over 1 million prevent plant acres on average for 20+ years!) – less prevent plant means many things including lower insurance rates for farmers and less government spending
- Better roads – water is the #1 enemy of roads
- Less flooding
- Less erosion
- Cleaner water
- Healthier soil for the next generation of farmers

pg. 2



AgPhD How Exactly Does Tile Work?

- All tile does is lowers the water table.
- For example, if a tile line was set in the ground at 3 feet deep, if the water table is below that level, the tile line will not run. If the water table is more shallow than 3 feet, water will enter the perforations in the line and flow out the end.
- If ground is 100% saturated and untiled, when a rain falls the rain runs off, leading to flooding and water quality issues. When land is tiled, it can better absorb rainfall, reducing erosion and improving downstream water quality.

AgPhD Why Does Poor Drainage Hurt Crop Yields?

- In Agronomy 101, we were taught that ideal soil composition is 50% dirt, 25% water, and 25% air. If the 25% air becomes 25% more water (that could equal an extra 3" of water per foot of soil), that has many negative consequences.
- Too much water kills soil microbes, stunts roots and plant growth, and leads to significantly lower yields. Plants will NOT grow into a water table, because there is no oxygen there.
- Also, over time if drainage is poor there will be little plant growth to use the water up, so the excess water issue becomes even worse.

AgPhD Why Does Tile Improve Crop Yields 15% or more?

- Roots can't grow into the water table. If the water table is high, roots die. Tiling leads to deeper, bigger roots.
- Less chance for soil compaction
- Earlier spring warm up
- Longer & more predictable growing season
- Very slowly reduce high magnesium levels
- Speed all field operations from planting to harvest
- Reduce stuck situations, breakdowns, and repair costs
- Plant earlier
- Fewer seed & seedling diseases
- Spraying can be done more timely
- Reduce surface water
- Lower high soil pH
- Reduce salt levels

AgPhD Tile Reduces Erosion

- Dozens of university studies have been done on this issue over the years. The summary is that tiling reduces erosion 40% to 60% because tiling creates a reservoir in the soil to hold rain water, so the rain water doesn't have to run off the field.
- Skaggs (1982) reported that improvement in subsurface drainage decreases excess surface water and erosion.
- Bottcher (1981) reported that a complete subsurface drainage system significantly reduced runoff and sediment losses
- Istok and Kling (1983) reported that runoff and sediment yield was reduced about 65% and 55%, respectively, due to installation of a drainage system.

AgPhD Tile Improves Water Quality

- Soil is the best water filter. When water has to slowly seep through the soil to a tile line several feet in the ground, contaminants are removed. A University of Guelph summary of university studies determined the general consensus is tile reduces phosphorus, potassium, and total nitrogen losses.
- Nitrate loss may go up slightly in tiled land, but if farmers properly manage nitrogen applications this is negligible. Keep in mind, the drinking water standard in the U.S. is 10 ppm of nitrate-nitrogen. In other words, a low level of nitrate does not hurt human beings.
- Phosphorus is the number one fresh-water quality issue in the U.S. today. Phosphorus is virtually immobile in soil, so when erosion is reduced, so is phosphorus loss.
- Bengston (1982) found tile lowered losses of P (48%) & K (22%), while increasing N (3.2%)

Report Number: 12-158-2050

Midwest Laboratories®

Date Reported: Jun 06, 2012

Date Received: Jun 01, 2012

Date Sampled:

Reported to: HEFTY SEED COMPANY
MIKE DREY
47504 252ND ST
BALTIC SD 57003-

HBS RESEARCH FARM
BALTIC SD

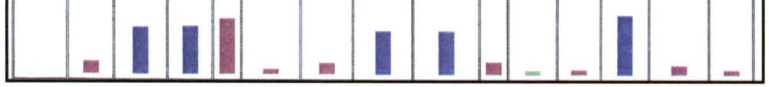
WATER ANALYSIS

Sample ID HELENS

Lab Number 1998144

Level Exceeds EPA Limits	Problems Likely	Potential Problems	No Apparent Problems	Non-Detect

Analyte	SODIUM Na ppm	CALCIUM Ca ppm	MAG-NESIUM Mg ppm	pH	NITRATE NITROGEN NO_3-N	SULFATE SO_4	CONDUC-TIVITY mmhos/cm	TOTAL DISSOLVED SOLIDS (TDS) ppm	SAR	PHOS-PHORUS P ppm	POTAS-SIUM K ppm	BICAR-BONATE HCO_3 ppm	CHLORIDE Cl ppm	BORON B ppm
Level Found	20.1	101	46.3	7.57	2.4	59	0.799	519	0.40	n.d.	2.4	374	23	0.05



AgPhD Tile Reduces Flooding

- By tiling, peak waterflow will be reduced.
- Zucker and Brown (1998) concluded that subsurface drainage (tiling) reduces peak flows from watersheds by 15 to 30 percent, and has little impact on the total annual flow from watersheds.
- Additional studies showing tiling reduces peak flows were conducted by:
  - Mason & Rost, 1951
  - Larson et al., 1980
  - Natho-Jina, 1986
  - Konyha, 1992
  - McLean & Schwab, 1982
  - Skaggs & Broadhead, 1982
- In the Skaggs & Broadhead study they found a reduction in peak flows from 20% to 87%!

AgPhD

Flooding Impact on Communities

- One of the main reasons flooding is reduced when tile is added to a farm is more crop will be produced. When a crop yields more, it extracts more water from the soil.
- When tile is first installed in a field, the "initial flush" will be high, but after 2 to 4 weeks, the flow is usually much less. Quite often, tile lines don't run at all through much of the year.

AgPhD

Final Statements

- North Dakota has approximately 24 million crop acres. My estimate is that almost half of these acres are adversely affected by excess water almost every year, not to mention the millions in damage caused to roads because water tables are too high.
- The tiling that has been done in North Dakota over the last few years has had great economic and environmental benefits with no real downside.

AgPhD

Final Statements

- In Minnesota and Iowa, where they have more rainfall and heavier soil on average, there are almost no regulations when it comes to tiling. As is the case in all states, if a property owner feels their land is damaged due to someone tiling upstream, they have the right to take it to court. Knowing this, upstream landowners tile responsibly, as they would here in North Dakota if no regulations restricted tiling.
- I am more passionate about this topic than almost anything else in agriculture, because when tiling is done correctly, everyone wins, and the benefits of better soils, less erosion, less flooding, cleaner water, better roads, and more income for rural America last for decades.

AgPhD

CONTACT INFO FOR BRIAN:

BRIAN HEFTY:

Cell: 605-351-3463

brian@agphd.com

1/26/17 #3

Chairmen Luick and Committee Members

Thank you for the opportunity to submit some thoughts that I have on SB 2263. During the 2011 session, we passed monumental legislation which eased the process for farmers to receive a tiling permit from their local Water Board. The 2011 legislation was appreciated by farmers as well as the Water Boards, because it put into code reasonable legislation that all parties could comply with.

I believe that the last figure I have seen from North Dakota State University was that nearly thirty percent of North Dakota soils are affected by soil salinity. That is a startling figure. The good news is that with tiling we can be good stewards of the land by tiling which is probably the most effective way to reduce salts. My personal experience on our family farm is that with tiling the reduction in salinity has been remarkable. Tiling is about soil health and it is important that the legislature sets forth legislation that clarifies existing law and promotes agriculture production while saving our natural resources for generations to come. North Dakota is one hundred years behind the corn belt in the tiling of fields. Water management thought tiling is a key management tool for agriculture production and soil health.

Although the 2011 legislation has been working well there is one issue that has seemed to have been an area of concern. That is that some Water Boards have required applicants to get easements from downstream land owners when downstream land owners have not expressed opposition to the applicant's plan. This is certainly counter to legislative intent in the 2011 legislation. Legislative intent is that downstream easements are the prerogative of the applicant when no downstream concern are expressed.

We have a good law but all laws need some changes to make them workable for all parties. I will leave that to you legislators to resolve concerns expressed in the hearing process.

On the lighter side, Judy and I are spending three months in California. California has been blessed with all the resources that God could have ever given any state. There is one thing Californians have forgot to use that God also must have given them. That is common sense. We can be so proud of the citizen legislative process we have in North Dakota. Working together to solve problems is exemplified in the hearing process.

Thank you for this opportunity. Not easy to get out of the arena in areas that are so important to our agriculture industry and the preservation of soils we have so richly been blessed with.

Sincerely

Wesley R. Belter

Former State Representative

Past Speaker of the House

#4
pg.1
1/26

Senate Ag Committee

SB 2263

Please support this bill.

Below is my exchange with attorney KaleVan Bruggen from Rinkee Noonan.

Chad Weckerly's Questions

I am getting ready to fill out this tile application. The Sheridan county water board seems hell bent on not allowing any tile application to go through. There is one board member pro drainage and one that is in the middle with the rest against any drainage.

I am writing you because this is the exact regulation they have passed in that county. Can they force permanent easement? ND doesn't even allow perpetual easements.

Do they have the right to the inspection of property as they laid out here?

Do they have the right to take the monies on the application if those dollars are not used for expense on the application?

Seems like their right to contact all landowners in an affected area is their attempt to stir up trouble. Why not certified mail notifications from the person filing the application?

Thanks,
Chad Weckerly

Office : 701-962-3343
Mobile: 701-793-7382
farmerchad@weckerlyfarms.com
www.weckerlyfarms.com

Kale's response

Chad,

Here are some detailed answers to your questions below. I have received countless complaints that the Sheridan Water Resource District has told landowners in that county that they do not permit drainage tile in Sheridan County, period, because everyone is wet and there is nowhere for the water to go. That is not permissible. You are dealing with a very difficult Board in that county. The answers below provide the legal answers to your questions; unfortunately, the reality here might be that if the Board flat out refuses to grant your permit and it otherwise meets the legal requirements, you may need to appeal their decision to the Sheridan County District Court for review. This must be done within 30 days of the Board's decision.

I have had clients in North Dakota who have gone forward with major projects that, under the law, require permits because the Water Resource District has frustrated the process so greatly. To date, the Board has not done anything. I can't advise that route as the Board would have the authority to order the drain blocked until a permit is drained. But I think it shows just how frustrating the behavior of some of the County Water Resource Boards has been.

Call me if you have any questions.

Permanent Easements from Downstream Landowners

The Board cannot force a permanent easement. A water resource district may only require a flowage easement or written permission from the current downstream landowner where an investigation by the water resource district or a downstream landowner within one mile shows that the proposed drainage will flood or adversely affect lands of downstream landowners in violation of the reasonable use principles within one mile. This language is found in N.D.C.C. § 61-32-03.1.

By requiring an applicant to obtain written permission or an easement for a drainage project from a downstream landowner prior to submitting the application to the water resource board, the water resource district gives downstream landowners unfettered power to stop drainage that might otherwise comply with the principles of reasonable use. Giving downstream landowners this power violates the property right to drain excess waters under the doctrine of reasonable use and constitutes a "taking" of that property right. N.D.C.C. § 61-32-03.1 requires that the water resource district or the downstream landowner within one mile of the project demonstrate to the water resource district board that the proposed project will flood or adversely affect downstream lands. The standard for "flood or adversely affect downstream lands" must be an investigation that considers the project in light of the principles and standards under the doctrine of reasonable use. Any other construction would create a conflict between the statute and the constitutional "takings" clause.

Permanent Easements from Downstream Road Authorities (Counties, Townships)

A water resource district may only require that an applicant for installation of an artificial subsurface drainage system proposing to drain into a highway right-of-way obtain a permit from the road authority for such drainage if an investigation by the water resource district or the road authority demonstrates that the proposed subsurface drainage project will flood or adversely

affect the highway right-of-way. This is the same rule that applies to the question of getting easements from downstream landowners.

Road authorities do not receive special status under the law of drainage. It has been said by the Supreme Court of South Dakota, for example, that the right to drain over or onto lower property of another, without compensation for the privilege (or without paying damages) is the same whether the upper land is the farm of an individual or a public highway. *See La Fleur v. Kolda*, 22 N.W.2d 741, 743 (S.D. 1946). The principal here is that when a drainage permit application is being processed under N.D.C.C. ch. 61-32, the road authority is a downstream landowner in the same status as downstream landowner farms and individuals.

As a government entity or road authority, the road authority may be permitted to adopt regulations respecting the use of its right-of-ways. Such ordinances or resolutions may include regulations respecting the use of right-of-ways for drainage purposes. Again, however, regulations of highway right-of-ways must not go so far as to prohibit the right to drain property of excess waters within the doctrine of reasonable use.

If a road authority has adopted a permitting procedure within its authority, then an applicant for a subsurface drainage system may need to approach the road authority and apply for a permit. The permit, if obtained, may serve as the written permission needed to satisfy the water resource district. However, if an investigation by the road authority or the water resource district cannot demonstrate that the proposed project will flood or adversely impact the highway right-of-way, the water resource district cannot deny the drainage permit based on the applicant's failure to have first obtained a permit from the road authority.

Inspection Rights

In my opinion, a water resource district board does have the authority to inspect the property subject of the permit application. N.D.C.C. § 61-32-03.1 permits the water resource district to conduct an investigation; therefore, if the purpose of the inspection is limited to investigation of the property for evaluation of the permit application, my opinion is that the water resource district would have the authority to do so.

Permit Application Fees

There is no authority in the Century Code for the District to assess costs incurred in the course of investigating applications for subsurface drainage systems under N.D.C.C. § 61-32-03.1. In fact, Attorney General Letter Opinion 2012-L-01 dated January 10, 2012 expressly states "[t]here is no requirement in section 61-32-03.1 for an owner of land to pay for an investigation" and that "such a directive would not be authorized under section 61-32-03.1 if it is not expressly stated." *See* N.D. Att'y Gen. Op. 2012-L-01 (Jan. 10, 2012).

Notice to Downstream Landowners

N.D.C.C. § 61-32-03.1 requires notice to all landowners downstream of the project within one mile. The purpose of the notice requirement is to permit the downstream landowner, who has the burden here, to show that he or she will be adversely affected or flooded by the project. If the Board determines the downstream landowner has met that burden, then the statute permits the Board to attach a condition to the permit that you must obtain a flowage easement prior to

construction; however, the statute also states that if the project outlets directly into an assessment drain, natural watercourse, or pond,

slough, or lake, then the Board cannot require that you obtain an easement. In my opinion, nothing legally would prevent the Board from notifying other members of the public, but the Board cannot deny your permit application unless it determines the project is of statewide significance or that the project will flood or adversely affect landowners within one mile downstream.

Kale R. Van Bruggen
Attorney

RINKE NOONAN
Suite 300, US Bank Plaza
P.O. Box 1497
St. Cloud, MN 56302
(320) 656-3522 Direct
(320) 656-3500 Fax

Sheridan County Water Board Drainage Regulations

The Sheridan County Water Board has approved the following regulations for this county, on March 28, 2013.

The Sheridan County Water Board reserves the right to add the following regulations to the existing state and/or county regulations involving above ground or subsurface drains. The board reviewed and reaffirm these regulations on June 10, 2013

All landowners or persons who plan on doing any drainage, must have a written (permanent easement) signed by affected parties downstream. This would include landowners, township boards and/or county commission boards. These signed documents will then be kept on file at the Sheridan County courthouse.

The Sheridan County water board reserves the right to contact all land owners or persons involved in writing in the affected drain area. This would include anyone that may be impacted within the drainage area. This would be after it leaves the draining landowners property.

The Sheridan County waterboard reserves the right to inspect this property at anytime before, during and after an application form has been returned to the waterboard. The water board reserves the right to inspect drain tile and/or pipe before, during and after installion. This tile or pipe must meet their approvable and conditions before being installed.

Anyone who applies for a drain application, upon its return to the courthouse, must submit a check or cash in the amount of $1000.00, this is non refundable. This money will be used to cover expenses involved in the drainage application.

Also all landowners or draining persons will be subject to cover any or all additional costs, that the waterboard,township boards and county commission boards deem necessary to protect property downstream.

Greater North Dakota Chamber

Testimony of Andy Peterson
Greater North Dakota Chamber of Commerce
SB 2263
House Appropriations – Human Resources
Honorable Larry Luick - Chair
January 26, 2017

Mr. Chairman and members of the committee, my name is Andy Peterson and I am here today representing the Greater ND Chamber, local chambers of commerce, and other business associations throughout north Dakota. Some members of the media describe the GNDC as the most prominent business organization in North Dakota. We stand in support of SB 2263 and ask for a "do pass" recommendation.

Why would the Greater North Dakota Chamber involve itself in a bill relating to the permitting of subsurface draining permits? Simply put, farming is a business which provides the framework for a larger economy. These include seed dealers, Ag manufactures, equipment dealers, and financial industries to name a few. Without farmers North Dakota would be that large rectangular flyover state Eric Severiod described so many years ago. A cornerstone, then, for farmers and any supportive business is certainty. SB 2263 prescribes regulatory certainty.

It does this by way of cutting red tape, not corners, and it leaves the decision making process at the local levels of government – in this case the local water boards. It also provides uniformity to the decision making process whether you are in McKenzie, Cass, or Grand Forks County or anywhere in between. By providing parameters, but not outcomes, for the decision making process landowners, farmers, and investors have the certainty to make decisions.

One only need to look at the regulatory uncertainty of the Dakota Access Pipeline where the decision making process and the rule of law was changed to understand the devastating consequences of regulatory uncertainty. Here we have an opportunity to champion certainty, to allow local government control, and, like we all like to say from time to time, do things the North Dakota way.

PO Box 2639
Bismarck, ND 58502
P: 701-222-0929
F: 701-222-1611

www.ndchamber.com

#6

North Dakota Grain Growers Association

Your voice for wheat and barley. www.ndgga.com

North Dakota Grain Growers Association
Testimony on SB 2263
Senate Agriculture Committee
January 26, 2017

Chairman Luick, members of the Senate Agriculture Committee, for the record my name is Mark Formo; I am a diversified family farmer from Litchville, North Dakota. I am also Immediate Past President of the North Dakota Grain Growers Association (NDGGA). I appear before you today both for myself as a North Dakota farmer as well as a representative of the North Dakota Grain Growers Association to support SB 2263.

Chairman Luick, members of the Senate Agriculture Committee, policy that promotes orderly water management in North Dakota is a top priority on my farm as well as for NDGGA. SB 2263 seeks to clarify current subsurface water management statutes as well as seeking to streamline the subsurface water management process in our state.

Specifically SB 2263:

- Clarifies the "scope and effect" of the tile is used to calculate whether the system drains 80 acres of land area
- Addresses when and to whom notice of downstream landowners are given
- Clarifies that the State Engineer shall make decisions, in a timely manner, on tiling permit applications impacting state property
- Clarifies that downstream landowners are entitled to receive notice, must present technical evidence supporting contentions that their land will be flooded or unreasonably harmed, and must present the information within 30 days of the subsurface water permit application being filed
- Clarifies flowage easement requirements
- Clarifies what will preclude the timely approval of a subsurface water permit application
- Sets the timeline for a water resource district's approval or denial of a permit application at 60 days
- Removes the liability and penalty for downstream damages caused by persons installing subsurface drainage without a permit

Phone: 701-282-9361 | Fax: 701-239-7280 | 1002 Main Ave W. #3 West Fargo, N.D. 58078

- Provides for an appeals process through the District Court

Chairman Luick, members of the Senate Agriculture Committee, I know first-hand of the benefits that orderly water management can bring to myself and to my neighbors; it improves the land quality, promotes soil health, and improves environmental quality to the benefit of all. I also know the frustration felt when the bureaucracy stymies the water management process through the use of official and artificial barriers. The clarifications and directives contained in SB 2263 will move water management forward to the benefit of North Dakota agriculture and the North Dakota economy.

Therefore, Chairman Luick, members of the Senate Agriculture Committee, I as a North Dakota farmer and on behalf of the North Dakota Grain Growers Association urge a Do Pass on SB 2263.

#7
1/26/17

Testimony in Support of SB 2263 – Subsurface Drainage Permit

Carson Klosterman, on behalf of the North Dakota Corn Growers Association

Good Morning Chairman (Larry) Luick and members of the Senate Agricultural Committee. For the record my name is Carson Klosterman. I farm in Richland County near Wyndmere, ND, with my wife Haley, dad and family. We raise corn, soybeans and sugar beets in our farming operation. I currently serve as the President of the North Dakota Corn Growers Association. I also serve on the National Corn Grower Association Production and Stewardship team and the chair the same team for the North Dakota Corn Growers. The North Dakota Corn Growers support SB 2263, to clarify the subsurface drainage permits to ensure uniformity across the state.

The support of this bill is based fairness and uniformity in the permitting process across county boundaries. Each landowner in the state should be treated the same and have chances at uniform outcome when requesting approval for water management from the county water boards.

A streamlined and uniform process for both the water boards, the landowners and applicable legal representatives, as applicable, is a worthy effort. A better working relationship between landowners and their county waterboards is also important.

Landowners and/or farm operators are limited to land access in our state. As a young farmer, I am trying to find ways to improve the value and productivity of the land I currently owner or rent. This allows me not to have to go out and bid for land at prices that I cannot afford. As stated earlier, I am also aware that as famers we must continue to show that we are good stewards of the land and farm in a sustainable way - - but still need to be mindful of the need to have a positive bottom line.

This bill which offers streamlining and uniformity, seems spot on for what we need in North Dakota.

Thank you and I would be happy to answer any questions.

1/26/17 #8

North Dakota Soybean Growers Association
1555 43rd Street South, Suite 103, Fargo, ND 58103
(701) 640-5215 | www.ndsoygrowers.com

Good morning Chairman Luick and members of the Senate Agricultural Committee. I'm Craig Olson, President of the North Dakota Soybean Growers Association, and a Colfax area farmer and rancher.

Thank you all for your willingness to serve ND's citizens, contributing both your time and talent, making our state a better place now, and into the future.

The North Dakota Soybean Growers Association supports SB 2263. As producers, we are always seeking ways to improve the quality and quantity of our crops. Available water, too little or too much, can create conditions that challenge both the quality and quantity results we desire.

Current law allows us to install tile projects that positively impact those crops, but we need to find ways to streamline the tile permitting process. SB 2263 seeks to clarify our current tile permitting law. We believe the intent of this bill is to improve the ability of Drain Boards to provide the right guidance for the installation of tile drainage systems.

Clear, compact permitting process are important. Extended permitting timelines jeopardize projects, and farmers can miss cost effective installation opportunities.

The basic concepts in the bill are good, but we would ask the committee to consider tweaks, such as: allowing for a more equitable balance between downstream people and persons requesting projects, perhaps providing the option for Water Boards to seek neutral third-party help to preserve and improve neighbor-to-neighbor relationships when contested situations arise or exist; and to ensure Water Boards have the authority to require and enforce appropriate erosion control devices for outlet locations, etc.

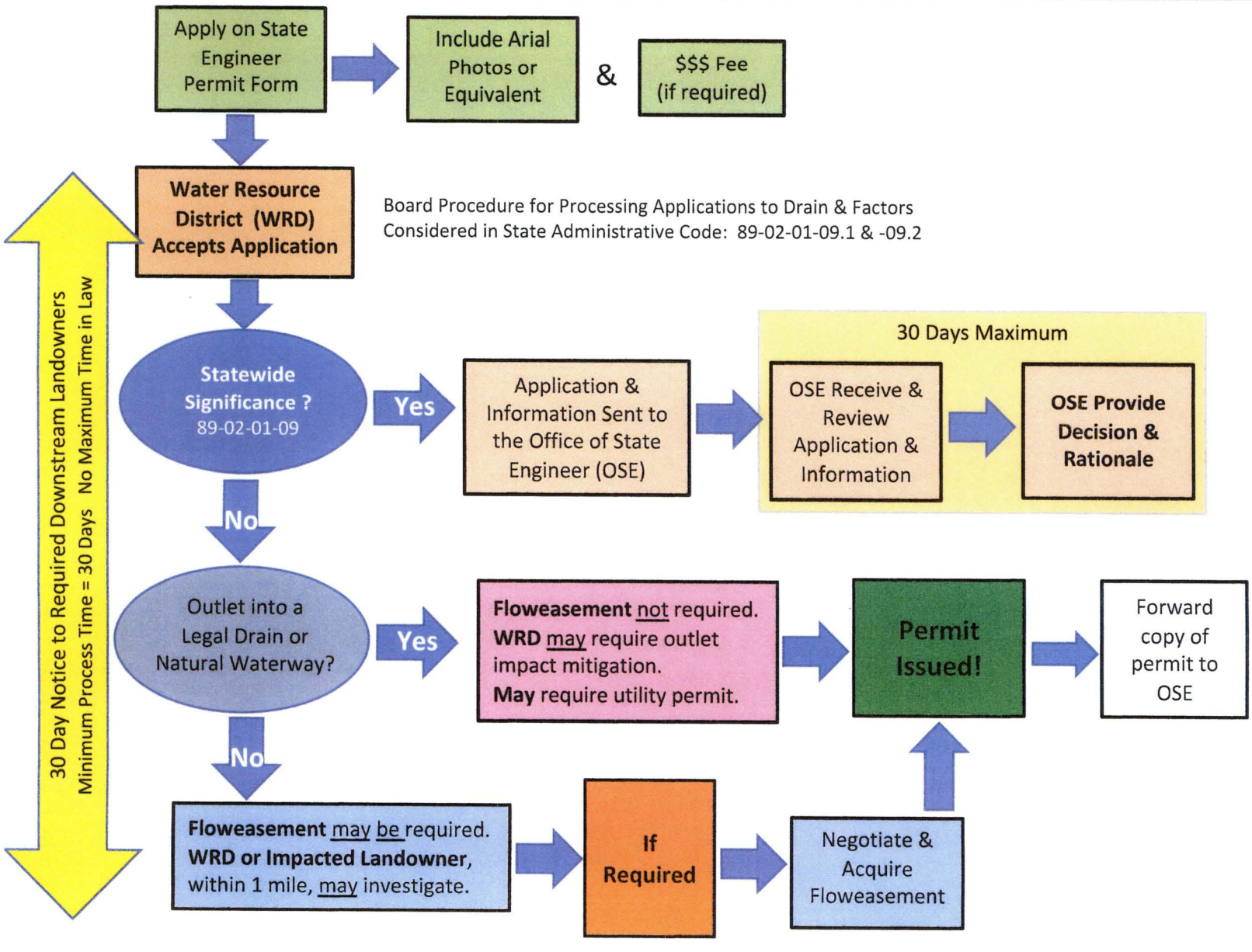
Thank You Again for your time and attention today. WE support SB 2263. We believe the suggestions we offer can help mitigate some of the potential emotional reactions that seem to accompany important water projects, improving individual farmer relationships and our entire Agriculture industry.

Thank You,

Craig Olson
NDSGA President
craig.olson@ndsoygrowers.com
Cell 701.640.4002

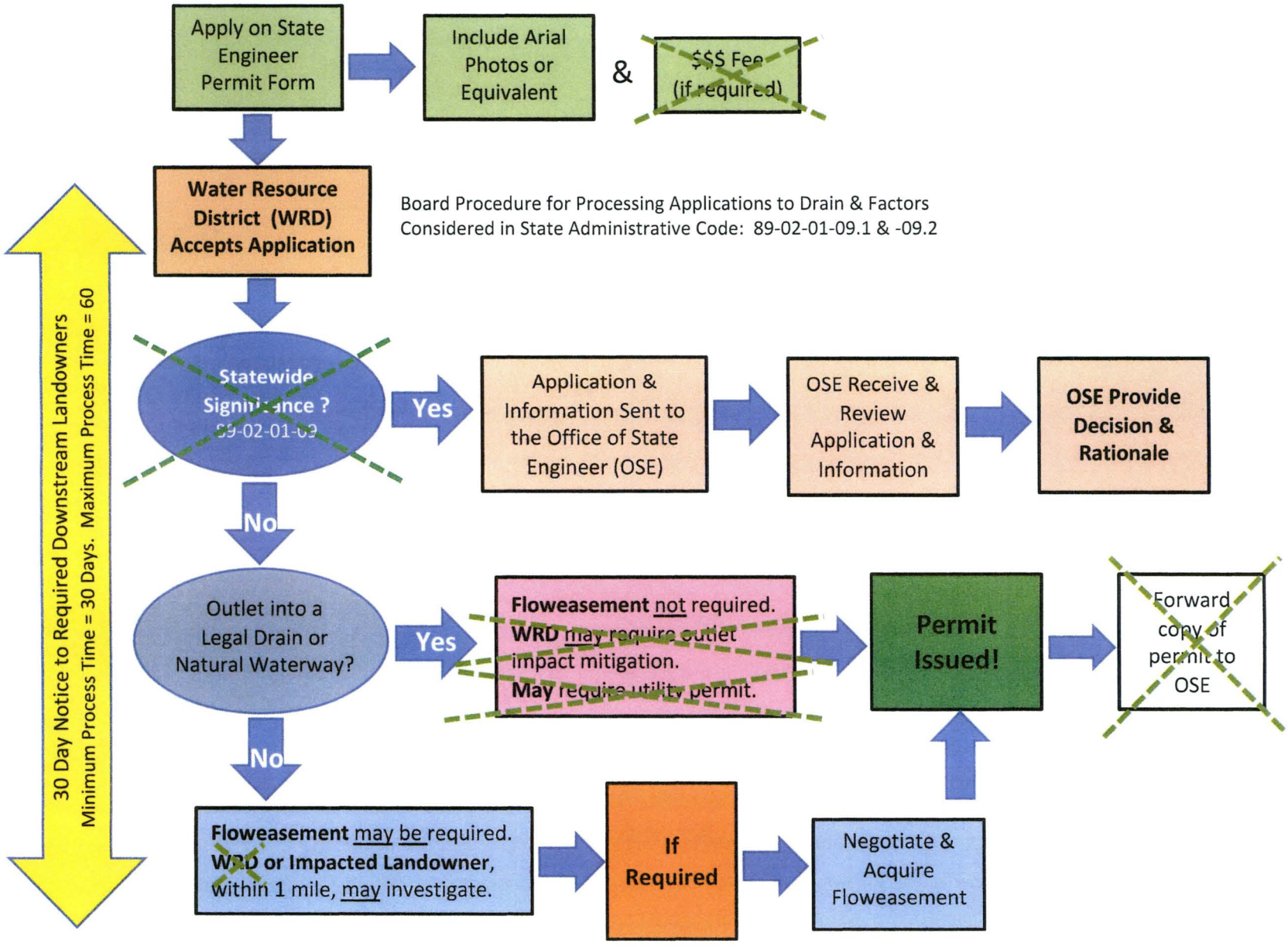
SB 2263 Process Bill -

Current Tile Permit Process Greater Than 80 Acres - NDCC 61-32-03.1 SB 2263



SB 2263 #9
1/26/17
pg 1

SB 2263 Proposed Tile Permit Process Greater Than 80 Acres



APPLICATION TO INSTALL A SUBSURFACE DRAIN

Version 4/11

I, the undersigned, am applying for a permit to install a subsurface drain system on an area comprising 80 acres or more as required under NDCC 61-32

Date Received Stamp Location

(OSE USE ONLY) **No.** _____

(WRD USE ONLY) **No.** _____

This application must be accompanied by FSA aerial photo or equivalent showing the location of the proposed drain tile.

(1) Water Resource District in which project is located: _____

(2) Legal description of land to be tiled: _____ ¼ _____ ¼ Section _____ Township _____ Range _____

_____ ¼ _____ ¼ Section _____ Township _____ Range _____

Legal description /location outlet: _____ ¼ _____ ¼ Section _____ Township _____ Range _____

_____ ¼ _____ ¼ Section _____ Township _____ Range _____

(3) Design Data:

(a) Type of outlet (gravity, pump, other): _____

(b) Design capacity of tile system (inches/day): _____ Outlet flow capacity: _____ cfs ☐ gpm ☐

Land area to be tiled (acres): _____

(c) Where does tile system discharge: road ditch ☐, private drain ☐, assessment drain ☐, natural waterway ☐

Other ☐: _____

(d) If discharging into road ditch include approval document from appropriate Federal, State, County, or Township road authority.

(4) Do you own land to be tiled? ☐Yes ☐ No If "No", give name and address of landowner: _____

_____

(5) Do you own location where tile system outlets? ☐Yes ☐ No

(6) Have downstream landowners been notified ☐Yes ☐ No Date of notice: _____

Before the Water Resource District will process a tile drain application, all downstream landowners for a distance of 1 mile from project outlet must have received 30 days notice by certified mail.

(7) Contractor if known: _____

(8) Anticipated construction start date: _____ Completion date: _____

APPLICANT'S CERTIFICATION

I understand that I must undertake and agree to pay the expense incurred in making an investigation. If the investigation discloses that the quantity of water to be drained will flood or adversely affect downstream lands, I may be required to obtain flowage easements and must file the easements in the office of the county recorder before a permit may be issued. My signature below acknowledges that I have read and agree to these statements, and will adhere to the conditions given on the back of this application.

Land Owner (Print): _____

Address: _____

_____

Phone: _____

Signature: _____ Date: _____

The filing of this application and its approval does not relieve the applicant and/or landowner(s) from any responsibility or liability for damages resulting from the construction, operation or failure of this drain.

FOR USE BY WATER RESOURCE DISTRICT AND STATE ENGINEER

If this application **does not involve** drainage of statewide significance, approval by the Water Resource District Board constitutes a permit to drain. If this application **does involve** drainage of statewide significance, approval by both the Water Resource District Board and the State Engineer must be given to constitute a permit to drain.

This application:

❒ does involve drainage of state-wide significance

❒ does not involve drainage of state-wide significance

❒ The Water Resource District Board has investigated according to NDAC Section 89-02-01-09.2.

This application is hereby:

❒ Denied Signature: _____
Chairman or Secretary of Water Resource District Board

❒ Approved Date: _____

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

(2) Construction must be completed within two years from the date of final approval.

(3) Additional conditions may include permission from roadway authorities, other permits, erosion protection, landowner consent if applicant is a tenant, operation restrictions under flood conditions, and other appropriate conditions attached by the water resource district.

This application involving drainage of state-wide is:

❒ Denied Signature: _____
State Engineer

❒ Approved Date: _____

CONDITIONS:

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

(2) Construction must be completed within two years from the date of final approval.

(3) See additional conditions attached by the State Engineer.

Mail to: Water Resource District in which the project is located.

#10
1/26/17

North Dakota AG COALITION

P.O Box 1091
Bismarck, ND 58502
(701) 355-4458
FAX (701) 223-4645

VOTING MEMBERS

Ameriflax
Independent Beef Association of ND
Milk Producers Association of ND
Minn-Dak Farmers Cooperative
ND Ag Aviation Association
ND Agricultural Assn.
ND Ag Consultants
ND Agri-Women
ND Barley Council
ND Corn Growers Association
ND Corn Utilization Council
ND Crop Improvement & Seed Association
ND Dairy Coalition
ND Dry Bean Council
ND Dry Edible Bean Seed Growers Association
ND Elk Growers
ND Ethanol Council
ND Farm Credit Council
ND Farmers Union
ND Grain Dealers Association
ND Grain Growers Association
ND Irrigation Association
ND Lamb & Wool Producers
ND Oilseed Council
ND Pork Producers Council
ND Soybean Growers Association
ND Stockmen's Association
ND Wheat Commission
Northern Canola Growers Association
Northern Plains Potato Growers
Northern Pulse Growers Association
Northwest Landowners Association
Red River Valley Sugarbeet Growers
U.S. Durum Growers Association

NON-VOTING MEMBERS

BNSF Railway Company
Ellingson Companies
Garrison Diversion Conservancy District
ND Association of Ag Educators
ND Association of Soil Conservation Districts
ND Beef Commission
ND Department of Ag
ND Soybean Council
ND State Seed Commission
NDSU Agricultural Affairs

Testimony of Jim Bahm
North Dakota Ag Coalition
Executive Committee Member
In Support of SB 2263

Chairman Luick and members of the committee, my name is Jim Bahm, and I am here today as a member of the Executive Committee of the North Dakota Ag Coalition. The Ag Coalition has provided a unified voice for North Dakota agricultural interests for over 30 years. Today, we represent more than 40 statewide organizations and associations that represent specific commodities or have a direct interest in agriculture. Through the Ag Coalition, our members seek to enhance the climate for North Dakota's agricultural producers.

The Ag Coalition takes a position on a limited number of issues, brought to us by our members, that have significant impact on North Dakota's producers and agriculture industry. The Ag Coalition supports SB 2263 in order for the drainage and water management process to be streamlined and made more equitable for producers in all townships within the state.

Our member groups represent the state's farmers who should be allowed to make timely investments in the use of their land and resources to produce high quality products, without the burden of regulations and extended wait periods. This bill assists in eliminating those roadblocks, therefore we encourage your support and passage of this bill.

SB 2263 #11a

1/26/17

pg. 1

PEMBINA COUNTY

WATER RESOURCE DISTRICT

308 Courthouse Drive #5
Cavalier, North Dakota 58220
Phone: 701-265-4511
Fax: 701-265-4165

TILE DRAINAGE CHECKLIST

1. TILE DRAIN PERMIT FEE OF $650.00 DEPOSITED AT PEMBINA COUNTY WATER RESOURCE DISTRICT

2. OBTAIN NECESSARY PERMITS/EASEMENTS
   - _____ Farm Service Agency Office Form AD1026
     Form will go to NRCS for wetland determination
   - _____ Pembina County Permit – if over 80 acres
     Cubic Ft/sec – Acres X 7 gal/min divided 60 seconds divided by 7.48 cu ft water
   - _____ Notification of downstream landowners for a distance of one mile – this must be done by certified mailings using attached form
   - _____ Contact County or township if crossing a road with drain tile or discharging into a ditch – written agreement needed.

3. Other documentation needed
   - _____ Tile goes across neighbor's land – easement involved
   - _____ Electrical service completed for the pump
   - _____ Outlet ditch needs to be cleaned or deepened
   - _____ Have NRCS flag any wetlands or tell us setback distances

APPLICATION TO INSTALL A SUBSURFACE DRAIN

Version 4/11

Date Received Stamp Location

I, the undersigned, am applying for a permit to install a subsurface drain system on an area comprising 80 acres or more as required under NDCC 61-32

(OSE USE ONLY) **No.** _____

(WRD USE ONLY) **No.** _____

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(2) Legal description of land to be tiled: _____ ¼ _____ ¼ Section _____ Township _____ Range _____

_____ ¼ _____ ¼ Section _____ Township _____ Range _____

Legal description /location outlet: _____ ¼ _____ ¼ Section _____ Township _____ Range _____

_____ ¼ _____ ¼ Section _____ Township _____ Range _____

(3) Design Data:

(a) Type of outlet (gravity, pump, other): _____

(b) Design capacity of tile system (inches/day): _____ Outlet flow capacity: _____ cfs ☐ gpm ☐

Land area to be tiled (acres): _____

(c) Where does tile system discharge: road ditch ☐, private drain ☐, assessment drain ☐, natural waterway ☐

Other ☐: _____

(d) If discharging into road ditch include approval document from appropriate Federal, State, County, or Township road authority.

(4) Do you own land to be tiled? ☐Yes ☐ No If "No", give name and address of landowner: _____

_____

(5) Do you own location where tile system outlets? ☐Yes ☐ No

(6) Have downstream landowners been notified ☐Yes ☐ No Date of notice: _____

Before the Water Resource District will process a tile drain application, all downstream landowners for a distance of 1 mile from project outlet must have received 30 days notice by certified mail.

(7) Contractor if known: _____

(8) Anticipated construction start date: _____ Completion date: _____

APPLICANT'S CERTIFICATION

I understand that I must undertake and agree to pay the expense incurred in making an investigation. If the investigation discloses that the quantity of water to be drained will flood or adversely affect downstream lands, I may be required to obtain flowage easements and must file the easements in the office of the county recorder before a permit may be issued. My signature below acknowledges that I have read and agree to these statements, and will adhere to the conditions given on the back of this application.

Land Owner (Print): _____

Address: _____

_____

Phone: _____

Signature: _____ Date: _____

The filing of this application and its approval does not relieve the applicant and/or landowner(s) from any responsibility or liability for damages resulting from the construction, operation or failure of this drain.

FOR USE BY WATER RESOURCE DISTRICT AND STATE ENGINEER

If this application **does not involve** drainage of statewide significance, approval by the Water Resource District Board constitutes a permit to drain. If this application **does involve** drainage of statewide significance, approval by both the Water Resource District Board and the State Engineer must be given to constitute a permit to drain.

This application:

❒ does involve drainage of state-wide significance

❒ does not involve drainage of state-wide significance

❒ The Water Resource District Board has investigated according to NDAC Section 89-02-01-09.2.

This application is hereby:

❒ Denied Signature: _____
Chairman or Secretary of Water Resource District Board

❒ Approved Date: _____

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

(2) Construction must be completed within two years from the date of final approval.

(3) Additional conditions may include permission from roadway authorities, other permits, erosion protection, landowner consent if applicant is a tenant, operation restrictions under flood conditions, and other appropriate conditions attached by the water resource district.

This application involving drainage of state-wide is:

❒ Denied Signature: _____
State Engineer

❒ Approved Date: _____

CONDITIONS:

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

(2) Construction must be completed within two years from the date of final approval.

(3) See additional conditions attached by the State Engineer.

Mail to: Water Resource District in which the project is located.

PEMBINA COUNTY WATER RESOURCE DISTRICT
RESOLUTION OF POLICY REGARDING DRAINAGE PERMIT FEES

WHEREAS, the **Pembina County** Water Resource District (the "District") is a North Dakota water resource district and political subdivision under N.D. Cent. Code Chapter 61-16.1.

WHEREAS, in accordance with Chapter 61-32 of the North Dakota Century Code, the District must consider, process, and approve or deny drainage permits, including subsurface or "tile" drainage permits.

WHEREAS, all permit applications, both surface and subsurface applications, require the District to conduct certain investigations and reviews before the District can make a final decision on a permit application, including land ownership, watershed impacted, impacts to downstream landowners, and other items, all in accordance with N.D. Cent. Code §§ 61-32-03 and 61-32-03.1, and Chapter 89-02-01 of the North Dakota Administrative Code.

WHEREAS, water resource districts' budgets are composed of those dollars generated by a maximum four mill levy, which typically does not generate substantial general fund dollars for water resource districts.

WHEREAS, water resource districts, including the District, must pay for the costs of conducting investigations and reviews of drainage permit applications, including applications for subsurface drainage projects, out of their general funds, and use of limited general fund dollars minimizes water resource districts' ability to construct other projects or to perform other tasks to benefit members of their districts.

WHEREAS, in light of the financial difficulties the District has encountered as a result of investigating, reviewing, and processing multiple drainage permit applications, including several applications for subsurface drainage permits, the District has concluded it is necessary to adopt a formal policy regarding the expenses associated with applications.

NOW THEREFORE BE IT RESOLVED that the terms contained in this RESOLUTION OF POLICY represent the District's official policy regarding drainage permit application fees.

BE IT FURTHER RESOLVED that each applicant submitting an ***Application to Install a Subsurface Drain*** will deposit $650 with the District for the costs of all legal and engineering fees, and other actual costs, as well as any costs over and above $650 incurred by the District prior to taking final action and making a final decision regarding an ***Application to Install a Subsurface Drain.***

APPROVED:
Ronald Falk
Chair

ATTEST:
Secretary-Treasurer

Date Approved: May 1, 2012

Tile Drain Restrictions:

1. Outlet design must be approved by the Pembina County Water Resource District
    a. Outlet shall include adequate erosion control methods to prevent damage
    b. Outlet must have a control structure that is capable of completely shutting off flow from the tile system during high water events.
2. Permit holder agrees to be bound by the decisions of the Pembina County Water Resource Board and will, upon request of and notice by the Pembina County Water Resource Board, seal the outlet
3. Any outlet work to be completed within the Right of way of a Pembina County Legal Assessment Drain must be done by a licensed and insured contractor. Proof of license and insurance must be filed with the Pembina County Water Resource District office prior to any work being completed.
4. Applicant must fully comply with all requirements as stated in the tile permit application
5. If an investigation is required under section 62-32-03.1, the applicant will be required to pay any and all actual costs over $650 for legal and engineering fees incurred by the district prior to taking final action and making a final decision.
6. Any and all additional maintenance required within the outlet ditch directly related to discharge from a tile drain is the responsibility of the applicant or landowner

In the Matter of APPLICATION TO INSTALL A SUBSURFACE DRAIN;
Applicant: _____

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF PEMBINA)

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

_____, being first duly sworn and being of legal age, states the following:

1. I am the Applicant under an APPLICATION TO INSTALL A SUBSURFACE DRAIN dated _____, 20____ (the "Application").

2. I recently filed the Application with the Pembina County Water Resource District (the "District").

3. As required under North Dakota law, I conducted a good faith search of records on file with the all County Recorder's Offices to determine the record owners of property within one mile of the discharge of my proposed tile project.

4. The landowners listed below represent all of the landowners within one mile of the discharge of my proposed tile project:

Name:	_____	Name:	_____
Address:	_____	Address:	_____
	_____		_____
Name:	_____	Name:	_____
Address:	_____	Address:	_____
	_____		_____
Name:	_____	Name:	_____
Address:	_____	Address:	_____
	_____		_____

(Please attach additional pages, if necessary.)

5. On the _____ day of _____, 20____, I provided a copy of the attached THIRTY-DAY NOTICE, and a copy of the Application, to all of the landowners listed above, by certified mail.

6. I recognize the District cannot make a decision regarding the Application until thirty days have elapsed from the date I mailed the THIRTY-DAY NOTICE to the landowners above.

7. I will provide copies of certified mail receipts to the District within a reasonable time, but before thirty days have elapsed from the date of mailing.

_____

Subscribed and sworn to before me this _____ day of _____, 20____.

_____
Notary Public, Pembina County, ND

(SEAL)

PEMBINA COUNTY HIGHWAY DEPARTMENT
APPLICATION FOR FLOWAGE EASEMENT

Name (please print):_____ Date:_____

Address:_____ City:_____ State:_____ Zip Code:_____

Phone:_____

Landowner:_____ or Renter:_____ Other (list):_____
(Please Check One)

County Road # _____ Sec. _____ Twp. _____ Range _____

Number of acres being tiled:_____ Number of affected acres:_____

Has a Tiling Permit been filed with the Pembina County Water Board?_____

Have the downstream landowners been notified?_____

If so, please list those contacted:_____

_____

Please describe the proposed project:_____

_____

_____

_____

_____

_____

_____

The described work must conform to the following provisions:

1. The Applicant shall sponsor the project and guarantee that no environmental conflicts are involved. The Applicant shall comply with federal, state, and local laws together with ordinances and regulations applicable to the work. The Applicant may also need to obtain a drainage permit from the Pembina County Highway Department if any County Road ditch must be cleaned to maintain flow.

2. The Applicant shall be responsible for all costs incurred for all items of work, complete in place, and shall include the furnishing of all labor, equipment, and relocation of utilities, if necessary.

3. The Applicant shall be responsible for all maintenance and repair costs of the county right-of-way, siltation, vegetation, cattail growth, and erosion control. If immediate maintenance and repairs are not made when requested by the Pembina County Highway Department, maintenance and repairs will be made by the Pembina County Highway Department at the cost of the Applicant.

4. All work on the county right-of-way shall be done in a neat and professional manner, subject to inspection and approval by the Pembina County Highway Department Superintendent of Highways.

5. Traffic Control must be provided and maintained, if necessary, and must be in accordance with the Federal Highway Department's "Manual on Uniform Traffic Control Devices," current edition.

6. The Pembina County Highway Department specifically reserves the right to revoke or change the terms and conditions of this Permit with or without cause and upon notice to the Applicant.

7. Any violations of any of the conditions in this permit will void the permit and no further activities of this permit may continue. Pembina County has the sole discretion to interpret all of these terms and conditions and to determine whether the terms of this permit have been violated.

8. By entering upon the county right-of-way to perform the work authorized by this permit and thereby accepting the benefits of this permit, the Applicant agrees to be bound by all the terms and conditions of this permit.

9. The applicant agrees to do the work in accordance with the description of the work, describe herein, and also agrees not to infringe upon the established in-slopes of any road ditch.

10. By entering upon the highway right of way to perform the work authorized by this permit, the Applicant agrees to and will indemnify and hold harmless the Road Authority, their officers, agents and employees from any and all claims of action for compensation for any losses arising out of the performance of the work authorized by this permit. The indemnification shall include all costs and expenses incurred by the Road Authority. The Road Authority herein referred to shall be interpreted to mean the County under whose jurisdiction the segment of highway referred to as detailed under paragraph (a) of this application lies.

11. The Applicant by signing this application agrees and understands that should the work exceed the limits herein allowed, the permit shall become null and void and the applicant shall immediately be in violation of any laws, ordinances, rules, regulation, etc., as pertains to working without a permit.

This application when signed and dated by the applicant and the approving agencies shall become the permit to do the work described herein.

Applicant: _____ Date: _____

Board of Commissioners – Chairman: _____ Date: _____

Supt. of Highways: _____ Date: _____

Pembina County Water Board: _____ Date: _____

SB 2263 #116

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PEMBINA COUNTY

WATER RESOURCE DISTRICT

308 Courthouse Drive #5
Cavalier, North Dakota 58220
Phone: 701-265-4511
Fax: 701-265-4165

January 25, 2017

Senator Luick
ND State Legislature
Senate Agricultural Committee

Dear Senator Luick and other members of the Senate Ag Committee,

We are corresponding with you regarding SB 2263 that substantially changes the permit application for subsurface drains to a determent of local and state governments as well as the public as a whole. In an effort to remedy permitting issues with a few water resource districts, sweeping changes are being proposed that would essentially penalize those water resource districts that are doing their due diligence to complete the current process in a timely and fair manner.

The Pembina County Water Resource District has permitted nearly 15,000 acres of subsurface tile projects since 2012 with NO denials of permit. In fact, the Pembina County Water Resource District worked diligently in cooperation with Ellingson Drainage and our local farmers to streamline the process by allowing recorded downstream easements to shorten the thirty-day comment period currently required by North Dakota Century Code. The streamlined process allowed over 3000 acres of subsurface tile to be permitted and installed this fall within a very short window of opportunity. We understand that North Dakota construction seasons can be short and try to balance the needs of the whole with the needs of the farmer wishes to tile.

Pembina County has extensive experience in the process of tiling and permitting. Under the current law, every tile application has ultimately been approved with minimal disruptions to the original plan. There have been permits that did require consideration of adverse downstream effects; however, the current law does allow for a timely process to identify and mitigate downstream effects.

Within our tile paperwork, we do have a set of standard restrictions that have met little resistance by our farmers who generally want to be good stewards and good neighbors. Our restrictions address issues that affect the public infrastructure or well-being as a whole.

PEMBINA COUNTY
WATER RESOURCE DISTRICT

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A sample includes:

1. Requiring erosion control on the outlet to prevent damage to the assessment drain, township road, etc it discharges into,
2. A control structure on the tile system to shut off flow in times of emergency,
3. Work within public right of ways/drain easements must be done by a licensed and insured contractor,
4. A $650 fee for fees and engineering which includes a title search, preparation of the certified mailings, etc.,
5. Finally, an agreement that any additional maintenance that might be a result of a tile project is the responsibility of the tile owner. This has come into play only recently when a drain was reconstructed and the outlet needed to be extended.

The point we are trying to make is that the current North Dakota Century Code does work when it is appropriately and fairly applied to tile applications. We acknowledge there may be some room for improvement -- for example: the current law refers to 80 acres of tiling but does not address projects done in multiple years or multiple outlets. As it is written, the proposed legislation will make it difficult for local boards to mediate solutions and protect the public as a whole.

In Line 19 of the proposed bill, the county with the majority issue would rule over the permit and not require comment from the minority county. After years of not working together, Cavalier County and Pembina County have come to the table together to approve tile projects that affect both counties – why would the downstream county not have the ability to review the permit. In other places of NDCC, the law directs upstream counties and downstream counties to work together – why would subsurface drains not require the same cooperation?

In line 18 and 19, the board has concerns regarding the timeliness of providing the downstream landowner notice. With the current 30-day period, the Pembina County Water Resource board sets the appointment for the first board meeting after thirty days elapses – which in most cases is less than 36 days. Further, by requiring that notices be sent certified, the Water Resource district can be sure that all downstream parties were served notice and move forward with processing the permit quickly if no downstream comments are received.

Lines 22 through 24 – Our board uses the standard watercourse layers from the ND GIS hub as a determining factor as a natural watercourse – this has not been a major issue for us.

PEMBINA COUNTY
WATER RESOURCE DISTRICT

308 Courthouse Drive #5
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Lines 30 thru 31 – There are certainly circumstances that prevent approval within thirty days – including emergencies as well as planting and harvest seasons as well as simple human error. The Pembina County Water Resource board does charge a $650 fee; however, the fee is used by the office to facilitate the timely and accurate processing of the permit. Farmers, or in many cases, Ellingson employees, complete the permit, downstream easements, title searches, and certified mailings with our office personnel. We have had few complaints about our fee as our landowners realize the value of having experienced staff when filling out the permit.

Downstream landowners currently are able to advise the board of potential adverse effects. In many cases, agreements between the parties are negotiated to mitigate the effects. There have also been several recent cases in which the board ruled there was no adverse downstream effect based on site inspections, LIDAR and engineering. Again, as long as the board is acting in good faith – the current law works to balance the needs of all parties. In most cases, an engineering report in not necessary to determine downstream effects – an experienced and diligent board can help to alieve many of the downstream concerns.

The Pembina County Water Resource Board has been a strong supporter of drain tile and facilitator among neighbors. The board works regularly with Ellingson Tile and the current system does work. It is apparent through the language of this bill that the purpose of the legislation is not to improve the permitting process but rather to eliminate the local Water Resource Board's ability to facilitate solutions that will work for upstream and downstream landowners.

We have been trying to reach out to Ellingson Tile Company to develop amendments that would work for all parties. It is unfortunate that farmers are experiencing difficulties with the current process in some counties; however, the process outlined by current NDCC does work as seen in Pembina County. SB 2263 is not in the best interest of our taxpayers and local landowners.

Sincerely,

Josh Heuchert, Vice- Chairman

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SB 2263

ND Senate Agriculture Committee Hearing

9:45 AM Thursday January 26, 2017

Testimony By: Arvard Burvee,

Red River Joint Water Resource and Dickey County Water Resource District

Position: Against SB 2263

Chairman Luick and members of the Senate Agriculture Committee,

I AM A FARMER AND HAVE 10 ACRES TILE ON MY FARM

My name is Arv~~ard~~ Burvee. I serve as a water manager on the Richland County Water Board and I am here today as a representative of the Red River Joint Water Resource District. I would like to thank the committee for the opportunity to ~~speak~~ APPEAR before you today. I am here today to testify against SB 2263 on behalf of the Red River Joint Water Resource District. The Red River Joint Water Resource District strongly recommends that you vote against this bill because it adds confusion, unrealistic timelines, unnecessary burdens to downstream landowners, and does little to address the problems with the existing Century Code. In short we believe this bill is unworkable and is simply bad policy.

As you are aware, the vast majority of water resource district board managers are farmers. As such, they are pro agriculture and pro responsible drainage. Water managers have a great deal of respect for the rights of private property owners and see tile drainage permitting as a way to protect private landowners, not only landowners downstream of tile projects but also the landowners that are improving their property with tile drainage. Yes, tile permitting does provide a means for identifying and mitigating adverse downstream impacts when adverse situations are identified. However, it is our opinion that tile permitting serves a greater benefit to the landowners planning to install tile by providing them with certain protections and assurances that their sizable capital investment will not be jeopardized by ~~future~~ complaints NOW AND IN THE FUTURE or other actions from downstream parties or other concerned entities. That being said, we strongly object to this proposed bill because it places an extremely heavy burden on downstream landowners to provide technical data to prove that the proposed project does not harm them. This concept is counter to standard permitting processes in that the applicant is generally responsible for providing technical data for review, not the downstream party.

In my experience, board managers are generally well educated as it relates to the science of drain tile. Many water managers have installed tile on their own properties

and understand its many benefits. But they also understand that like all drainage, tile needs to be managed. In 2011 the legislature decided that it is best that this management occur at the local level. As you are aware, the State Water Commission now has a minimal role in the tile permit application process.

In 2014, the Red River Retention Authority (RRRA) formed the Basin Technical and Scientific Advisory Committee (BTSAC) consisting of accredited hydrologists, engineers, and natural resource scientists to study tile drainage and provide recommendations for tile drainage management. This study was the most in-depth review of drain tile in the history of our region. The findings were very clear, there are situations where tile is a benefit to flooding and there are situations where tile adversely affects flooding. In other words, each situation is unique and complex. SB 2263 applies a broad brush to all tile projects and restricts the ability of local water managers to address the circumstances of each unique situation. This is in fact the opposite of what is needed for proper drainage management.

Often times a great deal of effort is required from the water resource districts in order to properly review a tile application and consider downstream adverse impacts and associated conditions. With these efforts come the expenses necessary to gather the data needed in order to make a sound decision. The Red River Joint Water Resource District believes that tile permit applicants should be responsible for these expenses so that general funds supported by taxpayer dollars are not being spent on private projects. Permit application fees are a standard government practice. SB 2263 proposes a $100 maximum application fee. This is far too low.

While some tile projects may be more expensive for water resource districts to process, some may also take far more time to process and approve. The time constraints placed on tile permit approvals by SB 2263 are not realistic for many permit applications and the Red River Joint Water Resource District is against these deadlines being arbitrarily applied to all applications in a broad brush fashion. Water managers do not seek to delay tile drainage projects; on the contrary, local government is quite responsive by nature. However, there are times that water resource districts have to deal with incomplete applications, modified applications, and very complex projects that result in extended review periods.

Both the current law and SB 2263 set the threshold for requiring a tile drainage permit at 80 acres of tile drained area. This has been a source of much confusion since the current law went into effect in 2011. For instance, do two 79 acre projects placed side by side on consecutive years require a permit on the second year? Current law is unclear and this bill does nothing to correct the existing issues. The Red River Joint Water Resource District supports setting this threshold at 20 acres which will have the effect of removing this uncertainty.

Furthermore, SB 2263 proposes changes in how projects with surface intakes would be permitted and how tile projects may be considered for statewide significance permitting. To the extent that the law needs to be revised to address these matters, the Red River Joint Water Resource District is advocating that the State Engineer have a continued role in determining projects that propose drainage of statewide significance. If an applicant submits a project of such magnitude and scale that it results in the drainage of large wetland basins that were previously non-contributing, the statewide significance permitting process provides the means for proper study, notification and comment by the citizens of North Dakota. The State Water Commission has an important role to play in these rare instances.

In summary, the Red River Joint Water Resource District is strongly opposed to SB 2263. ~~We urge you to vote against this bill.~~ We strongly believe it is a significant step backwards for agriculture. We believe its flaws are beyond the ability of any amendment to correct. And we recommend that the tile industry and North Dakota Water Resource Districts work out agreeable improvements to ~~the existing Century Code for the 2019 legislative session~~ THIS BILL. I thank the committee for the opportunity to speak before you today on behalf of the Joint Board.

, BUT IF IMPROVEMENTS CAN NOT BE MADE, I WOULD THEN URGE YOU TO VOTE AGAINST THIS BILL.

Testimony Before the Senate Agriculture Committee
Thursday, January 26, 2017
Monica Zentgraf
Secretary-Treasurer -- Richland County Water Resource District

The Richland County WRD recently forwarded a letter to Senator Luick addressing many of our concerns with SB 2263. I have copies available for anyone who has not received it. I'm not going to touch on everything addressed in that letter; but there are things I do want to say in addition to what is in the letter and to explain various issues we have dealt with in the Office and will deal with if the proposed changes become law. We support tile and we want landowners to have the opportunity to improve their property. However, we also value the property of downstream landowners, and we need to protect our legal assessment drains for the benefit of landowners who benefit from the drains. This bill eliminates WRDs' rights to protect those interests.

The first issue is the permitting threshold. There is conflicting language in SB 2263 which needs to be addressed as to how the threshold is determined. Is it land area or is it watershed area? This bill is not clear. From the standpoint of our office, it would be much easier to use "land area". Farmers relate to "land area" much easier than "watershed area". Ask a farmer what the watershed area is and in most all cases they give you the land area and even admit they could only guess what the watershed area is. It will make it easier for office staff when a farmer asks if he needs a permit; all we need to ask is "How many acres are being tiled" as opposed to trying to explain the watershed threshold or debating with them what the watershed area actually is. Experience with the ND DOT application form has shown clearly that the typical response to the question about the watershed area is "no other water comes onto me". Please modify the language so the permitting threshold is based on the tiling footprint and not on a watershed basis.

Beyond the issue of the manner in which to make the determination, our office has many concerns with the current "80 acre" language. Farmers are conveniently tiling 79 acres and later tiling another 79 acres or tiling two or more projects immediately adjacent to each other, which they think takes them off the hook for getting a permit. Some farmers legitimately tile less than 80 acres but later come in for a permit because they want to tie more acres into the same system. It's very cumbersome to deal with situations where landowners install part of the project one year, then add to an existing system in the future, let alone try to explain to the farmer that he now needs a permit for something that may have been done 2, 3 or 5 years ago. We request the number of acres be reduced to a minimum and suggest 20 acres of land. This would eliminate the "game playing" that is happening and, trust me, it is happening all the time.

I don't want to paint all farmers in a negative light; however, some are of the mindset that "the tile is going in-period"! There is no regard for the law, or for any impacts as a result of their

projects. Some farmers have come right out and told us, when they find out they need a permit, that they will tile 79 acres so they don't have to give downstream notice or go through the application process, then add more acres later without a permit or they just walk out of our office and go install their entire project, again without having obtained a permit.

The subject of downstream landowner notice is of great concern to us. Eliminating the certified notice requirement will create major problems for the WRDs and downstream landowners. The Districts will have no way of knowing if <u>any</u> notification was given to downstream landowners and it will allow applicants to give notice in whatever timeframe they choose, all to the detriment of the downstream parties. The bill says an applicant must "immediately" provide downstream notice, but from a practical perspective, we know this doesn't happen now and it won't happen in the future. Applicants' rush is to get the applications to the District; they are not, and will not, be in a rush to give downstream notice. In cases where applicants know downstream landowners will be concerned about damages as a result of their project, giving notice is <u>not</u> going to be high on the applicant's priority list! I guarantee you there will be major problems if the existing process is changed. The changes in this bill appear to be simply for the benefit of the drain tile applicants and tile contractors; I see no benefits or even reasonable safeguards for anyone else. Downstream landowner notice should be a priority; if you are concerned about landowner rights, then allowing downstream landowners sufficient opportunity to consider and react to a proposed tile project should also be your priority.

The language in SB 2263 regarding the 30 day and 60 day time limits is unreasonable. The District wants to approve these permits as quickly as they can, and we do for most applicants who do things properly, but I assure you many applicants do not make that an easy task. These time limits will actually reward applicants who submit vague tile plans, who are evasive when asked for specifics on outlet plans, and who understand they are in the driver's seat. Those time limits could result in serious problems for everyone except the applicants who abuse the system.

We are very concerned about the bill's elimination of WRBs ability to add reasonable conditions to a permit. Further, the bill completely shifts the burden of proof on the downstream landowners to prove someone else's project will harm them, at the downstream landowner's expense. These changes left me speechless. Two questions: #1) Isn't it the duty of those in government to protect the people? #2) Which one of you is going to sit in our office, take the calls, and talk to the downstream landowners who have been damaged by tile projects that are installed without any safeguards for their property and to explain to the people in the legal assessment districts why they have larger assessments on their property taxes for maintenance of the legal drains? I'm not trying to be disrespectful but this is exactly what the Board, as well as Office Staff, will deal with. We already deal with downstream landowners having legitimate issues but in almost all cases the issues are resolved by giving both parties a chance to work out the issues among themselves and/or by the Board adding reasonable conditions acceptable to all parties. What will happen when the Boards cannot facilitate or add conditions? I recall a

specific case where someone purposely cut his project to 79 acres to circumvent the downstream landowner issues. Our response to the elderly couple who contacted our office with legitimate concerns about damage to their property was that we could not do anything to help them because of the law. The elderly couple drove over 30 miles multiple times a week, for multiple weeks, to come to our office and ask us for help, which we could not give them. We spent hours trying to explain.

As proposed in this bill, downstream landowners' only remedy for damages would be taking the tile applicant to court, at the downstream owner's expense. Litigation is expensive and uncertain; why should downstream landowners' rights be limited to litigation when allowing water managers, who have the expertise in water management, to protect those downstream owners simply by adding reasonable conditions to a permit? I have personally experienced being the downstream landowner (on the MN side) and it cuts to my very core to hear those words let alone being forced to have to say them to someone else. We all know that in most cases reasonable conditions could be put in place to avoid these situations. From the office standpoint, consider the time it will take staff to deal with these issues. The conditions will not doom a tile project; they will afford tile applicants to operate their projects, but will also protect downstream landowners from damages and will protect public infrastructure (and tax dollars). WRDs need the ability to attach reasonable conditions.

From the standpoint of the legal assessment drains, we have seen multiple times where fabric and riprap were not installed at the tile outlets and there has been erosion. Should all people in a legal assessment district have to pay for damages caused by a few tile applicants? It will also add to the workload of the District by having to monitor the drains more often and make repairs. Again, if we cannot add reasonable conditions (like requiring an applicant to install riprap or erosion protection), legal assessment projects will be at risk, at the expense of other taxpayers.

We support tile and we want the tile permitting process to be reasonable. I assure you most landowners who want to install tile and who plan ahead get their permits and successfully install their projects, without issues with neighbors and without damaging downstream property or facilities. However, there are the few who wait until the last minute to apply for their permit, then complain when we can't approve their permit 24 hours after they submit their application. Tile installation is an expensive endeavor; we're always surprised by applicants who wait until the last minute to apply for a permit when they're spending so much money to improve their property. This bill will benefit tile applicants who do not want to deal with downstream landowners, who do not want to consider the damages their project will have on legal drains, and who want WRDs to rubber-stamp their permits. If you really want to address problems with permitting, I encourage you to bring landowners, water managers, and water resource district staff together. Passage of this bill would be a mistake and I urge a 'do not pass.'

I close with the following remarks:

1. I reiterate the comment made at the close of the letter to Senator Luick that the RCWRB has always been a strong supporter of drain tile and facilitator among neighbors. The Board will continue to support the installation of tile and I ask that you let them continue to be the facilitators and managers of tile. Twenty-one years ago when I first began working for the District, landowners would slam doors on their way out of board meetings, neighbors fought, and complained about what "so and so" did to their father or grandfather. We experience much less of that behavior now- don't take us back to that again.
2. Most Water Resource Boards, like the Richland County Board, have Mangers with 15 or 20 years or more experience on the Board. Their knowledge should be utilized rather than ignored.
3. If there are some who feel the current process is too long, I beg to differ with them and wish to recommend they plan ahead and don't procrastinate. Some people expect to come in today and get approval tomorrow. Tricks are played by drain tile companies such as telling farmers they will give a discount if they can "start next week" or "30 days from today". Companies also tell landowners to submit an application before they have their plan and if the plan changes from what they "think" it will be once the tile company gets it done, the applicant will come back to the District. If the outlet(s) change, the process starts over, which delays the application, adds to staff workload, and upsets the applicant. This does nothing but put pressure on Office Staff and shed a negative light on the Districts, when the tile companies know the law and certainly should know staff members, like everyone else, have full workloads. We do all we can to assist applicants and process applications timely. I've even met with applicants on Saturdays when I was in the office to catch up on other work.
4. Once more I will say, I believe the duty of government is to be fair to all people and to protect all people. Under this bill not all people will be treated fairly or properly protected. Those who desire to install drain tile, in most all cases, will be afforded that privilege, but they should expect to follow reasonable laws just like everyone else.

Thank you for your time.

SB 2263 #14

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Pg. 1

RICHLAND COUNTY
WATER RESOURCE DISTRICT

MANAGERS:
Gary Friskop, Chr. (Wahpeton)
Arv Burvee, Vice Chr. (Fairmount)
James Haugen (McLeod)
Don Moffet (Barney)
Robert Rostad (Colfax)

SECRETARY /TREASURER:
Monica Zentgraf
(701)642-7773 (Phone)
(701)642-6332 (Fax)
mzentgraf@co.richland.nd.us (E-mail)

CIVIL TECHNICIAN:
Justin Johnson
(701)642-7835 (Phone)
(701)361-9780 (Cell)
justinj@co.richland.nd.us (E-mail)

January 17, 2017

Senator Larry Luick
600 East Boulevard Ave
Bismarck, ND 58505

Dear Senator Luick,

Thank you for contacting our office and forwarding SB 2263 for our review. We have serious concerns regarding this draft bill and appreciate the opportunity to provide you with comments. The Richland County Water Resource Board (Board) submits the following comments:

Page 1

Line 7 and Lines 12 thru 14- You will recall that you and our Office Staff previously met to discuss various aspects of the current drain tile law. One of the main issues discussed was the need to change the number of acres that can be tiled without a state permit. All agreed the current 80 acre rule was too broad and felt a more reasonable number would be "building sites of 20 acres or less". Less controversial language may simply be "20 acres". Many landowners are "conveniently" tiling 79 acres and tiling another 79 acres at a later date in an attempt to circumvent the permit requirement. Further, if someone tiles 79 acres and later adds additional acres to the same system, the original tiled land has to be permitted after the fact. This only adds to confusion during the permitting process. We are quite disheartened to see "80 acres" in this bill and ask that consideration be given to reducing the acreage.

Section 1 of the draft bill confuses the issue further; the first line suggests a return to an 80 acre watershed determination, but the last line of this Section prohibits a watershed determination for permitting purposes. These two provisions completely contradict each other; as drafted, this bill contains no clear indicator of what the tile permitting threshold is (80 acre watershed or 80 acre physical footprint).

Lines 8 thru 12- We agree that surface inlets that drain 80 acre watersheds require surface drainage permits.

Line 19- We do not agree with the language limiting the Water Resource Districts involvement to only the District within which the majority of the land is located. Under the proposed language, if the majority of the land area being drained lies within one District but the outlet is in another District, the District receiving the water has no input. More appropriate language would be to require the District within which is found a majority of the land to forward the application to all other Districts within which a portion of the land area is located. All Districts involved should be required to approve (including the ability to add conditions) or deny the application.

Page 2

Lines 18 thru 19- This language suggests an applicant must "immediately" give notice to downstream landowners; however, the draft bill later requires the District to act on the application based on the date of submission to the District, and not the date of the applicant's notice to downstream landowners. In reality, applicants will not provide downstream notices "immediately"; in fact, we can envision situations where applicants submit their applications to the District, but fail to provide notice to downstream landowners until several days later (and usually only after significant assistance from our Office Staff). The draft bill seems to trust applicants will "immediately" provide these notices, but from a practical perspective we know that will not happen; the draft bill language contains no penalty for applicants who fail to provide the notices, or provide the notices late.

Lines 19- Add "give <u>certified</u> notice"

Lines 19 thru 20- The draft bill eliminates Water Resource Districts' ability to attach reasonable conditions to permits; this could be devastating to public infrastructure. Currently, if a tile applicant seeks to discharge into a legal assessment drain, the District requires the applicant to install and maintain riprap or other erosion protection to protect our drain. Without the ability to attach those types of reasonable conditions, under this draft bill language, tile applicants would be free to install outlets to discharge into our legal assessment drains with no regard for erosion or other damages they may cause to our projects. In turn, the landowners who benefit from our legal drains would have to pay to repair the damages caused by erosion from tile outlets. Similarly, the District often requires applicants to obtain written permission from Township Boards before discharging into township road ditches; the elimination of our right to attach reasonable conditions would effectively eliminate this important safeguard for Township Boards.

Lines 22 thru 24- "Natural watercourse, sloughs," is too broad and has always been a very contentious issue for the District to deal with. More appropriate language would be "an established named watercourse," or a "watercourse as recognized by USGS."

Lines 30 thru 31, including Line 1, Page 3- Under no circumstances should an application simply be "deemed approved" because it was not acted upon within 30 days by the State. Human error, in and of itself, could cause an application to be approved under this language when it should not be or is done prematurely by virtue of a missed deadline. This is very dangerous language. Further, often the failure of applicants to submit all relevant information with their applications is the cause of approval delays; this language would basically reward applicants who "play the system" and neglect to submit all relevant data with the application. In other situations, some landowners simply do not understand the requirements and, by no fault of their own, do not follow the process properly and do not submit all necessary information. This draft bill language would similarly reward those landowners with automatic approval.

[redacted]e 7- The $100 fee is not adequate given the legal and/or engineering input required for drain tile applications. The application and the process may seem "simple" to someone who has not dealt with the many varying aspects of tile projects, but numerous questions and concerns arise during the application process which require legal and/or engineering assistance, all at a cost to the District. An example of a very common issue is property ownership and/or titles. We can count on one hand the number of people over the years who have complained about the fee charged; the typical comment is "Your help is worth the money". Some Districts choose to utilize the services of their attorneys or engineers to process applications; these costs should be the responsibility of the individual tile applicants, not all taxpayers in the County (via the District's General Fund.) Again, the draft bill language seems to trust the applicants to submit all relevant and accurate information with their applications; we find many applicants fail to submit all relevant and accurate information. In those situations, our Office Staff must assist these applicants, and our legal and engineering consultants ensure the District and the applicant have conducted the process properly. Forcing the District to utilize our limited general fund dollars for ensuring compliance with the tile law, for the benefit of those applicants, is unfair to the District and to the landowners of Richland County (since we cannot then utilize our general fund dollars for other legitimate purposes).

Lines 7 thru 31- Here we have several concerns. Sections 4a, 4b, and 4c place the burden of proof on downstream landowners. Downstream landowners who will not benefit from a tile project should not be burdened with expensive engineering costs unless the concerns brought forward appear to be frivolous. The decision as to which party (the applicant or downstream landowner) should provide engineering data would be more appropriately made by the Water Resource Managers on a case-by-[redacted]e basis. If a project will result in adverse impacts to downstream properties, the applicant should be responsible for a hydrology report to demonstrate how the applicant intends to mitigate those damages. Requiring the downstream landowner to pay for that type of expense is unfair.

Additionally, language in Section 4, requiring a downstream landowner to retain a registered engineer, produce a hydrology report, and provide it to the District within 30 days of the date the applicant submitted the application to the District is inequitable and unrealistic. If an applicant does not provide a copy of the application to the downstream landowners until 5 or 10 days after submitting it to the District, that would reduce downstream landowners' window to 25 or 20 days to go through this arduous process; that is simply not going to happen and, as a result, virtually no landowners will ever have a realistic opportunity to comment on a proposed project or potential impacts and, as a result, no landowners will ever have a realistic opportunity to protect their property from upstream tile outlets and pumps.

It is very obvious the 30 day requirement is too restrictive. A typical example is if an application is filed during winter months, it is determined that engineering data is required and surveying or other on-site work is needed. During most North Dakota winters, on-site work is not possible and the application should be deferred until weather conditions allow the on-site work to be completed.

While Lines 20 thru 23 in Section 4b allow Water Resource Districts to require an easement if technical evidence proves there will be adverse impacts to downstream landowners, this authority given the Districts is of very little use. It is unrealistic to think that all of the requirements in the 30 [redacted] timeframe laid out in this draft bill can be met (as stated above), thereby eliminating the District's [redacted]ity to apply the easement requirement and in turn, taking away the downstream landowners ability to protect their property.

Again, we have concerns regarding the "Natural watercourse, or pond, slough" language in Section 4b (Line 26); this language is too broad and has always been a very contentious issue for the District to deal with. More appropriate language would be "an established named watercourse" or "watercourse as recognized by USGS."

We further wish to point out adverse impacts and unreasonable harm other than hydrological effects or flooding exist which may justify denial of an application (or better yet, justify the addition of conditions). One example is safety concerns for the traveling public. Drain tile outlets in road ditches could cause harm (damage to personal property or bodily injury) if a vehicle runs off a road or a snowmobile in a ditch hits an outlet structure. We have seen outlet structures that are dangerous and should not be allowed. Under N.D.C.C., the road authority (i.e. Township Board, County, or ND DOT) and not the District has jurisdiction over the roads and their rights-of-way, unless it involves a legal assessment drain (and only then is there dual jurisdiction between the road authority and District). The road authorities must be given control over work within their rights-of-way. Eliminating WRDs' ability to attach reasonable conditions to permits, like requiring road authority permission to discharge into their rights-of-way, will put road authorities' rights-of-way, and the traveling public's safety, at risk.

This draft bill language ignores the practical issues of considering drain tile applications. The Board feels strongly that limiting the law to only "approval" or denial" is too restrictive; most issues can be resolved by adding reasonable conditions that work for both the applicant and downstream landowners.

Page 4

Lines 4 thru 6- Under no circumstances should an application simply be "deemed approved" because an application was not denied within 60 days by the District. Human error, in and of itself, could cause an application to be approved under this language when it should not be or is done prematurely by virtue of a missed deadline. This is very dangerous language. As stated previously, a typical example of the 60 day requirement being too restrictive is if an application is filed during winter months, it is determined engineering data is required and surveying or other on-site work is needed. During most North Dakota winters, on-site work is not possible and the application would need to be deferred until weather conditions allow the on-site work to be completed. The vast majority of applications processed by this Office are acted upon in less than 60 days. The process being proposed under this draft bill will actually lengthen the process in some situations. Ultimately, downstream landowners will not have sufficient opportunity to consider potential impacts of an upstream tile project, retain an engineer, and submit any hydrology analysis to the District quickly enough for the District to consider the issues. The 60-day window prior to automatic approval will result in impacts and damages to downstream properties, downstream roads, and downstream legal assessment drains. This Board cannot, in any way, support the proposed language in this Section.

Additional comments, in general, regarding this bill:

- Since the original drain tile law was implemented there have been changes made to the law and policies that put all Water Resource Districts in difficult situations; by the time Water Resource Districts can develop a somewhat similar process to ensure uniformity, the Legislature seeks further amendments. It is time for the Legislators and Water Resource Boards to come together and develop a good, workable law for all parties. The constant changing of the law only leads to very time consuming work and continual added expenses for the Districts, confusion for all, and landowners not following the law because of being unaware of the many changes.

•The RCWRB requests the Districts be given the right to attach reasonable conditions to applications. Examples of typical conditions are installation of fabric and riprap around drain tile outlets to control erosion, a requirement that outlets be shut off during flood water occurrences and/or periods of adverse downstream impacts, and a requirement that applicants obtain permission from township boards or other road authorities. There is no good "cookie cutter" law for approval or denial of a drain tile application. As this District has seen through the hundreds of applications which have come through our office, many of the projects have specific issues that must be addressed on a case-by-case basis. This draft bill does not provide Water Resource Districts with the ability or the time to consider or address unique issues.

• It is imperative that the Districts maintain the right to issue utility permits and reasonable conditions for drain tile projects discharging into the legal assessment drains to ensure the integrity of the legal assessment drains and the financial stability of the legal assessment drains funds.

•Water Resource Districts do periodic maintenance work on various established named watercourses. To allow the Districts to work on these watercourses in an efficient and least costly manner it is necessary for the Districts to require certain conditions on drain tile projects discharging directly into such watercourses. A typical example would be a condition addressing the number of outlets into an established named watercourse.

• The Richland County Water Resource Board has always been a strong supporter of drain tile and facilitator among neighbors. The changes proposed under this draft bill will take away the Water Resource Board's ability to be facilitators. Very few drain tile applications have been denied by this Office; reasonable conditions have been included which have been acceptable to all parties. Upon our review of the draft bill, it is apparent to us that the purpose of the proposed changes is not to improve the processing of drain tile applications (in fact, it complicates it even further), but rather to severely limit Water Resource Districts authority over drain tile permitting. It is our opinion that passage of this bill will only cause undue burden on downstream landowners, pit neighbor against neighbor, and take away Water Managers ability to protect the legal assessment drains that <u>all</u> landowners in the assessment districts have paid for. We assure you that this Board wants to see the continued use of drain tile. Landowners desiring to install drain tile will be afforded this privilege; however, they, too, need to follow reasonable laws and rules. We ask you and the other Legislators to give serious consideration to modifying the draft bill to make it more equitable for all and to allow Water Resource Districts to continue to do their job to protect all landowners. Thank you for your time and your consideration of our comments.

Sincerely,

Gary Friskop
Chairman

GF:mz

#15
pg. 1

TESTIMONY ON SENATE BILL NO. 2263

Senate Agriculture Committee

John Paczkowski, Assistant State Engineer
Office of the State Engineer/State Water Commission

January 26, 2017

Chairman Luick and members of the Senate Agriculture Committee, my name is John Paczkowski. I am the Assistant State Engineer for the Office of the State Engineer/State Water Commission. I am here testifying on behalf of State Engineer Garland Erbele to present our testimony regarding Senate Bill 2263. Before going further, the State Engineer wants to acknowledge that he and his staff fully support an agricultural producer's goal to properly manage waters on their land. The State Engineer has concerns with the language and permitting processes presented in Senate Bill 2263, which intends to significantly change tile drainage permitting and regulation in the State of North Dakota.

The State Engineer is able to provide the Committee with a unique perspective regarding how Senate Bill 2263 will affect tile drainage regulation in North Dakota. Prior to July 2011, the State Engineer played a meaningful role in the regulation of tile drainage. For all drainage permit applications, surface and subsurface, the State Engineer was tasked with making "statewide significance determinations," which meant a designation given to a drainage project deemed to be of importance to the State following guidelines in N.D.A.C. § 89-02-01-09. In 2011, the North Dakota legislature proposed Senate Bill 2080, which strove to streamline and expedite the tile drain permitting process. At the time, the State Engineer had concerns related to the unintended consequences of the proposed language. Ultimately, Senate Bill 2080 formed what is now known as the 2011 tile law, codified at N.D.C.C. § 61-32-03.1. In particular, the State Engineer had three primary concerns with the proposed language:

- The removal of the State Engineer's authority to classify drainage of Statewide Significance for good cause hamstrung the State Engineer's ability to proactively manage known large-scale flooding issues, such as Devils Lake.
- The limitation to only require downstream flowage easements for impacted lands within one-mile removed both Water Resource District and State Engineer administrative remedies for landowners with impacted lands further than one-mile downstream from a tile system outlet.

- The exemption for flowage easements that discharge into a pond, slough, or lake also removed any potential administrative remedy for impacts to adjacent landowners.

After five years of having the 2011 tile law in effect, the State Engineer's original concerns are still valid. The 2011 tile law sought to streamline and expedite, but the language of the law has left a need for greater clarity to be provided, as evidenced by the dozens of calls the Regulatory Division has fielded over the past five years questioning the process and on-going litigation a landowner has brought against the State Engineer.

Senate Bill 2263 does not address the State Engineer's concerns with the current law, but has the potential to further weaken the overall management of tile drainage by the following provisions:

- Subsection 3 (Page 2, lines 26-31, and Page 3, lines 1-4) proposes to redact the statewide provision of the tile statute (which identifies projects that affect property owned by the State or its political subdivisions; drain sloughs, ponds, or lakes having recognized fish and wildlife values; have a substantial effect on another district; or converts noncontributing areas during the 25-year event to permanently contributing areas [N.D.A.C. § 89-02-01-09]) and replaces it with a different process. Not only does the proposed language significantly reduce the criteria available to designate a drain for State Engineer review, the 30-day review provision for the State Engineer to make a determination is inadequate.
- The definition of "technical evidence" (Page 3, lines 12-18) that is the basis on which a Water Resource District may place conditions or deny an application would become the responsibility of the downstream landowner(s). The expectation that a downstream landowner would be able to secure the services of a registered professional engineer and have that engineer prepare "technical evidence" for the board denoting adverse impacts within 30 days of being noticed of the application is unrealistic. Doing so unfairly shifts the burden of proof and costs of identifying project impacts from the applicant or Water Resource District to the downstream landowner(s).
- Subsection 4 (page 3, lines 29-31 and page 4, lines 1-4) The term "unreasonable harm" only applies to the hydrologic impacts to the integrity of a roadway, and coupled with flooding, is one of only two criteria upon which a Water Resource District may deny an application. This limitation on when an application may be denied again unfairly shifts the burden of identifying impacts from the applicant to the downstream landowner(s).
- The proposed language also removes the requirement that all approved tile drain permits be forwarded to the State Engineer. This greatly reduces the

ability of producers, Water Resource Districts, the State, and others to adequately plan and review projects without knowledge of existing drainage systems.

Finally, the State Engineer again is supportive of an agricultural producer's mission to properly manage waters on their land, but not at the expense of eliminating the ability of Water Resource Districts and the State to manage water resources. The State Engineer and his staff are available to help in any way possible to craft a streamlined and expedited tile drain permitting process that is as effective as it is just.

#16

Ducks Unlimited, Inc.

To: North Dakota Senate Agriculture Committee
From: Eric Lindstrom, National Manager of Agriculture Policy, Ducks Unlimited, Inc.
RE: Opposition Testimony on SB2263
Date: January 26, 2017

Good afternoon, Chairman Luick, and distinguished members of the committee. My name is Eric Lindstrom and I serve as Ducks Unlimited's National Manager of Ag. Policy stationed in Bismarck. I appreciate the opportunity to testify on behalf of our more than 6,000 grassroots members in North Dakota and more than 1 million supporters across the county. As a science-based habitat conservation organization, we are focused on conserving wetlands for waterfowl, wildlife, and people.

North Dakota's wetlands are a globally unique resource and home to as many 900 different plant and animal species. Unfortunately, we've already drained half of our original wetlands (4.9M acres) and continue to lose the remaining ones (2.4M acres or only ~5% of our state's total land area) at an alarming rate (Dahl 1990, 2014).

Earlier today, we heard many of the proponents, including of the prime sponsors, say "their intent here is to not drain wetlands". However, the proposed statutory language in lines 8-11 specifically states a permit is not needed to "...drain a wetland, pond, slough or lake...". It's also important to understand that pattern tiling (see Figure1), while not going directly in the basin can have negative effects on wetlands (i.e., starves surface and subsurface flows). We would encourage the committee to strike this language (lines 10-12).

The detrimental effects of tile drainage on wetlands and wildlife habitat are well-documented and supported by years of independent peer-reviewed research (see Blann et al. 2009).

But, this bill effects much more than just ducks and this isn't an out of sight, out of mind issue.

ND's wetlands are a major catalyst for our state's recreational economy and quality of life. According to a recent study by NDSU's Agricultural and Applied Economics Department, hunting and fishing generate $1.4 billion in economic impact for our state each year (Taylor et. 2013).

These "natural assets" also play an important role in purifying chemicals and toxins from entering our water supplies, recharge our aquifers and act as natural sponges to absorb and store flood waters to protect downstream residents, farmland, homes and other businesses. Conversion and drainage of land generally increases peak run off events, extends flood duration, and increases pollutant loads to surface water resources (Blann et al. 2009).

We've also seen first-hand the devastating, costly and chronic effects that flooding has had on many of our communities and our downstream neighbors. Communities like Fargo, Grand Forks and Minot have endured tens of millions of dollars of flood damage over recent years and we're seeing major national and regional water quality issues of concern happening in places like the James River, Devils Lake Basin, Red River Valley, Lake Winnipeg, and Gulf Hypoxia zone.

We've heard a lot of hyperbole and pysdo-science claims today that tiling improves downstream water quality. But, that's just not true in the case of nitrates. The Des Moines Water Works facility (Iowa), which treats and provides clean drinking water for 500,000 residents or nearly 1/5 of the entire state's population, has a lawsuit currently pending against three upstream counties with extensive drainage networks alleging subsurface drainage tiles have transported and concentrated high levels of nitrates into public water supplies (see Politico, "Iowa's Nasty Water War" January 21, 2016 http://www.politico.com/magazine/story/2016/01/iowas-nasty-water-war-213551). (see Fig 2.)

We're also seeing similar headlines in SD (http://rapidcityjournal.com/news/south-dakota-s-big-sioux-among-dirtiest-rivers-in-nation/article_26094a6e-984c-11e1-a46d-001a4bcf887a.html - see Fig. 3) and and Manitoba (see Figure 4.).

According to the Center of Disease Control (CDC), increased exposure to excess nitrates pose serious health risks to humans (e.g., higher risks of Methemoglobinemia, cancer, birth and reproductive defects, thyroid disruption, etc. https://www.atsdr.cdc.gov/csem/csem.asp?csem=28&po=10)

Issues like this have pitted neighbors vs. neighbors and I think we can all agree in this room today that's not what we want for ND.

Given this information, I'd like to highlight just a few important points related to SB2263:

1. Current law does not prohibit tile drainage, but merely provides some common sense oversight and local control. This bill would effectively eliminate the state's and local water resource board's involvement and oversight in tile drain permitting. *(Note: The vast majority of ND's wetlands are positioned in watersheds less than 80 acres in size*).
2. Fast-tracks the permitting process without ample time for thorough review;
3. Requires downstream landowners and water resource boards to provide "technical evidence" that a project would have adverse hydrologic impacts, i.e., burden of proof on the impacted;
4. Restricts comments by parties affected downstream to only those prepared by a licensed engineer—with no consideration of water quality, only water quantity.
5. Potentially increases landowners' and the state's litigation costs in cases of disputes between tile applicants and local water resource boards.

Key Questions:

1. What assurances or safeguards does this bill provide to ensure that tile drainage projects won't adversely impact wetlands, downstream water quality, and homes, businesses and other property, etc.?

2. What if I'm a downstream landowner adversely impacted by an upstream tiling project, but I don't have the financial resources to hire a professional engineer or attorney? How does this bill protect my rights and interests?

3. **If increased wetland drainage is not part of the legislative intent of this bill, then why shouldn't it be removed from the bill?**

In summary, this bill would open the flood-gates to further destruction of critical wildlife habitat, reduce downstream water quality, increase potential flood and public health risks, jeopardize our world class hunting, fishing and outdoor recreation economy and potentially

invite more contentious and divisive water quality lawsuits, like those we're seeing in places like Iowa.

For these reasons, we would respectfully urge this committee to give SB2263 a <u>DO NOT PASS</u> recommendation. Thank you for your time and service to the people North Dakota, including all of those that live downstream. I would be happy to take any questions if time allows.

<u>Literature Cited</u>

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Figure 1. Aerial view of pattern tiling in the Dakotas.

Figure 2. "Iowa's Nasty Water War" *Politico* Jan. 21, 2016

Figure 3. "South Dakota's Big Sioux among dirtiest rivers in nation" *Rapid City Journal*, May 7, 2012

South Dakota's Big Sioux among dirtiest rivers in nation

The Associated Press May 7, 2012 2

SIOUX FALLS -— The Big Sioux River snakes 420 miles down eastern South Dakota.

From its headwaters in Roberts County, it gradually drops 800 feet as it cuts through the Coteau des Prairies flatiron and meanders into Iowa and flows into the Missouri River.

Some of the state's largest cities were built along its banks — Sioux Falls, Brookings, Watertown — as people and industry flocked to the wide-open prairie. Farms, feedlots, cities, industry all thrive, each

Figure 4. Summer algal blooms from Lake Winnipeg (outlet basin of the Red River).

North Dakota
Wildlife Federation
Ensuring abundant wildlife, wildlife habitat, and access to wildlife recreational opportunities

TESTIMONY OF MICHAEL McENROE
NORTH DAKOTA WILDLIFE FEDERATION
SENATE BILL 2263
SENATE AGRICULTURE COMMITTEE
JANUARY 26, 2017

Chairman Luick and Members of the Senate Agriculture Committee:

For the record, I am Mike McEnroe and I am representing the North Dakota Wildlife Federation. The Federation has 1,400 members in eighteen affiliated clubs and organizations across the State of North Dakota. The Federation is the largest sportsmen's club in the State.

The North Dakota Wildlife Federation strongly opposes SB 2263 as it almost entirely eliminates all regulation of tile drainage. The bill eliminates the watershed of a tile drainage system without surface intakes from consideration in the 80-acre permit requirement.

SB 2263 requires notice to landowners for only one mile downstream of the outlet. This is a very minimal notice to potentially affected parties.

The only consideration the County Water Resource District can make is to determine whether or not the proposed drainage system would affect state property.

PO Box 1091 • Bismarck, North Dakota 58502 • E-mail: ndwf@ndwf.org • Fax: 701-223-4645
Office Manager: 701-222-2557 • 1-888-827-2557 • Web: www.ndwf.org

Downstream landowners or other parties could only object to hydrological impacts, flooding or erosion, if determined by a licensed, professional engineer. Water quality impacts are not to be considered.

We object to the 30 day review periods for both the County Water Resource District and the State Engineer, because these time frames may not be adequate to assess impacts of the proposed drainage project. Projects should not be deemed approved simply because the reviewing entities have not had sufficient time to review the adequacy of the permit.

Given the problems nationwide with nutrient loading in municipal and rural water supplies, proposed tile drainage projects must be given more strict review rather than less review by downstream interests, agencies, land owners and the public.

I would stand for any questions the Committee may have.

Testimony of Eric Volk, Executive Director

ND Rural Water Systems Association

Senate Bill 2263

Senate Agriculture Committee – January 26, 2017

Chairman Luick and members of the Senate Agriculture Committee, my name is Eric Volk. I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA) which serves a membership of more than 250 cities, 27 rural/regional water systems, and four tribal systems.

The NDRWSA is committed to ensuring all North Dakota's residents receive affordable drinking water of excellent quality and sufficient quantity. NDRWSA is committed to completing and maintaining North Dakota's water infrastructure for economic growth and quality of life. Today I am submitting testimony opposition of SB 2263.

Rural Water Facts:

Serve 145,000 rural residents (50,000 connections)

Serve 100,000 city residents, that is 247 of the 357 Incorporated Cities

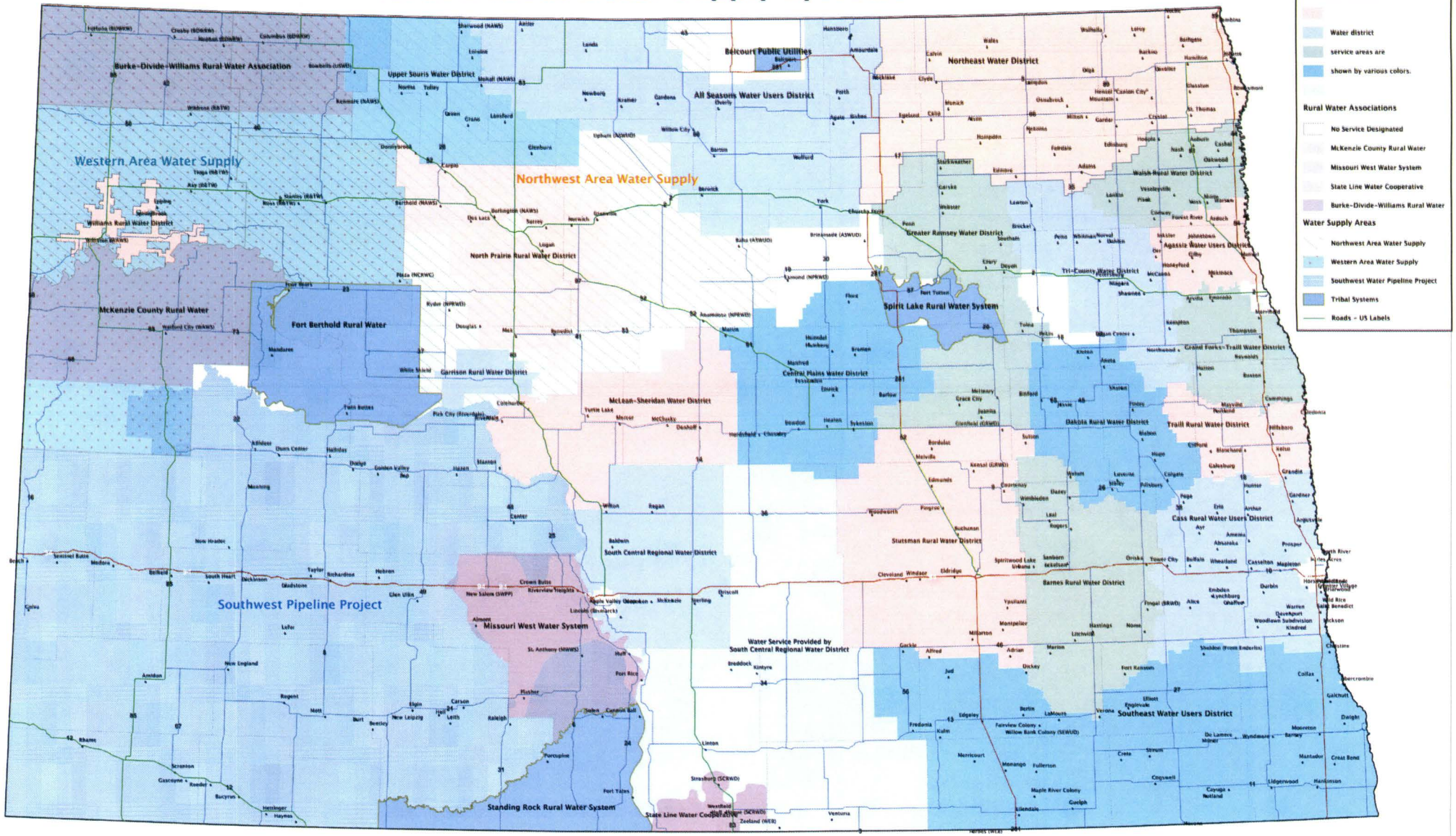
Provide service through nearly 40,000 miles of pipe

For the record, I want to say that we fully understand the importance of organized drain tiling in today's agricultural world. A large percentage of farmers who are drain tiling are served by a Rural Water System. I would like to draw your attention to page 1, lines 19 thru 20. The bill draft eliminates Water Resource District's ability to attach reasonable conditions to permits. This will have adverse effects rural water infrastructure. Below are some conditions that rural water systems seek when dealing with drain tiling within areas of potable water lines:

- Contractor will notify XYZ Rural Water System (System) prior to any excavation over or around water line paint or flag markings.
- Contractor will send out construction crew to expose water line to verify depth and location of the line prior to engineer design and layout of drain tile with a System employee present.
- All System water line crossings with drain tile will be seamless, solid, non-perforated pipe and will extend no less than fifty feet (50') either side of the water line. Crossings shall be at least eighteen inches (18") above or below System lines. All crossings need a System employee to be present when excavation of crossing to ensure proper support and bedding of water line is to System standards.
- All drain tile lines that parallel System lines need to be a distance no closer than fifty feet (50') from either side of said water line.

I will say it again, we are not against drain tiling. Systems want to work with farmers on this issue. There may be instances where the farmer needs to be close to the water line for short distances and systems understand that. At the same time, it will probably be that same farmer that won't have water service because a system can't find a leak due to the drain tile that was installed on their land. Communication is the key. For the reasons listed above, we oppose SB 2263. I will stand for any questions. Thank You! EV

North Dakota Water Supply Systems



January 2016

Mr. Chairman and members of the committee,

1/26/17 #19

My name is Scott Mahrer and I am from Forman.

I am here today because my family farm land has been affected by tiling and draining by other farmers upstream.

We have lost cropland acres due to draining by farmers who have not filed for correct permits and/or followed guidelines.

I have been working closely with our local water board on this matter since 2013. I oppose 2263 because It further empowers tile applicants to NOT work with downstream landowners who may be affected. This would cause the downstream landowner such as myself to incur legal fees to fight it.

Thank you for your time.

Scott Mahrer
13333 88th St SE
Forman ND
7[redacted]678-4171

SB 2263 #20

1/26/17 pg. 1

WALSH COUNTY
WATER RESOURCE DISTRICT

600 Cooper Avenue
Grafton, ND 58237

Phone: (701) 352-0081
Email: wcwrb@nd.gov

August 5, 2014

Ellingson Companies
56113 State Hwy 56
West Concord, MN 55985

RE: Subsurface Drain Installation

To Whom It May Concern:

It has been brought to our attention that your company is not aware of conditions that are added to Subsurface Drain Permits in Walsh County.

For your reference we have attached the conditions that are required for the Subsurface Drain Permits that are approved.

If you have any questions or concerns regarding this matter, please do not hesitate to contact our office.

Sincerely,

Larry Tanke

Larry Tanke
Chairman

LDT: mo

Enclosures

WALSH RURAL WATER DISTRICT
P. O. Box 309

Grafton, North Dakota 58237
Phone (701)352-3915

Quality On Tap!
Our Committment Our Profession

Contractor will notify Walsh Rural Water DIST prior to any excavation over or around water line paint or flag markings.

Contractor will send out a construction crew to expose water line to verify depth and location of line prior to engineer design and layout of drain tile with a Walsh Rural Water DIST employee present.

All Walsh Rural Water Line crossing with drain tile will be solid non perforated pipe and non perforated pipe will extend no less then fifty feet (50') ether side of water line. All crossings need a Walsh Rural Water employee to be present when excavation of crossing to ensure proper support and beading of water line is to Walsh Rural Water DIST standards.

All drain tile line that parallel Walsh Rural Water DIST Lines need to be a distance no closer then fifty feet (50') from ether side of said water line.

Walsh County Water Resource District
Conditions to Application to Install a Subsurface Drain No. _____

Conditions to permit:

1. You are required to have an engineer analyze the specific water flow that includes quantity and to determine the parameters of the flowage easement(s) required.
2. Flowage easement(s) or written permission will be required from the current downstream landowners.
3. If water is to be discharged into the Township right-of-way, you will be required to get permission from the Township Supervisors.
4. If water is to be discharged into the County right-of-way, you will be required to get permission from the County and obtain a drainage permit from the County and or a flowage easement if required from the County.
5. If water is to be discharged into the City limits, you will be required to get permission from the City and obtain a drainage permit from the City.
6. If water is to be discharged into the North Dakota Department of Transportation (NDDOT) right-of-way, you will be required to get written permission from the NDDOT.
7. If water is to be discharged into a legal drain and if it causes any alterations to the ditch, you would be responsible for these alterations.
8. You must obtain approval from any/all utilities in the area and comply with their conditions and provide Walsh County Water Board the documentation of utility requirement(s).
9. You must comply with all State, Federal, Local laws, rules, regulations and interpretations thereof, including but not limited to rules and regulations of the North Dakota Health Department that are currently active or adopted in the future.
10. Pumps cannot be used during high flows in the spring and pump is to be turned off during heavy summer rains. If gravity outlet a control structure must be installed so outlet can be closed during high flows in the spring and during heavy summer rains.
11. You must provide an engineer report showing the exact location of the outlet to a legal drain system.
12. Outlet must be marked permanently with rock and fabric placed at and around the outlet. Tile outlet is to be placed 50 feet from any lateral or pipe of a legal drain.
13. You remain solely responsible for the construction, maintenance and operation of the drain, including without limitation claims that in any manner relate to and/or arise from the construction, maintenance and operation of the requested drain, and you shall indemnify and save and hold the Board harmless from any and all claims, causes of action, demands and/or damages arising from or in any manner related to the construction, maintenance and operation of the requested drain.
14. See attached Walsh Rural Water District Conditions
15. Any violation of the above conditions will warrant your permit to be revoked.

LETTER OPINION
2012-L-01

January 10, 2012

Mr. Neil W. Fleming
Attorney at Law
PO Box 633
Cavalier, ND 58220-0633

Dear Mr. Fleming:

Thank you for your letter requesting my opinion[1] on whether water resource boards have the authority to assess costs incurred in the course of investigating a drainage complaint and enforcing a removal order,[2] and whether boards can require complainants to pay investigation costs or post a bond.

It is my opinion that water boards may not assess landowners for drainage investigation costs incurred by a board prior to the issuance of a removal order under N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1. It is my further opinion that a water board may not assess compliance costs if a landowner completes the timely removal of an obstruction or noncomplying dike or dam. It is my further opinion that sections 61-16.1-51, 61-16.1-53, and 61-21-43.1 do not authorize a water board to assess a complainant for investigation costs nor do the laws authorize a board to require the posting of a bond.

ANALYSIS

You state that water boards must sometimes rely upon professional engineering or surveying services for assistance to fulfill their regulatory and water management obligations. Water boards have broad authority to manage water resources within their jurisdiction; this authority includes the power to:

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[1] You requested this opinion on behalf of the Pembina County Water Resource Board, a public entity entitled to Attorney General legal opinions under N.D.C.C. § 61-16.1-58.
[2] Your letter inquires specifically about drainage complaints, but this opinion will also address unauthorized works, such as dikes and dams.

5. Plan, locate, relocate, construct, reconstruct, modify, maintain, repair, and control all dams and water conservation and management devices of every nature and water channels, and to control and regulate the same and all reservoirs, artificial lakes, and other water storage devices within the district.

6. Maintain and control the water levels and the flow of water in the bodies of water and streams involved in water conservation and flood control projects within the district and regulate streams, channels, or watercourses and the flow of water therein by changing, widening, deepening, or straightening the same, or otherwise improving the use and capacity thereof.

7. Regulate and control water for the prevention of floods and flood damages by deepening, widening, straightening, or diking the channels or floodplains of any stream or watercourse within the district, and construct reservoirs or other structures to impound and regulate such waters.

. . . .

9. Do all things reasonably necessary and proper to preserve the benefits to be derived from the conservation, control, and regulation of the water resources of this state.[3]

Water boards have more specific regulatory obligations within N.D.C.C. chs. 61-16.1 and 61-21, which require boards to determine or investigate whether drainage obstructions have been negligently constructed and whether dams or dikes comply with the law. These laws also allow a water board to assess a responsible landowner for the costs of removal if the landowner does not comply with a board's removal order. Since the investigation costs associated with this work can be unpredictable and expensive,[4] you question whether a water board may also assess investigation costs to a responsible landowner or complainant.

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[3] N.D.C.C. § 61-16.1-09.

[4] The annual funding for water boards is generated by a tax levy of up to four mills approved by county commissions under N.D.C.C. § 61-16.1-06. See also N.D.C.C. § 57-15-26.6. Water boards may also use special assessments to fund projects. See N.D.C.C. §§ 61-16.1-17, 61-16.1-18, 61-16.1-21, 61-16.1-22, and 61-16.1-24.

Water boards are political subdivisions created by statute.[5] "A political subdivision's 'rights and powers are determined and defined by law.'"[6] "[D]rainage boards are creatures of statute, and they have no powers, except such as are expressly granted by the statute or reasonably implied from the powers granted."[7] "In defining a [political subdivision's] powers the rule of strict construction applies and any doubt as to the existence or extent of the powers must be resolved against the [political subdivision]."[8] After it has been determined that a political subdivision has the particular power, the rule of strict construction no longer applies, and the manner and means of exercising those powers, where not limited or specified by the Legislature, are left to the discretion of the political subdivision.[9]

Your letter specifically references three statutes within these chapters: N.D.C.C. §§ 61-16.1-51 (Removal of obstructions to drain), 61-16.1-53 (Removal of a noncomplying dike or dam),[10] and 61-21-43.1 (Removal of obstructions to drain). Sections 61-16.1-51 and 61-21-43.1, N.D.C.C., which are nearly identical, provide that if a water board determines an obstruction to a drain has been caused by the negligent act or omission of a landowner (or tenant), the board shall provide a notice to the landowner:

> [specifying] the nature and extent of the obstruction, the opinion of the board as to its cause, and must state that if the obstruction is not removed within such period as the board determines, but not less than fifteen days, the board shall procure removal of the obstruction and assess the cost of the removal, or the portion the board determines appropriate,[11] against the property of the landowner responsible.[12]

Neither section 61-16.1-51 nor 61-21-43.1 provides the authority to assess costs for an investigation, a formal complaint or investigation process, or the authority to assess "any" or "all" costs.

Section 61-16.1-53, N.D.C.C., provides a more structured complaint and investigation process. Under this law, a water board "shall promptly 'investigate' and make a

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[5] N.D.C.C. ch. 61-16.1; see also Anderson v. Richland Cnty. Water Res. Bd., 506 N.W.2d 362, 366 (N.D. 1993); N.D.A.G. 99-F-17; N.D. Const. art. VII, § 2.
[6] Burlington N. & Santa Fe Ry. Co. v. Benson Cnty. Water Res. Dist., 618 N.W.2d 155, 157 (N.D. 2000) (quoting Eikevik v. Lee, 13 N.W.2d 94, 97 (1944)).
[7] Freeman v. Trimble, 129 N.W. 83, 87 (1910).
[8] Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980).
[9] See Haugland v. City of Bismarck, 429 N.W.2d 449, 453 (N.D. 1988).
[10] See also N.D.C.C. § 61-16.1-53.1 (Appeal of board decisions).
[11] The word "appropriate" is not included in N.D.C.C. § 61-21-43.1.
[12] N.D.C.C. § 61-16.1-51.

determination [upon receipt of a complaint of unauthorized construction of a dike, dam, or other device] . . . ."[13] If a water board orders the removal of the noncomplying dike or dam and the responsible landowner does not comply, "the board shall cause the removal of the dike, dam, or other device and assess the cost of the removal, or the portion the board determines, against the property of the landowner responsible."[14] The law is silent regarding whether a water board may seek costs for an investigation.

Since the specific laws discussed above do not provide express authority for water boards to assess investigation costs, you question whether investigation costs may be assessed to landowners as a cost of removing an obstruction or noncomplying dike or dam.[15]

As explained above, the Legislature has only provided a water board with the express authority to assess a landowner for the costs of removing an obstruction or noncomplying dike or dam. This language is not ambiguous[16] and it is apparent that the Legislature has concluded investigations are distinct regulatory tasks for water boards rather than a general or generic function that may be cast as another regulatory function.[17]

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[13] N.D.C.C. § 61-16.1-53.
[14] N.D.C.C. § 61-16.1-53.
[15] Your question assumes that a responsible landowner has not complied with a board's removal order.
[16] See N.D.C.C. § 1-02-02 (words in a statute are understood in their ordinary sense unless a contrary intention plainly appears).
[17] Authority for water boards or a water authority to specifically conduct investigations is provided in a number of locations throughout N.D.C.C. title 61, including: N.D.C.C. § 61-01-23 (Investigation or removal of obstructions in channel); N.D.C.C. § 61-16.1-12 (Scope of water resource board's extraterritorial contractual authority – Board may acquire property in adjoining states and provinces); N.D.C.C. § 61-16.1-53.1 (Appeal of board decisions – State engineer review – Closing of noncomplying dams, dikes, or other devices for water conservation, flood control, regulation, and watershed improvement); N.D.C.C. § 61-21-02 (Watercourses, ditches, and drains may be constructed, maintained, repaired, improved, or extended); N.D.C.C. §§ 61-24.5-10 and 61-24.5-11 (Southwest Water Authority, District budget – Tax levy and Determination of amount to be levied – Adoption of levy – Limitation); N.D.C.C. § 61-32-03.1 (Permit to drain subsurface waters required – Permit form – Penalty); N.D.C.C. § 61-32-07 (Closing a noncomplying drain – Notice and hearing – Appeal – Injunction – Frivolous complaints); N.D.C.C. § 61-32-08 (Appeal of board decisions – State engineer review – Closing of noncomplying drains); N.D.C.C. § 61-39-05 (Authority of the Lake Agassiz water authority); N.D.C.C. § 61-40-05 (Authority of the western area water supply authority).

For example, under N.D.C.C. § 61-32-03, a drainage permit "may not be granted until an investigation discloses that the quantity of water which will be drained . . . will not flood or adversely affect downstream lands." In addition, the law further provides that if "the [subsurface drain permit] investigation shows that the proposed drainage will flood or adversely affect lands of downstream landowners . . . [a]n owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required [flowage easement] investigation."

By comparison, N.D.C.C. § 61-32-03.1, which was passed by the 2011 Legislature,[18] provides that "[i]f an investigation by a water resource district or a downstream landowner within one mile [1.61 kilometers] . . . shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers] . . . the water resource district may require flowage easements . . . ." There is no requirement in section 61-32-03.1 for an owner of land to pay for an investigation. Thus, it is logical to conclude that the mention of investigation costs under section 61-32-03 implies that such a directive would not be authorized under section 61-32-03.1 if it is not expressly stated.[19]

The "investigation" distinction is further supported by N.D.C.C. §§ 61-16.1-53 and 61-32-07, which both require a board to conduct an investigation upon receipt of a complaint.[20] The laws require that if a board determines a dike, dam, or drain does not comply with the law, a water board's removal or closure notice must state that the landowner may be assessed for the cost of removal or closure. There is no authority within these laws for water boards to assess investigation costs. Similarly, there is no authority for a water board to expand the field of costs assessed to a landowner when the statutory notice only requires a board to inform a landowner he or she may be assessed for removal costs.

Finally, the statutes you reference, N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1, do not uniformly use the word "investigate" nor do the laws require that a water board hire or designate an engineer or surveyor.[21] The addition of "investigation costs" to "the cost of removal" would be an extension of existing law based only upon a

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[18] 2011 N.D. Sess. Laws ch. 498, § 2; 2011 N.D. Sess. Laws ch. 499, § 2.

[19] See generally Juhl v. Well, 116 N.W.2d 625, 628 (N.D. 1962) (generally, the mention of one thing in a statute implies the exclusion of another, except if there is some special reason for mentioning one thing and not the other).

[20] See also N.D.C.C. § 61-16.1-53.1 (requiring the State Engineer to complete an independent investigation) and N.D.C.C. § 28-32-26 (authorizing a state agency to assess the costs of an investigation to a person found to be in violation of a statute or rule as a result of an adjudicative proceeding or informal disposition).

[21] Compare N.D.C.C. § 61-16.1-17 (providing a water board with specific authority to designate an engineer for special assessment projects).

presumption that the Legislature intended a water board to assess additional costs. Such an extension ignores the Legislature's express directive for landowners to pay investigation costs in N.D.C.C. § 61-32-03, and the rule of strict construction. Although the Legislature has provided water boards with broad authority to regulate water resources and levy assessments, the authority to assess costs is limited. It is my opinion, therefore, that water boards may not assess responsible landowners for investigation costs incurred prior to the issuance of a removal order under N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1.[22]

Your next question is whether a water board may assess costs if a board incurs costs in the course of determining whether a responsible landowner has fully complied with a removal order.

A plain reading and strict construction of N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1 suggest that a water board may only assess removal costs if an obstruction or noncomplying dike or dam is not removed. Consistent with the prior discussion and according to the rule of strict construction, it is my opinion that a water board may not assess compliance costs, such as post-removal survey or engineering costs, if a landowner completes the timely removal of an obstruction or noncomplying dike or dam.

Finally, you question whether a water board may require a complainant to post a bond[23] or whether a water board may assess investigation costs to a complainant if a board determines no obstruction to drainage exists. In practical terms, you are asking whether a water board may require a complainant, whose land might be flooded from a downstream drainage obstruction, to pay a water board's costs to investigate the source of the flooding.

In my review of the drainage laws, it appears that a water board is only authorized to assess costs against a complainant under N.D.C.C. § 61-32-07. The law provides that "[i]f, after the first complaint, in the opinion of the board, the complaint is frivolous, the board may assess the costs of the frivolous complaint against the complainant."[24] The remaining laws discussed above[25] do not authorize a water board to require a bond or to assess costs against a complainant.

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[22] Although the laws do not require an investigation per se, water board decisions must still be supported by substantial evidence, and board decisions cannot be arbitrary, capricious, or unreasonable. See Gowan v. Ward Cnty. Comm'n, 764 N.W.2d 425, 427 (N.D. 2009); Klindt v. Pembina Cnty. Water Res. Bd., 697 N.W.2d 339, 344 (N.D. 2005).
[23] See, e.g., N.D.C.C. § 61-16.1-39.1 (requiring petitioners for maintenance of a project to supply a surety bond for payment of costs if a water board finds the petition was improvidently made).
[24] N.D.C.C. § 61-32-07.
[25] N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1.

Based upon the rule of strict construction and the Legislature's plain and unambiguous wording with respect to the assessment of costs, it is my opinion that N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1 do not authorize a water board to require a complainant to post a bond or assess investigation costs against a complainant.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[26]

[26] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

What is Subsurface (Tile) Drainage?

Thomas F. Scherer
North Dakota State University
Extension Agricultural Engineer

Subsurface drainage can be simply described as buried perforated pipelines that intercept water below ground surface and direct it to an outlet. Subsurface drainage is often referred to as "tile" drainage because up to the 1970's, clay or concrete tiles were used to construct the subsurface pipeline. The joints between the tiles allowed water to flow into the pipeline. Since the 1970's, most tile drainage uses corrugated plastic pipe that is perforated. Many homes with basements have plastic tile lines installed around the footings to control basement water seepage. In agriculture, tile drainage is used to control water table elevations in production fields. Many agricultural fields have areas where the water table rises to close to the surface before, during or after the growing season. This water is generally not removed in a timely manner by surface drains. To control the water table, farmers install tile lines below the surface to intercept the water and direct it away from the field. Tile lines are typically buried 3 to 3.5 feet to allow normal tillage or planting operations and promote full root development of the crop. The tile lines in the field are called laterals and many laterals may be connected a main or sub-main line to convey water to the outlet. A tiled field may have one or more outlet locations depending on topography and surface drainage in the area. In some places, the elevation of the outlet is higher than the elevation of the main and a pump station must be used to lift the water from the main to the surface drain.

Why do farmers install tile?

There are two main reasons why farmers install tile drainage; control high water table situations that affect planting, cultivation or harvest conditions and remove excess salt that accumulates in the soil. In the semi-arid and arid portions of the country, salt accumulation inhibits crop production and is often linked to rising water table conditions either due to natural rain events or irrigation. Salt accumulation frequently affects the selection of crops that can be grown on a field, so a farmer may decide to tile a field to improve their crop rotation.

What does it cost to install tile on a farm field?

Depending on topography, tile laterals, sub-mains and mains can be installed in a random pattern or in a parallel pattern. The random pattern is often used to tile only portions of a field whereas the parallel pattern is used to tile the entire field. A tile contractor will often bid a project based on the length and diameter of installed tile. If the whole field is to be tiled, a contractor may bid the project on a per acre basis. For a whole field tile system that is installed commercially, the costs can be $800 to over $1500 per acre. Field costs are determined by the length of each lateral, spacing between laterals, length and diameter of submains and mains, topography, obstructions and outlet conditions. Some farmers contract with a commercial installer to put in the

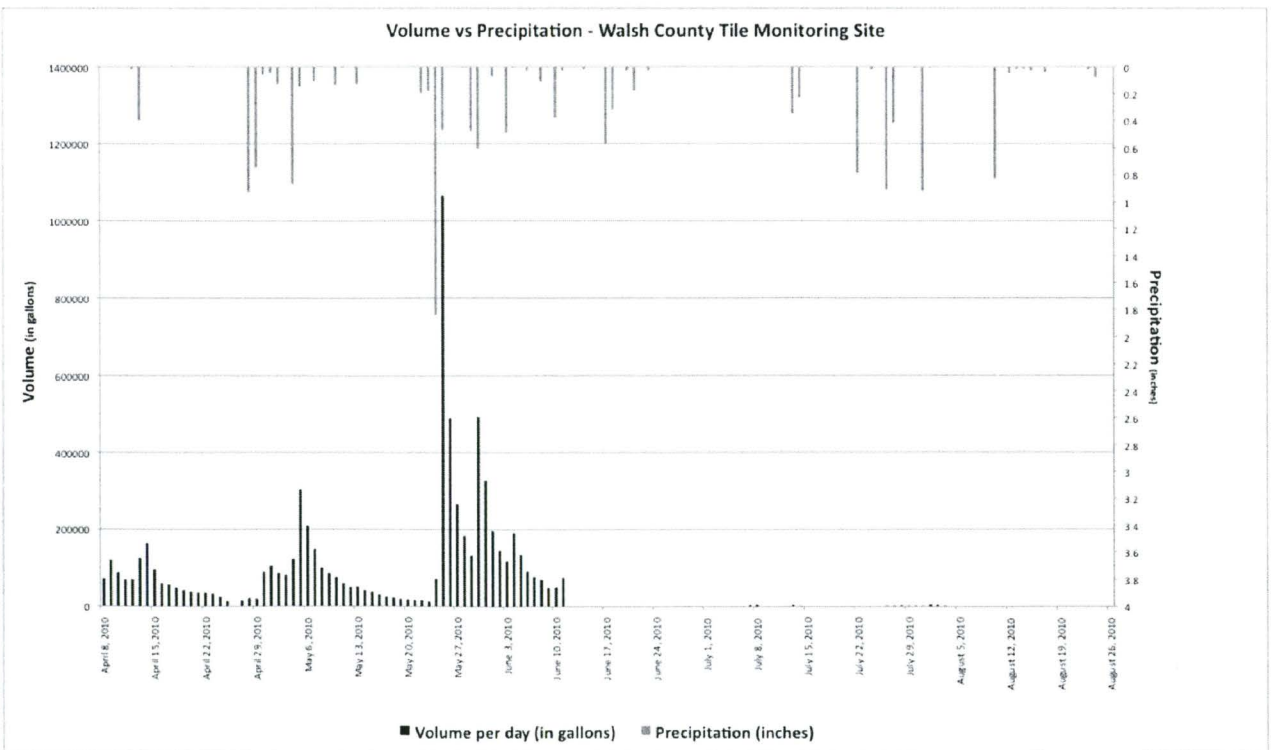
mains and then install the laterals with their own plow and thus significantly reduce the cost of installation.

Are water quality issues associated with subsurface drainage?

Where rainfall triggers tile flow events, the water that discharges from tile has some positive and negative quality aspects. Generally, phosphorus and sediment losses from tile drained fields are less than surface drained fields while loss of nitrogen in the form of nitrate and other dissolved minerals may increase. Tile drains installed to control salinity will discharge water containing higher total dissolved salts for several years with the concentration decreasing each year after installation. Eventually, the discharge will reach an equilibrium value. Over the last 10 years, researchers have developed several methods that will reduce nitrate in water flowing from tile drains. These methods include controlled drainage, buried biofilters, reducing the depth and spacing of tile laterals, improved design of surface intakes, storage and recycling of drainage water and saturated buffers .

How does tile respond to precipitation?

This question must be answered for two conditions: in the spring when snow melts and the rest of the year. At the present time, we do not have enough data to determine when tile start flowing in response to the melting of snow and frost leaving the soil. We do know that tile respond to rain events heavy enough to saturate the soil. The graph below shows the rain events and tile flow for a tile drainage site in Walsh County – note that there is no flow after June 10 even though there were significant rain events.



SB 2263 1/26/17 #23
pg. 1

AE1690 (Revised)

Frequently Asked Questions About Subsurface (Tile) Drainage

Tom Scherer
NDSU Extension Agricultural Engineer

Gary Sands
University of Minnesota Extension Engineer

Hans Kandel
NDSU Extension Agronomist

Chris Hay
South Dakota State University Extension Engineer

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March 2015

Installation of subsurface (tile) drainage systems in the upper Great Plains, especially the Red River of the North valley, has increased since the late 1990s. A wet climate cycle, along with increased crop prices and land values, are the major reasons this technology is being put to use. As a relatively new practice in this region, many questions are being asked about tile drainage.

This publication attempts to provide some answers.

Why are farmers installing tile (subsurface) drainage?

Tile drainage installation has accelerated in the Red River Valley drainage basin as well as other parts of North Dakota during the last 15 years. The recent interest in this practice is primarily due to seasonally high water tables. In springtime, many farmers have experienced difficulties in timely crop planting due to the wet conditions.

Soil salinity is also a problem in the Red River Valley and is related to water table behavior and soil moisture. Soil salinity in the Red River Valley alone encompasses more than 1.5 million acres and accounts for about $50 million to $90 million of lost annual revenue. Tile drainage is a management practice that offers the potential to control and reduce salinity in poorly drained soils.

Do my soils have too much clay to tile drain?

Tile drainage has been practiced successfully on a wide range of soil textures, from sandy to clayey. Coarser soils (silts and sands) can be drained with wider drain spacing, whereas finer soils (loams and clays) require narrower drain spacing. Soils with significant coarse silt or fine sand content may need a sock envelope around the pipe to prevent soil particles from entering the tile.

For a 4-foot drain depth and a drainage coefficient of .25 inch per day, a Fargo clay might require a drain spacing of around 40 feet, whereas the drain spacing for a Ulen fine sandy loam would be around 120 feet.

Soils in which shrinking/swelling clays or peat predominate, or soils that are sodic, may need special consideration with regard to tile drainage. Soils are classified sodic when the pH is in excess of 8.5 and the amount of sodium in the soil complex is much greater than the combined amount of calcium and magnesium.

Are my fields too flat to drain?

Level fields can be drained as long as minimum grades of 0.08 to 0.1 percent are maintained for tile laterals and mains. A tile at 0.1 percent grade has 1 foot of fall per 1,000 feet. On level ground, this means that the tile depth would vary by 1 foot over 1,000 feet. Many parts of the Red River Valley have a natural field slope of around 0.1 percent. A typical drainage system provides an outlet where tile can drain freely (by gravity) into a surface ditch.

How do I determine if a pump station is needed?

Where topography or depth of the outlet ditch does not allow for a gravity outlet, pumped outlets are used, provided a surface waterway exists to discharge the drainage water. A pumped outlet or "lift station" provides the lift required to get the drainage water from the elevation of the tile to the ground surface or higher and into the receiving waterway.

Typical electric-powered lift station

Pumped outlets increase the initial investment and operation/maintenance costs of the tile drainage system but may be economically feasible in many situations. A pumped outlet station includes a sump, pump, discharge pipe and usually an electric control panel. Important design features include the storage volume of the sump and capacity (flow rate) of the pump.

Am I experiencing negative effects from inadequate drainage on my farm, and how will tile drainage affect my overall farming operation?

Tile drainage will promote faster soil warmup and drying in the spring, and intermittent wet spots in fields will dry out more uniformly. A significant negative effect of inadequate drainage relates to the timeliness of spring and fall field operations.

Inadequate drainage can delay spring field operations from days to weeks and interrupt field traffic patterns due to nonuniform drying of the field.

Machinery traffic on soils that are too wet will cause increased soil compaction. Delays in planting mean a shorter growing season and fewer accumulated heat units for the crop.

Once the crop has been planted, inadequate drainage can cause stunted and shallow root growth, and sometimes complete crop failure due to excess-water stress (lack of oxygen in the root zone). Planting delay, soil compaction and excess-water stress combined can translate into significant negative crop yield impacts. The magnitude of the yield impact for a growing season depends on crop and variety, soils and the season's rainfall pattern.

Can the effects of salt buildup in soils be mitigated with tile drainage?

Soluble salts may accumulate in the root zone during a period of years with high water tables. Salinity can be measured by its ability to conduct electricity. One of the measurements is in millimhos/centimeter (mmho/cm). A soil sample is dried and equal parts of water and soil are mixed before measuring. With higher salt concentration, the conductivity readings will be higher. With levels of more than 1 mmho/cm, a yield reduction can be expected for most crops.

Studies have shown that leaching water through the profile and removing the salt via tile drainage will reduce the salt concentration in the root zone through time. Depending on seasonal rainfall or ability to irrigate, reducing the salt enough in high-concentration areas for optimum agricultural production may take a few years. This effect may occur more quickly in years with higher rainfall and may not occur at all in dry years. Reclaiming the land with a sequence of more tolerant crops such as barley is important before planting a salt-sensitive crop.

Will random or targeted tile drainage help control salt levels in saline seeps?

Saline seeps may occur where soil water from high land slowly seeps laterally to lower areas and carries dissolved minerals (salts) with it. If the water comes near, or seeps out of the surface in the low area, it may evaporate and leave the salts behind.

Through time, salts can increase to an extent where the soil no longer can support crop growth. Tiling these low areas, along with the side slopes, will lower the water table and, depending on the amount of precipitation, eventually will leach the salts. A targeted drainage system of relatively few tile lines may be all that is needed to address a saline seep situation.

What are the economics of tile drainage for the crops that I produce?

The economics of tile drainage systems depend on crop yield response, initial capital investment for the materials and installation of the system, and any annual operation and maintenance costs (such as electricity for pumped outlets).

Although crop yield response to drainage can be assessed directly, the impacts of inadequate drainage on soil quality (structure, microbial activity, etc.) are more difficult to measure and assign economic value. Many field crops show a positive response to drainage (on previously poorly drained soils), often with the best response from a combination of surface and tile drainage. The level of yield increase for a given year depends greatly on how poorly drained the soil was prior to drainage, and the timing of seasonal rainfall.

Research has shown that during many growing seasons, average yields may increase around 10 to 15 percent, depending on the aforementioned factors. Research on a clay loam soil has shown that wheat yield will be reduced by 42 percent and sugarbeet yield will be reduced by 29 percent of potential yield when the water table stays 15 to 20 inches below the surface for extended periods during the growing season.

In addition to yield increases associated with adequate drainage, operating expenses on the farm may be cut due to reduced cropping inputs, less fuel consumption, and timely field operations.

Several drainage pipe manufacturers have developed Web-based pages to evaluate tile drainage investment. A more detailed description of drainage economics can be found at this Iowa State University Extension website: *www.extension.iastate.edu/agdm/wholefarm/html/c2-90.html.*

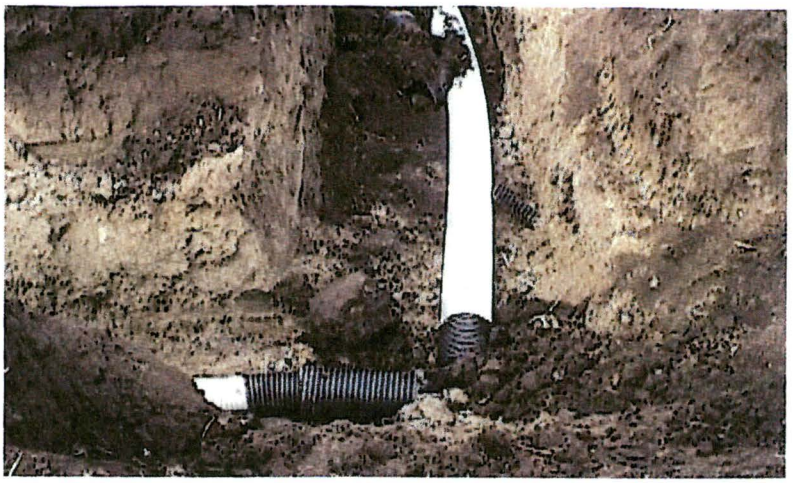
Will drainage stress my crop in dry years?

Tile drainage does not remove "plant available" water from the soil; it merely removes "gravitational" water that would drain naturally if unimpeded by confining layers in the soil. The greatest benefits of tile drainage typically are realized in wet years, but because drainage promotes deep root development, crops often will have better access to soil moisture in dry years. During extremely dry growing seasons, a tile-drained field certainly might have less available water at some point during the growing season than an undrained field.

Whether such an effect would offset the early season positive effects of drainage is unknown, and highly site- and year-specific. In general, where poorly drained soils exist, crop yields will be more uniform from year to year with tile drainage.

Drainage control structures (also known as controlled drainage or drainage water management) can be installed to provide the potential for limiting the release of drainage water into the ditch and conserve more soil water in the root zone. Similarly, the pump in a lift station can be turned off when drier growing conditions become a concern.

A lot of equipment is required to install tile drainage.



"Sock" on the tile.

Can I install a tile drainage system myself or have a neighbor do it to reduce costs?

Do-it-yourself (DIY) tiling is certainly an option that is being considered by many farmers/ landowners. With good equipment, good design and the necessary commitment of time and resources, DIY tiling may be a sound option and may save on installation costs. However, like any other field operation, an investment in specialized equipment and knowledge is required for DIY tiling.

Tiling typically requires at least a four-person crew, a tile plow, electronic controls (global positioning system and plow control), a backhoe, tile cart, and several large and medium-sized tractors.

Pipe depth and grade, pipe size and field layout are all extremely important in design and will determine the quality of performance of your system. Above all, making sure the tile system is designed and installed properly is important so it will perform well for many years.

When do I need to use a "sock" drain envelope or fine/narrow-slot tile?

The need for an envelope (sock), or narrower slots, on the drainage pipe depends on the soil texture in the region of the tile depth in the field. Generally, poorly graded fine sands and coarse silts require the use of sock envelopes.

In general, clay, silty clay, sandy clay, silty clay loam, silts and loams do not require envelopes due to their natural cohesiveness. The Natural Resources Conservation Services (NRCS) Web Soil Survey website *(http://websoilsurvey.nrcs.usda.gov/)* can be used to determine the soil texture in the region of the tile depth.

If you have doubts or questions, then a soil sieve or particle size analysis should be done. This is a relatively easy mechanical procedure that can be performed by a commercial soil-testing lab or the soil-testing lab at NDSU. The analysis will determine the sand, silt and clay fractions of the soil, and the range of soil particle sizes.

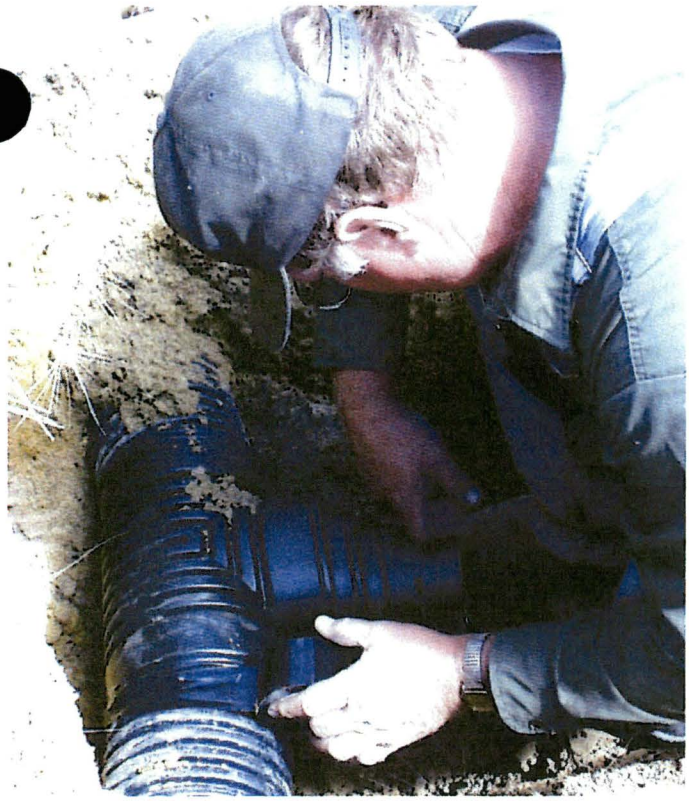
No sock is needed if the clay fraction is greater than 30 percent. A sock may be needed if the medium to very coarse sand fraction (0.5 to 2 millimeter particle size) accounts for more than 20 percent of the total.

What is "controlled" drainage or "drainage water management"?

Controlled, or managed, drainage systems incorporate structures that allow the producer/manager to raise the outlet elevation at strategic locations in the drainage system to control the release of drainage water and potentially maintain a shallower water table.

Controlled drainage systems offer the potential to conserve soil water in the root zone and reduce drainage flows and the loss of dissolved nutrients (nitrogen and phosphorus) from the field. If the timing of rainfall is favorable, controlled drainage creates the potential to store water for drier periods during the growing season.

Pg. 5



ne or more special control structures, or the pumped outlet itself, may be used to control the drainage system. Control structures utilize stop-logs or baffles to set the desired water table elevation at the location of the structure; a pumped outlet may be turned off to create the same effect.

Considering the option of drainage water management in the initial design of the drainage system is important so that the layout of the system accommodates the goal of drainage management to the fullest extent and maximizes the effectiveness of the practice.

Typically, fields with average field grade from 0 to 0.5 percent are best suited for the practice, but other factors such as field slope uniformity and access to control structure locations are important, too. A field that is nearly flat may require only one control structure (or a pumped outlet) to implement the practice, whereas a field with more grade may require several control structures.

The benefit of drainage water management is that producers have one more tool to manage production sks. Under certain conditions, water retained with the control structures may increase crop yield.

Can I irrigate through the tile drainage system, or "subirrigate"?

"Subirrigation" is the practice of providing water to the root zone through a drainage water management system. If a source of irrigation water is available and the drainage system is designed appropriately, water can be introduced into control structures, special inlets or the sump of a pumped outlet to raise the water table and make water available to the crop.

To make this practice work, a sufficient source of water is needed to supply the water needs of the crop, usually during July and August. As with drainage water management, for this practice to be effective, the subirrigation system must be designed before installation of the tile. A system designed for subirrigation generally will require closer drain spacing than a system designed only for conventional drainage.

Are any water quality issues associated with tile drainage?

The water quality impacts of tile drainage are positive and negative. In general, when compared with surface drainage only, phosphorus and sediment losses via surface runoff are lower from tile-drained fields, while losses of nitrate-nitrogen and other dissolved constituents in the root zone are greater. The extent of the increase or decrease of these constituents also depends on farm management practices, and the magnitudes of the losses are highly variable from year to year.

What is the relationship between tile drainage and downstream flow and flooding?

Tile drainage impacts on downstream flow and flooding have been the subject of much debate for more than a century. The influence of tile drainage on stream flow involves complex processes that depend on many factors. Therefore, generalizations

Pg. 6

Drainage pump station discharge mixes with surface runoff.

such as tile drainage "causes" flooding or tile drainage "prevents" flooding oversimplify the issue.

Some of the important factors that will determine the impact of tile drainage on downstream flow and flooding include soil types, rainfall (or snowmelt) amount and intensity, point of interest (near the field outlet or over a larger watershed), time frame of interest, existing soil moisture conditions, and the extent of surface drainage (including surface intakes) and channel improvements.

Despite this complexity, the research on tile drainage and stream flow contain some areas of general agreement. For the poorly drained, low-permeability soils where tile drainage typically is used in the upper Midwest, tile drainage will lower the water table, which increases soil water storage capacity and infiltration. This reduces the amount of surface runoff and the peak flows coming from the field.

For small or moderate rain or snowmelt events, this may help reduce downstream peak flows that are often a concern for flooding. Discharge from tile drainage occurs during a longer time period than surface runoff, however, base flows (stream flows between storm or snowmelt events) tend to increase from tile drainage.

For large rain or snowmelt events or extended rain events on wet soils that exceed the infiltration ability of the soil – which typically are related to catastrophic flooding-stream flows are driven by surface runoff, and tile drainage has minimal impact on downstream flows and flooding.

Because of the many factors and complexity involved, computer models are used to help understand how drainage impacts hydrology. Studies based on computer modeling suggest that the water yield (surface runoff plus tile and shallow groundwater flow) with tile drainage will be similar to the water yield without drainage.

Some studies have shown some increase (on the order of 10 percent[1]) in overall water yield from tile drainage, while others have shown no change or even a decrease. These studies, however, have not been verified with field data.

Moving beyond the field scale to larger watershed scales, the complexity increases greatly with more variation in all of the factors contributing to stream flow, and thus, isolating the impacts of tile drainage at these scales becomes much more difficult. Therefore, the influence of tile drainage on stream flow and flooding at these larger scales is not yet well-understood.

[1] Hydrologic and Water Quality Impacts of Agricultural Drainage. 1994. Skaggs, R.W., M.A. Brevé and J.W. Gilliam. Critical Reviews in Environmental Science and Technology 24(1) 1-32.

Pg-7

The golden rule of drainage water management is to drain only that amount necessary to create adequate field conditions and retain water that may contribute to crop production.

NDSU tile drainage research plots.
Note the water level control boxes.

Photos by Tom Scherer, Hans Kandel and Xinhua Jia

For more information on this and other topics, see www.ag.ndsu.edu

600-10-13; 500-1-14; 1M-3-15

SB 2263
1/26/17
#24
pg. 1

DICKEY COUNTY WATER RESOURCE BOARD

Dickey County Water Resource Board
c/o Hope A. Jury, secretary
9246 94th Ave SE
Fullerton, ND 58441
May 12, 2015

Richard A. Gramlow
9439 88th St SE
Fullerton, ND 58441

Dear Mr. Gramlow,

Enclosed you will find a copy of the attorney's and engineering bills for the examination of the Application to Tile Drain dated February 13, 2014. Please pay the total of $830.16 to the Dickey County Water Resource Board (DCWRB). You may send it either to me (address above) or take it to the county auditor's office in Ellendale. Thank you.

These are the bills for the first 2 applications you sent and then withdrew. There will be further costs for the new applications you submitted on 4-22.

Sincerely yours,
Hope A. Jury
Hope A. Jury, secretary

enc. 2

pg. 2

moore engineering, inc.

Shaping the Region for 50 Years.

925 10th Avenue East • West Fargo, ND 58078
T: 701.282.4692 F: 701.282.4530

Dickey County Water Resource District
9246 94th Ave SE
Fullerton, ND 58441

Invoice number 9850
Date 03/30/2015

Project 18242 Dickey County WRD

Professional Services

RE: Permit: [redacted] Gramlow (2), [redacted]

900 Permit & Complaint Reviews

Labor

2 hrs @ $145 = $290

	Hours	Rate	Billed Amount
Engineering Technician I	3.00	75.00	225.00
Project Manager	3.00	145.00	435.00
Phase subtotal			660.00

Invoice total **660.00**

Invoice Summary

Description	Contract Amount	Prior Billed	Total Billed	Current Billed
900 Permit & Complaint Reviews	0.00	0.00	660.00	660.00
Total	0.00	0.00	660.00	660.00

DUE UPON RECEIPT

PLEASE REMIT PAYMENT - ATTENTION ACCOUNTING

OHNSTAD TWICHELL, P.C.
901 13TH AVENUE EAST
PO BOX 458
WEST FARGO ND 58078-0458
WK 701-282-3249 FAX 701-282-0825
Federal I.D. #45-0310621

April 28, 2015

DICKEY CO WATER RESOURCE DISTRICT
PO BOX 215
ELLENDALE, ND 58436-0215

Invoice# 134511 SMF
Our file# 150013 00003
Billing through 04/21/2015

RICHARD AND ALAN GRAMLOW TILE APPLICATIONS 2015

Balance forward as of invoice dated	01/01/00	$0.00
Last payment received	01/01/1900	$0.00
A/R adjustments made since last invoice		$0.00
Accounts receivable balance carried forward		$0.00

PROFESSIONAL SERVICES

03/05/2015	SMF	Review Gramlow tile applications; correspond with Hope and Mike.				
			0.20	hrs	170.00 /hr	34.00
03/06/2015	SMF	Correspond with Hope and Mike regarding potential "statewide" issues and actions for the Board.				
			0.30	hrs	170.00 /hr	51.00
03/13/2015	JDR	Receive and review email from attorney Sean M. Fredricks; conduct multiple property records searches; exchange emails with Dickey County Recorder; receive and review documents from county recorder.				
			0.60	hrs	90.00 /hr	54.00
03/25/2015	SMF	Prepare draft letter to State Engineer's Office regarding statewide findings.				
			0.80	hrs	170.00 /hr	136.00
03/30/2015	SMF	Correspond with Mike and Hope regarding application for Section 15; revise minutes and letter to Dwight Comfort regarding statewide finding.				
			0.80	hrs	170.00 /hr	136.00
04/16/2015	SMF	Review applications; review Hope's email regarding errors on application; correspond with Mike and Hope.				
			0.20	hrs	170.00 /hr	34.00
04/21/2015	SMF	Phone conference with Richard Gramlow; review new application; review two other applications and correspond with Hope and Mike regarding Gramlow's plan to withdraw his application and his dad's and to submit a single joint application.				
			0.50	hrs	170.00 /hr	85.00
		Total fees for this matter				$530.00

EXPENSES

03/13/2015	North Dakota records search fee for Dickey County	$5.00
03/16/2015	Copy Fee paid to the Dickey County Recorder	$3.00

PURSUANT TO SECTION 13-01-14, NDCC, A LATE PAYMENT CHARGE OF 1% PER MONTH IS ASSESSED UPON ACCOUNTS NOT PAID 30 DAYS FROM BILLING DATE. THANK YOU.

03/31/2015	Postage	$0.96
04/21/2015	Photocopies	$1.20
	Total expenses for this matter	$10.16

BILLING SUMMARY

Total fees	$530.00
Total expenses	$10.16
Total of new charges for this invoice	$540.16
Total balance now due	$540.16

PURSUANT TO SECTION 13-01-14, NDCC, A LATE PAYMENT CHARGE OF 1% PER MONTH IS ASSESSED UPON ACCOUNTS NOT PAID 30 DAYS FROM BILLING DATE. THANK YOU.

DICKEY COUNTY WATER RESOURCE BOARD

Dickey County Water Resource Board
c/o Princess Haak
314 6th St. S
Oakes, ND 58474
October 21, 2016

Mr. Richard Gramlow
9439 88th St. SE
Fullerton, ND 58441

Dear Mr. Gramlow,

Enclosed you will find a copy of the attorney's and engineer's bills for the professional services of your tile application. Please pay the total of $1,714.74 to the Dickey County Water Resource Board (DCWRB). You may send it either to me (address above) or take it to the county auditor's office in Ellendale. Thank you.

Sincerely yours,

Princess Haak, secretary

moore engineering, inc.

Shaping the Region for 50 Years.

925 10th Avenue East • West Fargo, ND 58078
T: 701.282.4692 F: 701.282.4530

Dickey County Water Resource District
314 6th St S
Oakes, ND 58474

Invoice number 13471
Date 08/19/2016

Project **18242 Dickey County WRD**

Professional Services

Time Thru 08-12-16

924 Gramlow Tile 2016-1 (89 acres)

Labor

	Hours	Rate	Billed Amount
Graduate Engineer	1.00	115.00	115.00
Senior Project Manager	0.50	175.00	87.50
Phase subtotal			202.50

925 Gramlow Tile 2016-2 (410 acres)

Labor

	Hours	Rate	Billed Amount
Graduate Engineer	0.50	115.00	57.50
Senior Project Manager	0.50	175.00	87.50
Phase subtotal			145.00

926 Gramlow Tile 2016-3 (280 acres)

Labor

	Hours	Rate	Billed Amount
Graduate Engineer	0.50	115.00	57.50
Senior Project Manager	0.50	175.00	87.50
Phase subtotal			145.00

927 Gramlow Tile 2016-4 (185 acres)

Labor

	Hours	Rate	Billed Amount
Graduate Engineer	0.50	115.00	57.50
Senior Project Manager	1.00	175.00	175.00
Phase subtotal			232.50

Invoice total **725.00**

DUE UPON RECEIPT

PLEASE REMIT PAYMENT - ATTENTION ACCOUNTING

moore engineering, inc.

925 10th Avenue East · West Fargo, ND 58078
T: 701.282.4692 F: 701.282.4530
mooreengineeringinc.com

Dickey County Water Resource District
314 6th St S
Oakes, ND 58474

Invoice number 13795
Date 09/22/2016

Project **18242 Dickey County WRD**

Professional Services

Time Thru 9-16-16

923 Munroe, Zimbelman, Quandt - South Jackson Lateral West

RE: Correspondence with John Quandt

Labor

	Hours	Rate	Billed Amount
Project Manager	0.50	160.00	80.00

925 Gramlow Tile 2016-2 (410 acres)

RE: Correspondence with WRD legal counsel and Office of the State Engineers

Labor

	Hours	Rate	Billed Amount
Senior Project Manager	0.50	175.00	87.50

Invoice total **167.50**

DUE UPON RECEIPT

PLEASE REMIT PAYMENT - ATTENTION ACCOUNTING

OHNSTAD TWICHELL, P.C.
901 13TH AVENUE EAST
PO BOX 458
WEST FARGO ND 58078-0458
WK 701-282-3249 FAX 701-282-0825
Federal I.D. #45-0310621

September 26, 2016

DICKEY CO WATER RESOURCE DISTRICT
C/O PRINCESS HAAK
314 6TH ST S
OAKES, ND 58474

Invoice# 144926 SMF
Our file# 160013 00006
Billing through 09/21/2016

RICHARD AND ALAN GRAMLOW TILE APPLICATIONS 2016

Balance forward as of invoice dated	01/01/00	$0.00
Last payment received	01/01/1900	$0.00
A/R adjustments made since last invoice		$0.00
Accounts receivable balance carried forward		$0.00

PROFESSIONAL SERVICES

07/29/2016	SMF	Review Gramlow tile applications; review email from Mike regarding downstream discharges; correspond with Mike and Princess.	0.80 hrs	180.00 /hr	144.00
08/02/2016	JDR	Receive and review email from attorney Sean M. Fredricks; conduct multiple property records searches; interoffice conference with attorney Sean M. Fredricks; draft correspondence to Dickey County Abstract.	0.60 hrs	95.00 /hr	57.00
08/10/2016	JDR	Follow-up telephone conference with Dickey County Abstract regarding status of request.	0.30 hrs	95.00 /hr	28.50
08/11/2016	JDR	Receive and review email and documents from abstract company; exchange email with abstract company regarding additional documents required; interoffice conference with attorney Sean M. Fredricks; prepare summary of property ownership; locate addresses for property owners.	1.00 hrs	95.00 /hr	95.00
08/15/2016	JDR	Exchange email with Dickey County Treasurer regarding parcel in Section 34; revise table summary.	0.40 hrs	95.00 /hr	38.00
08/23/2016	SMF	Review notes from meeting, applications, plat maps, deeds; and Administrative Code; with regard to SE 1/4 of Section 35, prepare draft minutes, Notice of Decision, Affidavit of Service, Affidavit of Applicant, and letter to Dwight Comfort; with regard to remaining three applications, prepare draft minutes and draft letter to State Engineer regarding "statewide" finding.	2.00 hrs	180.00 /hr	360.00
08/24/2016	DMS	Review e-mail from attorney Sean M. Fredricks regarding preparation of Affidavit of Service by Mail for statewide findings letter to Matt Lindsay; prepare and draft Affidavit of Service by Mail (Notice of Statewide Findings).	0.20 hrs	95.00 /hr	19.00
08/24/2016	DMS	Long-distance telephone call with Princess Haak regarding status of four original Richard and Alan Gramlow Permits, as well as status of Oakes Surface Permit 4834 and original signed Resolution Setting Hearing on Lovell Project; prepare e-mail to attorney Sean M. Fredricks letting him know status of these original documents.			

Pay online @ www.OhnstadLaw.com
Late payment charge of 1% per month assessed on all accounts not paid 30 days from billing date.

		0.20 hrs	95.00 /hr		19.00
08/25/2016	DMS	Review message from attorney Sean M. Fredricks regarding taking out paragraph about converting non-contributing areas to contributing areas on "statewide significance" letter to Matt Lindsay at the State Engineer's office; revise letter; prepare mailing packets.			
		0.20 hrs	95.00 /hr		19.00
		Total fees for this matter			$779.50

EXPENSES

08/02/2016	North Dakota records search fee for Dickey County	$16.00
08/11/2016	Copy & Search Fees paid to the Dickey County Abstract & Title Company	$25.00
08/25/2016	Postage	$7.74
09/21/2016	Photocopies	$74.00
	Total expenses for this matter	$122.74

BILLING SUMMARY

Total fees	$779.50
Total expenses	$122.74
Total of new charges for this invoice	$902.24
Total balance now due	$902.24

10/19

Pay online @ www.OhnstadLaw.com
Late payment charge of 1% per month assessed on all accounts not paid 30 days from billing date.

SB 2263 #25
1/26/17 Pg. 1

LETTER OPINION
2012-L-01

January 10, 2012

Mr. Neil W. Fleming
Attorney at Law
PO Box 633
Cavalier, ND 58220-0633

Dear Mr. Fleming:

Thank you for your letter requesting my opinion[1] on whether water resource boards have the authority to assess costs incurred in the course of investigating a drainage complaint and enforcing a removal order,[2] and whether boards can require complainants to pay investigation costs or post a bond.

It is my opinion that water boards may not assess landowners for drainage investigation costs incurred by a board prior to the issuance of a removal order under N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1. It is my further opinion that a water board may not assess compliance costs if a landowner completes the timely removal of an obstruction or noncomplying dike or dam. It is my further opinion that sections 61-16.1-51, 61-16.1-53, and 61-21-43.1 do not authorize a water board to assess a complainant for investigation costs nor do the laws authorize a board to require the posting of a bond.

ANALYSIS

You state that water boards must sometimes rely upon professional engineering or surveying services for assistance to fulfill their regulatory and water management obligations. Water boards have broad authority to manage water resources within their jurisdiction; this authority includes the power to:

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[1] You requested this opinion on behalf of the Pembina County Water Resource Board, a public entity entitled to Attorney General legal opinions under N.D.C.C. § 61-16.1-58.
[2] Your letter inquires specifically about drainage complaints, but this opinion will also address unauthorized works, such as dikes and dams.

5. Plan, locate, relocate, construct, reconstruct, modify, maintain, repair, and control all dams and water conservation and management devices of every nature and water channels, and to control and regulate the same and all reservoirs, artificial lakes, and other water storage devices within the district.

6. Maintain and control the water levels and the flow of water in the bodies of water and streams involved in water conservation and flood control projects within the district and regulate streams, channels, or watercourses and the flow of water therein by changing, widening, deepening, or straightening the same, or otherwise improving the use and capacity thereof.

7. Regulate and control water for the prevention of floods and flood damages by deepening, widening, straightening, or diking the channels or floodplains of any stream or watercourse within the district, and construct reservoirs or other structures to impound and regulate such waters.

. . . .

9. Do all things reasonably necessary and proper to preserve the benefits to be derived from the conservation, control, and regulation of the water resources of this state.[3]

Water boards have more specific regulatory obligations within N.D.C.C. chs. 61-16.1 and 61-21, which require boards to determine or investigate whether drainage obstructions have been negligently constructed and whether dams or dikes comply with the law. These laws also allow a water board to assess a responsible landowner for the costs of removal if the landowner does not comply with a board's removal order. Since the investigation costs associated with this work can be unpredictable and expensive,[4] you question whether a water board may also assess investigation costs to a responsible landowner or complainant.

---

[3] N.D.C.C. § 61-16.1-09.

[4] The annual funding for water boards is generated by a tax levy of up to four mills approved by county commissions under N.D.C.C. § 61-16.1-06. See also N.D.C.C. § 57-15-26.6. Water boards may also use special assessments to fund projects. See N.D.C.C. §§ 61-16.1-17, 61-16.1-18, 61-16.1-21, 61-16.1-22, and 61-16.1-24.

Water boards are political subdivisions created by statute.[5] "A political subdivision's 'rights and powers are determined and defined by law.'"[6] "[D]rainage boards are creatures of statute, and they have no powers, except such as are expressly granted by the statute or reasonably implied from the powers granted."[7] "In defining a [political subdivision's] powers the rule of strict construction applies and any doubt as to the existence or extent of the powers must be resolved against the [political subdivision]."[8] After it has been determined that a political subdivision has the particular power, the rule of strict construction no longer applies, and the manner and means of exercising those powers, where not limited or specified by the Legislature, are left to the discretion of the political subdivision.[9]

Your letter specifically references three statutes within these chapters: N.D.C.C. §§ 61-16.1-51 (Removal of obstructions to drain), 61-16.1-53 (Removal of a noncomplying dike or dam),[10] and 61-21-43.1 (Removal of obstructions to drain). Sections 61-16.1-51 and 61-21-43.1, N.D.C.C., which are nearly identical, provide that if a water board determines an obstruction to a drain has been caused by the negligent act or omission of a landowner (or tenant), the board shall provide a notice to the landowner:

> [specifying] the nature and extent of the obstruction, the opinion of the board as to its cause, and must state that if the obstruction is not removed within such period as the board determines, but not less than fifteen days, the board shall procure removal of the obstruction and assess the cost of the removal, or the portion the board determines appropriate,[11] against the property of the landowner responsible.[12]

Neither section 61-16.1-51 nor 61-21-43.1 provides the authority to assess costs for an investigation, a formal complaint or investigation process, or the authority to assess "any" or "all" costs.

Section 61-16.1-53, N.D.C.C., provides a more structured complaint and investigation process. Under this law, a water board "shall promptly 'investigate' and make a

---

[5] N.D.C.C. ch. 61-16.1; see also Anderson v. Richland Cnty. Water Res. Bd., 506 N.W.2d 362, 366 (N.D. 1993); N.D.A.G. 99-F-17; N.D. Const. art. VII, § 2.
[6] Burlington N. & Santa Fe Ry. Co. v. Benson Cnty. Water Res. Dist., 618 N.W.2d 155, 157 (N.D. 2000) (quoting Eikevik v. Lee, 13 N.W.2d 94, 97 (1944)).
[7] Freeman v. Trimble, 129 N.W. 83, 87 (1910).
[8] Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980).
[9] See Haugland v. City of Bismarck, 429 N.W.2d 449, 453 (N.D. 1988).
[10] See also N.D.C.C. § 61-16.1-53.1 (Appeal of board decisions).
[11] The word "appropriate" is not included in N.D.C.C. § 61-21-43.1.
[12] N.D.C.C. § 61-16.1-51.

determination [upon receipt of a complaint of unauthorized construction of a dike, dam, or other device] . . . ."[13] If a water board orders the removal of the noncomplying dike or dam and the responsible landowner does not comply, "the board shall cause the removal of the dike, dam, or other device and assess the cost of the removal, or the portion the board determines, against the property of the landowner responsible."[14] The law is silent regarding whether a water board may seek costs for an investigation.

Since the specific laws discussed above do not provide express authority for water boards to assess investigation costs, you question whether investigation costs may be assessed to landowners as a cost of removing an obstruction or noncomplying dike or dam.[15]

As explained above, the Legislature has only provided a water board with the express authority to assess a landowner for the costs of removing an obstruction or noncomplying dike or dam. This language is not ambiguous[16] and it is apparent that the Legislature has concluded investigations are distinct regulatory tasks for water boards rather than a general or generic function that may be cast as another regulatory function.[17]

---

[13] N.D.C.C. § 61-16.1-53.
[14] N.D.C.C. § 61-16.1-53.
[15] Your question assumes that a responsible landowner has not complied with a board's removal order.
[16] See N.D.C.C. § 1-02-02 (words in a statute are understood in their ordinary sense unless a contrary intention plainly appears).
[17] Authority for water boards or a water authority to specifically conduct investigations is provided in a number of locations throughout N.D.C.C. title 61, including: N.D.C.C. § 61-01-23 (Investigation or removal of obstructions in channel); N.D.C.C. § 61-16.1-12 (Scope of water resource board's extraterritorial contractual authority – Board may acquire property in adjoining states and provinces); N.D.C.C. § 61-16.1-53.1 (Appeal of board decisions – State engineer review – Closing of noncomplying dams, dikes, or other devices for water conservation, flood control, regulation, and watershed improvement); N.D.C.C. § 61-21-02 (Watercourses, ditches, and drains may be constructed, maintained, repaired, improved, or extended); N.D.C.C. §§ 61-24.5-10 and 61-24.5-11 (Southwest Water Authority, District budget – Tax levy and Determination of amount to be levied – Adoption of levy – Limitation); N.D.C.C. § 61-32-03.1 (Permit to drain subsurface waters required – Permit form – Penalty); N.D.C.C. § 61-32-07 (Closing a noncomplying drain – Notice and hearing – Appeal – Injunction – Frivolous complaints); N.D.C.C. § 61-32-08 (Appeal of board decisions – State engineer review – Closing of noncomplying drains); N.D.C.C. § 61-39-05 (Authority of the Lake Agassiz water authority); N.D.C.C. § 61-40-05 (Authority of the western area water supply authority).

For example, under N.D.C.C. § 61-32-03, a drainage permit "may not be granted until an investigation discloses that the quantity of water which will be drained . . . will not flood or adversely affect downstream lands." In addition, the law further provides that if "the [subsurface drain permit] investigation shows that the proposed drainage will flood or adversely affect lands of downstream landowners . . . [a]n owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required [flowage easement] investigation."

By comparison, N.D.C.C. § 61-32-03.1, which was passed by the 2011 Legislature,[18] provides that "[i]f an investigation by a water resource district or a downstream landowner within one mile [1.61 kilometers] . . . shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers] . . . the water resource district may require flowage easements . . . ." There is no requirement in section 61-32-03.1 for an owner of land to pay for an investigation. Thus, it is logical to conclude that the mention of investigation costs under section 61-32-03 implies that such a directive would not be authorized under section 61-32-03.1 if it is not expressly stated.[19]

The "investigation" distinction is further supported by N.D.C.C. §§ 61-16.1-53 and 61-32-07, which both require a board to conduct an investigation upon receipt of a complaint.[20] The laws require that if a board determines a dike, dam, or drain does not comply with the law, a water board's removal or closure notice must state that the landowner may be assessed for the cost of removal or closure. There is no authority within these laws for water boards to assess investigation costs. Similarly, there is no authority for a water board to expand the field of costs assessed to a landowner when the statutory notice only requires a board to inform a landowner he or she may be assessed for removal costs.

Finally, the statutes you reference, N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1, do not uniformly use the word "investigate" nor do the laws require that a water board hire or designate an engineer or surveyor.[21] The addition of "investigation costs" to "the cost of removal" would be an extension of existing law based only upon a

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[18] 2011 N.D. Sess. Laws ch. 498, § 2; 2011 N.D. Sess. Laws ch. 499, § 2.

[19] See generally Juhl v. Well, 116 N.W.2d 625, 628 (N.D. 1962) (generally, the mention of one thing in a statute implies the exclusion of another, except if there is some special reason for mentioning one thing and not the other).

[20] See also N.D.C.C. § 61-16.1-53.1 (requiring the State Engineer to complete an independent investigation) and N.D.C.C. § 28-32-26 (authorizing a state agency to assess the costs of an investigation to a person found to be in violation of a statute or rule as a result of an adjudicative proceeding or informal disposition).

[21] Compare N.D.C.C. § 61-16.1-17 (providing a water board with specific authority to designate an engineer for special assessment projects).

presumption that the Legislature intended a water board to assess additional costs. Such an extension ignores the Legislature's express directive for landowners to pay investigation costs in N.D.C.C. § 61-32-03, and the rule of strict construction. Although the Legislature has provided water boards with broad authority to regulate water resources and levy assessments, the authority to assess costs is limited. It is my opinion, therefore, that water boards may not assess responsible landowners for investigation costs incurred prior to the issuance of a removal order under N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1.[22]

Your next question is whether a water board may assess costs if a board incurs costs in the course of determining whether a responsible landowner has fully complied with a removal order.

A plain reading and strict construction of N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1 suggest that a water board may only assess removal costs if an obstruction or noncomplying dike or dam is not removed. Consistent with the prior discussion and according to the rule of strict construction, it is my opinion that a water board may not assess compliance costs, such as post-removal survey or engineering costs, if a landowner completes the timely removal of an obstruction or noncomplying dike or dam.

Finally, you question whether a water board may require a complainant to post a bond[23] or whether a water board may assess investigation costs to a complainant if a board determines no obstruction to drainage exists. In practical terms, you are asking whether a water board may require a complainant, whose land might be flooded from a downstream drainage obstruction, to pay a water board's costs to investigate the source of the flooding.

In my review of the drainage laws, it appears that a water board is only authorized to assess costs against a complainant under N.D.C.C. § 61-32-07. The law provides that "[i]f, after the first complaint, in the opinion of the board, the complaint is frivolous, the board may assess the costs of the frivolous complaint against the complainant."[24] The remaining laws discussed above[25] do not authorize a water board to require a bond or to assess costs against a complainant.

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[22] Although the laws do not require an investigation per se, water board decisions must still be supported by substantial evidence, and board decisions cannot be arbitrary, capricious, or unreasonable. See Gowan v. Ward Cnty. Comm'n, 764 N.W.2d 425, 427 (N.D. 2009); Klindt v. Pembina Cnty. Water Res. Bd., 697 N.W.2d 339, 344 (N.D. 2005).

[23] See, e.g., N.D.C.C. § 61-16.1-39.1 (requiring petitioners for maintenance of a project to supply a surety bond for payment of costs if a water board finds the petition was improvidently made).

[24] N.D.C.C. § 61-32-07.

[25] N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1.

Based upon the rule of strict construction and the Legislature's plain and unambiguous wording with respect to the assessment of costs, it is my opinion that N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1 do not authorize a water board to require a complainant to post a bond or assess investigation costs against a complainant.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[26]

[26] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

#1

17.0745.02004

Title.

Prepared by the Legislative Council staff for Senator Luick

February 9, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2263

Page 1, line 2, replace "drainage" with "water management"

Page 1, line 7, overstrike "drainage" and insert immediately thereafter "water management"

Page 1, line 7, replace "drains" with "encompasses"

Page 1, line 8, remove "A person seeking a"

Page 1, remove lines 9 through 11

Page 1, line 12, replace "[32.37 hectares] or more" with "A person that installs a water management system that encompasses less than eighty acres [32.37 hectares] of land area shall notify owners of land within one mile [1.61 kilometers] downstream of the outlet for the proposed water management system and the water resource district within which is found the majority of the land comprising the water management system of the installation before it occurs, but need not obtain a permit for the installation"

Page 1, line 12, replace "of a drainage" with "drained by a subsurface water management"

Page 1, line 12, remove "without surface"

Page 1, line 13, remove "intakes"

Page 1, line 14, after the underscored period insert "A person seeking a permit for a subsurface water management system that encompasses eighty acres [32.37 hectares] of land area or more and utilizes a surface intake shall apply for a permit under section 61-32-03, regardless of the watershed size."

Page 1, line 16, replace "issued" with "required"

Page 1, line 16, after the period insert "The form must require the applicant to identify whether the state or an agency of the state is a landowner to which notice must be given under subdivision b."

Page 1, line 17, overstrike "drainage" and insert immediately thereafter "water management"

Page 2, line 19, after "submission" insert "via certified mail"

Page 2, line 20, replace "drainage" with "water management"

Page 2, remove lines 21 through 24

Page 2, line 25, remove "slough, or lake"

Page 2, line 25, after the underscored period insert "If the state or an agency of the state is a landowner to which notice must be given, the water resource district board may notify the state engineer. The requirement in this subsection to notify landowners must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection."

Page 2, line 26, remove "At the next meeting of the water resource district board which is at least thirty days"

Page 2, remove lines 27 through 31

Page 3, remove lines 1 through 4

Page 3, line 5, remove "4."

Page 3, line 5, remove "If property owned by the state or a state governmental entity would not be"

Page 3, line 6, replace "affected by the system for which a permit application is submitted, the" with "The"

Page 3, line 7, after "application" insert "at its next meeting that is at least thirty days after receipt of the application"

Page 3, line 8, replace "one" with "seven"

Page 3, line 8, after "hundred" insert "fifty"

Page 3, line 9, replace "or" with an underscored comma

Page 3, line 10, after "2" insert ", or, if the state or an agency of the state is a notified landowner, the state engineer"

Page 3, line 11, replace "drainage" with "subsurface water management"

Page 3, line 13, replace "drainage" with "subsurface water management"

Page 3, line 13, remove "and signed by a licensed, professional"

Page 3, line 14, remove "engineer"

Page 3, line 14, remove "engineering"

Page 3, line 15, remove "drainage"

Page 3, line 18, remove "Technical evidence must be submitted to the permit applicant,"

Page 3, remove lines 19 and 20

Page 3, line 21, replace "drainage" with "subsurface water management"

Page 3, line 23, replace "flowage easement" with "notarized letter of approval"

Page 3, line 24, remove "The applicant shall file a flowage easement in the office"

Page 3, line 25, remove "of the recorder of the county in which the easement is situated."

Page 3, line 26, replace "flowage easement" with "notarized letter of approval"

Page 3, line 26, replace "drainage" with "a system that outlets"

Page 3, line 29, after "c." insert "Water resource districts encompassing land located within one mile [1.61 kilometers] downstream of the outlet of the proposed water management system may attach reasonable conditions to an approved permit. For purposes of this subsection, "reasonable conditions" are conditions that address the outlet location, proper erosion control, reseeding of disturbed areas, installation of riprap or

other ditch stabilization, and conditions that require all work be done in a neat and professional manner.

d. Water resource districts encompassing land located within one mile [1.61 kilometers] downstream of the outlet of the proposed water management system may require the system to incorporate a control structure at the outlet into the design of the system, and may require the control structure to be closed during critical flood periods.

e."

Page 3, line 29, replace "resources" with "resource"

Page 3, line 31, after "2" insert "or, if applicable, the state engineer"

Page 4, line 1, replace "flowage easement" with "letter of approval"

Page 4, remove lines 8 through 10

Page 4, line 11, replace "5." with "4."

Page 4, line 11, remove "or the state engineer"

Page 4, line 14, remove "or the state engineer"

Page 4, line 16, replace "6." with "5."

Page 4, line 16, remove "or the state engineer"

Page 4, after line 17, insert:

"6. A person that installs a subsurface water management system is liable for all damages sustained by any other person which are caused by the system."

Renumber accordingly

SB 2263 2/16/17

#1

17.0745.02007
Title.

Prepared by the Legislative Council staff for
Senator Luick
February 14, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2263

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 61-32 of the North Dakota Century Code, relating to definitions; to amend and reenact section 61-32-03.1 of the North Dakota Century Code, relating to subsurface water management system applications and permits; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 61-32 of the North Dakota Century Code is created and enacted as follows:

Definitions.

For purposes of this chapter unless context otherwise requires:

1. "Reasonable conditions" are conditions that address the outlet location, proper erosion control, reseeding of disturbed areas, and installation of riprap or other ditch stabilization, and conditions that require all work be done in a neat and professional manner.

2. "Technical evidence" means written information regarding the proposed subsurface water management system prepared after consideration of the design and physical aspects of the proposed system, and any adverse hydrological effects, including erosion, flood duration, crop loss, and downstream water control device operation impact, which may occur to land owned and rented by a landowner or renter entitled to notice under section 61-32-03.1.

3. "Unreasonable harm" means hydrological impacts, including erosion or other adverse impacts, that degrade the physical integrity of the downstream real property within one watercourse mile [1.61 kilometers] of a subsurface water management system outlet.

SECTION 2. AMENDMENT. Section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

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

~~Installation of an artificial subsurface drainage system comprising eighty acres [32.37 hectares] of land area or more requires a permit. The state engineer shall develop an application form for a permit for subsurface drainage of water. A person seeking to construct an artificial subsurface drainage system must submit an application to the water resource district within which is found a majority of the land area for consideration and approval. Water resource districts may attach any necessary conditions to an approved permit, but may not deny an application unless the water resource district determines the application is of statewide significance or the~~

~~proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers] of the proposed subsurface drainage. Water resource districts must forward copies of all approved permits to the state engineer. Water resource districts shall determine if the application proposes drainage of statewide significance. If so, the application must be referred to the state engineer for consideration and approval, and the state engineer shall make a determination within thirty days. The permit applicant shall provide a thirty-day notice to downstream property owners within one mile [1.61 kilometers] of the proposed subsurface drainage. If an investigation by a water resource district or a downstream landowner within one mile [1.61 kilometers] shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers], the water resource district may require flowage easements before issuing a permit. If an artificial subsurface drainage system drains into an assessment drain, natural watercourse, or pond, slough, or lake, a flowage easement is not required. Flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. A person that installs an artificial subsurface drainage system without first securing a permit to do so, as provided in this section, is liable for all damage sustained by a person caused by the draining, and is guilty of an infraction.~~

1. Installation of a subsurface water management system that manages subsurface water requires submission of a proper application to the required water resource board. Installation of a subsurface water management system that manages subsurface water comprising eighty acres [32.37 hectares] or more of land area requires a permit from the required water resource board. The required water resource board is the board in whose district the primary downstream impact from the water management project's outlet occurs. For purposes of this subsection the primary downstream impact is limited to one watercourse mile [1.61 kilometers] from the outlet source.

2. a. The state engineer shall develop an application form for subsurface water management required under this section. The form must require the applicant to identify whether the state or an agency of the state is a landowner or renter to which notice must be given under subdivision b.

   b. Upon submission of an application for a permit under this section, the applicant immediately shall give notice and a copy of the submission via certified mail to each owner or renter of land within one watercourse mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet. If the state or an agency of the state is a landowner or renter to which notice must be given, the water resource district board may notify the state engineer. The requirement in this subsection to notify landowners or renters must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners and renters entitled to notice in this subsection.

3. a. The water resource district board that receives a permit application shall review it at the next meeting of the board which is not more than thirty days after receipt of the application. The board may charge the applicant a fee not to exceed five hundred dollars. The board shall consider any written, technical evidence provided by the applicant, a landowner or renter notified under subsection 2, or, if the state or an

agency of the state is a notified landowner or renter, the state engineer addressing whether the land of a notified landowner or renter is likely to be flooded or unreasonably harmed by the proposed subsurface water management system.

b. If the board finds, based on technical evidence, the proposed subsurface water management system is likely to flood or unreasonably harm real property within one watercourse mile [1.61 kilometers] of the system's outlet, the board may require the applicant to obtain a notarized letter of approval from the affected landowner or renter before issuing a permit for the system. The board may not require a notarized letter of approval for a system that directly outlets into an assessment drain, natural watercourse, named pond, named slough, or named lake.

c. Water resource districts encompassing land located within one watercourse mile [1.61 kilometers] downstream of the outlet of the proposed water management system may attach reasonable conditions to an approved permit.

d. Water resource districts encompassing land located within one watercourse mile [1.61 kilometers] downstream of the outlet of a proposed water management system of any size may require the system to incorporate a control structure at the outlet into the design of the system, and may require the control structure to be closed during critical flood periods.

e. A water resource district board may not deny a permit application under this section unless the board determines, based on technical evidence, that the proposed water management system is likely to flood or unreasonably harm real property of a notified landowner or renter, and a letter of approval required by the board has not been obtained by the applicant. The board shall include a written explanation of the reasons for a denial of an application and notify, by certified mail, the applicant and all persons notified under this section of the approval or denial.

4. A denial of a permit application by a water resource district board may be appealed, under section 28-34-01, to the district court of the county in which the permit application was filed. The court may approve a permit application denied by a water resource district board if the application meets the requirements of this section.

5. A water resource district board may not be held liable to any person for issuing or denying a permit under this section.

6. A person that installs a subsurface water management system is liable for all damages sustained by another person which are caused by the system.

7. A water resource district board that approves a permit application under this section must send a copy of the plan for the permitted subsurface water management system to the state engineer.

8. A person that commences construction on a subsurface water management system before securing a permit under this section is guilty of an infraction.

9. A person that submits an application for a permit under this section shall notify the local rural water supply company of the proposed subsurface water management system and negotiate the placement of the subsurface tile lines in good faith with the company.

10. All subsurface water management systems, regardless of size or presence of a surface intake, must have a maximum drainage coefficient that does not exceed three-eighths of an inch per twenty-four hours.

11. An application for installation of a subsurface water management system is not complete until all information required by the application form is documented and delivered to the required water resource board.

12. All subsurface water management system plans must be sent to the state engineer by the required water resource board for the system.

13. A water resource board that is required to approve or deny a permit shall make a reasonable, expedited attempt to issue an approval or denial after all applicable information is received. Grievances regarding the board's decision may be submitted to the board of county commissioners for a county in which the water resource district or part of the district is located."

Renumber accordingly

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.

SB 2263 2/16/17 #1

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

1. a. Installation of ~~an artificial~~a subsurface ~~drainage~~ water management system ~~comprising~~that ~~drains~~ encompasses eighty acres [32.37 hectares] of land area or more requires a permit. ~~A person seeking a permit for a subsurface drainage system that utilizes surface intakes shall apply for a permit under this section unless the intake is utilized to completely drain a wetland, pond, slough, or lake that has a watershed area comprising eighty acres [32.37 hectares] or more.~~ The watershed area ~~of a~~drained by a ~~drainage~~ subsurface water management system ~~without surface intakes~~ may not be used to determine whether the system requires a permit under this section.

b. A person seeking a permit for a subsurface water management system that encompass eighty acres of land area or more and utilizes surface intakes shall be required to apply for a permit only under this section unless the intake is utilized to drain a wetland, pond, slough, or lake that has a watershed area comprising eighty acres [32.37 hectares] or more. Subsurface water management systems that utilize a surface intake to drain a wetland, pond, slough, or lake that has a watershed area comprising eighty acres [32.37 hectares] or more shall be required to apply for a permit only under section 61-32-03.

c. A person that installs a water management system that encompasses less than eighty acres [32.37 hectares] shall notify the water resource district within which is found a majority of the land comprising the water management system of the installation before it occurs, but no permit for the installation shall be required.

2. a. The state engineer shall develop an application form for a permit ~~for subsurface drainage of water issued~~ required under this section. A person seeking to construct ~~an artificial~~a subsurface ~~drainage~~ water management system that requires a permit under this section must submit an application to the water resource district board within which is found a majority of the land area for consideration and approval. ~~Water resource districts may attach any necessary conditions to an approved permit, but may not deny an application unless the water resource district determines the application is of statewide significance or the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers] of the proposed subsurface drainage. Water resource districts must forward copies of all approved permits to the state engineer. Water resource districts shall determine if the application proposes drainage of statewide significance. If so, the application must be referred to the state engineer for consideration and approval, and the state engineer shall make~~

~~a determination within thirty days. The permit applicant shall provide a thirty-day notice to downstream property owners within one mile [1.61 kilometers] of the proposed subsurface drainage. If an investigation by a water resource district or a downstream landowner within one mile [1.61 kilometers] shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers], the water resource district may require flowage easements before issuing a permit. If an artificial subsurface drainage system drains into an assessment drain, natural watercourse, or pond, slough, or lake, a flowage easement is not required. Flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. A person that installs an artificial subsurface drainage system without first securing a permit to do so, as provided in this section, is liable for all damages sustained by a person caused by the draining, and is guilty of an infraction.~~

b. Upon submission of an application for a permit, the applicant ~~immediately shall give notices~~shall immediately give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface ~~drainage water~~ management system outlet unless the distance to the nearest assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section shall be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection.

~~3. At the next meeting of the water resource district board which is at least thirty days after receipt of a permit application, the board shall determine whether the proposed drainage system would affect property owned by the state or any state governmental entity. If property owned by the state or a state governmental entity would be affected by the system, the board shall refer the permit application to the state engineer, who shall approve or deny it within thirty days of receipt. If the state engineer fails to deny the permit application within thirty days of receipt, the permit application is deemed approved. The state engineer shall include a written explanation of the reasons for the denial of the application. The state engineer shall notify, by certified mail, the applicant and all landowners notified under subsection 2 of the approval or denial.~~

43. a. ~~If property owned by the state or a state governmental entity would not be affected by the system for which a permit application is submitted, the~~ The water resource district board shall review the application at its next meeting which is at least thirty days after receipt of the permit application. The board may charge the applicant a fee not to exceed ~~one~~ five hundred dollars. The board shall consider any written, technical evidence provided by the applicant or a landowner notified under subsection 2 addressing whether the land of a notified landowner will be flooded or unreasonably harmed by the proposed ~~drainage~~ subsurface water management system. For purposes of this section "technical evidence" means written information regarding the proposed ~~drainage~~ subsurface water management system, ~~prepared and signed by a licensed, professional engineer~~ after consideration of the ~~engineering~~ design and physical aspects of the proposed ~~drainage~~ system, and any adverse hydrologic effects, including erosion, flood duration, crop loss, and downstream water control device operation impacts, which may occur to land owned by a landowner provided under subsection 2. Technical evidence must be submitted to the permit applicant, notified landowners, and the board within thirty days of the receipt of the permit application by the board.

b. If the board finds, based on technical evidence, the proposed ~~drainage~~ subsurface water management system will flood or unreasonably harm lands of a landowner notified under subsection 2, the board may require the applicant to obtain a notarized letter of approval ~~flowage easement~~ before issuing a permit for the system. ~~The applicant shall file a flowage easement in the office of the recorder of the county in which the easement is situated.~~ The board may not require a ~~flowage easement~~notarized letter of approval for any land downstream of ~~drainage~~ a system that outlets into an assessment drain, natural watercourse, or pond, slough, or lake if notified landowners did not provide technical evidence to the district.

c. Water resource districts may attach reasonable conditions to an approved permit that outlets directly into a legal assessment drain or public highway right-of-way. For purposes of this subsection, "reasonable conditions" shall be limited to conditions that address the outlet location, proper erosion control, reseeding of disturbed areas, installation of riprap or other ditch stabilization, and conditions that require all work be done in a neat and professional manner.

d. Water resource districts may require that subsurface water management systems granted a permit under this section incorporate a control structure at the outlet into the design of the system and may require the control structure be closed during critical flood periods.

~~ce~~. A water resource district board may not deny a permit application under this section unless the board determines, based on technical evidence submitted by a landowner notified under subsection 2, the proposed drainage system will flood or unreasonably harm land of a notified landowner, and a ~~flowage easement~~notarized letter of approval required by the board has not been obtained by the applicant. For purposes of this section, "unreasonable harm" is limited to hydrological impacts, including erosion or other adverse impacts that degrade the physical integrity of a roadway. The board shall include a written explanation of the reasons for a denial of an application and notify, by certified mail, the applicant and all landowners notified under subsection 2 of the approval or denial.

~~df~~. The board may not deny a permit more than sixty days after receipt of the application for a permit. If the board fails to deny the permit application within sixty days of receipt, the permit application is deemed approved.

~~54~~. A denial of a permit application by a water resource district board or the state engineer may be appealed, under section 28-34-01, to the district court of the county in which the permit application was filed. The court may approve a permit application denied by a water resource district board or the state engineer if the application meets the requirements of this section.

~~65~~. A water resource district board or the state engineer may not be liable to any person for issuing a permit under this section.

6. A person that installs a subsurface water management system without first securing a permit to do so, as provided in this section, is liable for all damages sustained by a person caused by the draining.

SB 2263 2/16/17 #1

17.0745.02008
Title.

Prepared by the Legislative Council staff for
Senator Klein
February 16, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2263

Page 1, line 2, replace "drainage" with "water management system"

Page 1, line 6, overstrike "**Permit to drain subsurface waters**" and insert immediately thereafter "**Permits for subsurface water management systems**"

Page 1, line 7, after "1." insert "a."

Page 1, line 7, remove "a"

Page 1, line 7, overstrike "subsurface drainage system"

Page 1, line 7, after "~~comprising~~" insert "a subsurface water management system"

Page 1, line 8, remove "A person seeking a"

Page 1, remove lines 9 through 11

Page 1, line 12, remove "[32.37 hectares] or more."

Page 1, line 12, replace "of a drainage" with "drained by a subsurface water management"

Page 1, line 12, remove "without surface"

Page 1, line 13, remove "intakes"

Page 1, after line 14, insert:

"b. A person seeking a permit for a subsurface water management system that encompasses eighty acres [32.37 hectares] of land area or more and utilizes surface intakes shall apply for a permit only under this section unless the intake is utilized to drain a wetland, pond, slough, or lake that has a watershed area comprising eighty acres [32.37 hectares] or more. Subsurface water management systems that utilize a surface intake to drain a wetland, pond, slough, or lake that has a watershed area comprising eighty acres [32.37 hectares] or more must apply for a permit only under section 61-32-03.

c. A person that installs a water management system that encompasses less than eighty acres [32.37 hectares] shall notify the water resource district within which is found a majority of the land comprising the water management system of the installation before it occurs, but no permit for the installation may be required."

Page 1, line 16, replace "issued" with "required"

Page 1, line 17, overstrike "drainage" and insert immediately thereafter "water management"

Page 2, line 19, after "submission" insert "via certified mail"

Page 2, line 20, replace "drainage" with "water management"

Page 2, line 25, after the underscored period insert "The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection."

Page 2, line 26, remove "At the next meeting of the water resource district board which is at least thirty days"

Page 2, remove lines 27 through 31

Page 3, remove lines 1 through 4

Page 3, line 5, remove "4."

Page 3, line 5, remove "If property owned by the state or a state governmental entity would not be"

Page 3, line 6, replace "affected by the system for which a permit application is submitted, the" with "The"

Page 3, line 7, after "application" insert "at its next meeting that is at least thirty days after receipt of the application"

Page 3, line 8, replace "one" with "five"

Page 3, line 11, replace "drainage" with "subsurface water management"

Page 3, line 13, replace "drainage" with "subsurface water management"

Page 3, line 13, remove "and signed by a licensed, professional"

Page 3, line 14, remove "engineer"

Page 3, line 14, remove "engineering"

Page 3, line 15, remove "drainage"

Page 3, line 21, replace "drainage" with "subsurface water management"

Page 3, line 23, replace "flowage easement" with "notarized letter of approval"

Page 3, line 24, remove "The applicant shall file a flowage easement in the office"

Page 3, line 25, remove "of the recorder of the county in which the easement is situated."

Page 3, line 26, replace "flowage easement" with "letter of approval"

Page 3, line 26, replace "drainage" with "a system that outlets"

Page 3, line 29, after "c." insert "A water resource district may attach reasonable conditions to an approved permit for a subsurface water management system that outlets directly into a legal assessment drain or public highway right-of-way. For purposes of this subsection, "reasonable conditions" means conditions that address the outlet location, proper erosion control, reseeding of disturbed areas, installation of riprap or other ditch stabilization, and conditions that require all work to be done in a neat and professional manner.

d. A water resource district may require a subsurface water management system granted a permit under this section to incorporate a control structure at the outlet into the design of the system and may require the control structure be closed during critical flood periods.

e."

Page 3, line 31, replace "drainage" with "water management"

Page 4, line 1, replace "flowage easement" with "notarized letter of approval"

Page 4, line 8, replace "d." with "f."

Page 4, line 11, replace "5." with "4."

Page 4, line 16, replace "6." with "5."

Page 4, after line 17, insert:

"6. A person that installs a subsurface water management system requiring a permit under this section without first securing the permit is liable for all damages sustained by a person caused by the subsurface water management system."

Renumber accordingly

SB 2263 2/16/17 #2

17.0745.02007
Title.

Prepared by the Legislative Council staff for
Senator Luick
February 14, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2263

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 61-32 of the North Dakota Century Code, relating to definitions; to amend and reenact section 61-32-03.1 of the North Dakota Century Code, relating to subsurface water management system applications and permits; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 61-32 of the North Dakota Century Code is created and enacted as follows:

Definitions.

For purposes of this chapter unless context otherwise requires:

1. "Reasonable conditions" are conditions that address the outlet location, proper erosion control, reseeding of disturbed areas, and installation of riprap or other ditch stabilization, and conditions that require all work be done in a neat and professional manner.

2. "Technical evidence" means written information regarding the proposed subsurface water management system prepared after consideration of the design and physical aspects of the proposed system, and any adverse hydrological effects, including erosion, flood duration, crop loss, and downstream water control device operation impact, which may occur to land owned and rented by a landowner or renter entitled to notice under section 61-32-03.1.

3. "Unreasonable harm" means hydrological impacts, including erosion or other adverse impacts, that degrade the physical integrity of the downstream real property within one watercourse mile [1.61 kilometers] of a subsurface water management system outlet.

SECTION 2. AMENDMENT. Section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

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

~~Installation of an artificial subsurface drainage system comprising eighty acres [32.37 hectares] of land area or more requires a permit. The state engineer shall develop an application form for a permit for subsurface drainage of water. A person seeking to construct an artificial subsurface drainage system must submit an application to the water resource district within which is found a majority of the land area for consideration and approval. Water resource districts may attach any necessary conditions to an approved permit, but may not deny an application unless the water resource district determines the application is of statewide significance or the~~

~~proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers] of the proposed subsurface drainage. Water resource districts must forward copies of all approved permits to the state engineer. Water resource districts shall determine if the application proposes drainage of statewide significance. If so, the application must be referred to the state engineer for consideration and approval, and the state engineer shall make a determination within thirty days. The permit applicant shall provide a thirty-day notice to downstream property owners within one mile [1.61 kilometers] of the proposed subsurface drainage. If an investigation by a water resource district or a downstream landowner within one mile [1.61 kilometers] shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers], the water resource district may require flowage easements before issuing a permit. If an artificial subsurface drainage system drains into an assessment drain, natural watercourse, or pond, slough, or lake, a flowage easement is not required. Flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. A person that installs an artificial subsurface drainage system without first securing a permit to do so, as provided in this section, is liable for all damage sustained by a person caused by the draining, and is guilty of an infraction.~~

1. Installation of a subsurface water management system that manages subsurface water requires submission of a proper application to the required water resource board. Installation of a subsurface water management system that manages subsurface water comprising eighty acres [32.37 hectares] or more of land area requires a permit from the required water resource board. The required water resource board is the board in whose district the primary downstream impact from the water management project's outlet occurs. For purposes of this subsection the primary downstream impact is limited to one watercourse mile [1.61 kilometers] from the outlet source.

2. a. The state engineer shall develop an application form for subsurface water management required under this section. The form must require the applicant to identify whether the state or an agency of the state is a landowner or renter to which notice must be given under subdivision b.

   b. Upon submission of an application for a permit under this section, the applicant immediately shall give notice and a copy of the submission via certified mail to each owner or renter of land within one watercourse mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet. If the state or an agency of the state is a landowner or renter to which notice must be given, the water resource district board may notify the state engineer. The requirement in this subsection to notify landowners or renters must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners and renters entitled to notice in this subsection.

3. a. The water resource district board that receives a permit application shall review it at the next meeting of the board which is not more than thirty days after receipt of the application. The board may charge the applicant a fee not to exceed five hundred dollars. The board shall consider any written, technical evidence provided by the applicant, a landowner or renter notified under subsection 2, or, if the state or an

agency of the state is a notified landowner or renter, the state engineer addressing whether the land of a notified landowner or renter is likely to be flooded or unreasonably harmed by the proposed subsurface water management system.

b. If the board finds, based on technical evidence, the proposed subsurface water management system is likely to flood or unreasonably harm real property within one watercourse mile [1.61 kilometers] of the system's outlet, the board may require the applicant to obtain a notarized letter of approval from the affected landowner or renter before issuing a permit for the system. The board may not require a notarized letter of approval for a system that directly outlets into an assessment drain, natural watercourse, named pond, named slough, or named lake.

c. Water resource districts encompassing land located within one watercourse mile [1.61 kilometers] downstream of the outlet of the proposed water management system may attach reasonable conditions to an approved permit.

d. Water resource districts encompassing land located within one watercourse mile [1.61 kilometers] downstream of the outlet of a proposed water management system of any size may require the system to incorporate a control structure at the outlet into the design of the system, and may require the control structure to be closed during critical flood periods.

e. A water resource district board may not deny a permit application under this section unless the board determines, based on technical evidence, that the proposed water management system is likely to flood or unreasonably harm real property of a notified landowner or renter, and a letter of approval required by the board has not been obtained by the applicant. The board shall include a written explanation of the reasons for a denial of an application and notify, by certified mail, the applicant and all persons notified under this section of the approval or denial.

4. A denial of a permit application by a water resource district board may be appealed, under section 28-34-01, to the district court of the county in which the permit application was filed. The court may approve a permit application denied by a water resource district board if the application meets the requirements of this section.

5. A water resource district board may not be held liable to any person for issuing or denying a permit under this section.

6. A person that installs a subsurface water management system is liable for all damages sustained by another person which are caused by the system.

7. A water resource district board that approves a permit application under this section must send a copy of the plan for the permitted subsurface water management system to the state engineer.

8. A person that commences construction on a subsurface water management system before securing a permit under this section is guilty of an infraction.

9. A person that submits an application for a permit under this section shall notify the local rural water supply company of the proposed subsurface water management system and negotiate the placement of the subsurface tile lines in good faith with the company.

10. All subsurface water management systems, regardless of size or presence of a surface intake, must have a maximum drainage coefficient that does not exceed three-eighths of an inch per twenty-four hours.

11. An application for installation of a subsurface water management system is not complete until all information required by the application form is documented and delivered to the required water resource board.

12. All subsurface water management system plans must be sent to the state engineer by the required water resource board for the system.

13. A water resource board that is required to approve or deny a permit shall make a reasonable, expedited attempt to issue an approval or denial after all applicable information is received. Grievances regarding the board's decision may be submitted to the board of county commissioners for a county in which the water resource district or part of the district is located."

Renumber accordingly

SB 2263 2/17/17 #1

17.0745.02008
Title.

Prepared by the Legislative Council staff for
Senator Klein
February 16, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2263

Page 1, line 2, replace "drainage" with "water management system"

Page 1, line 6, overstrike "**Permit to drain subsurface waters**" and insert immediately thereafter "**Permits for subsurface water management systems**"

Page 1, line 7, after "1." insert "a."

Page 1, line 7, remove "a"

Page 1, line 7, overstrike "subsurface drainage system"

Page 1, line 7, after "~~comprising~~" insert "a subsurface water management system"

Page 1, line 8, remove "A person seeking a"

Page 1, remove lines 9 through 11

Page 1, line 12, remove "[32.37 hectares] or more."

Page 1, line 12, replace "of a drainage" with "drained by a subsurface water management"

Page 1, line 12, remove "without surface"

Page 1, line 13, remove "intakes"

Page 1, after line 14, insert:

"b. A person seeking a permit for a subsurface water management system that encompasses eighty acres [32.37 hectares] of land area or more and utilizes surface intakes shall apply for a permit only under this section unless the intake is utilized to drain a wetland, pond, slough, or lake that has a watershed area comprising eighty acres [32.37 hectares] or more. Subsurface water management systems that utilize a surface intake to drain a wetland, pond, slough, or lake that has a watershed area comprising eighty acres [32.37 hectares] or more must apply for a permit only under section 61-32-03.

c. A person that installs a water management system that encompasses less than eighty acres [32.37 hectares] shall notify the water resource district within which is found a majority of the land comprising the water management system of the installation before it occurs, but no permit for the installation may be required."

Page 1, line 16, replace "issued" with "required"

Page 1, line 17, overstrike "drainage" and insert immediately thereafter "water management"

Page 2, line 19, after "submission" insert "via certified mail"

Page 2, line 20, replace "drainage" with "water management"

Page 2, line 25, after the underscored period insert "The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection."

Page 2, line 26, remove "At the next meeting of the water resource district board which is at least thirty days"

Page 2, remove lines 27 through 31

Page 3, remove lines 1 through 4

Page 3, line 5, remove "4."

Page 3, line 5, remove "If property owned by the state or a state governmental entity would not be"

Page 3, line 6, replace "affected by the system for which a permit application is submitted, the" with "The"

Page 3, line 7, after "application" insert "at its next meeting that is at least thirty days after receipt of the application"

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Page 3, line 26, replace "flowage easement" with "letter of approval"

Page 3, line 26, replace "drainage" with "a system that outlets"

Page 3, line 29, after "c." insert "A water resource district may attach reasonable conditions to an approved permit for a subsurface water management system that outlets directly into a legal assessment drain or public highway right-of-way. For purposes of this subsection, "reasonable conditions" means conditions that address the outlet location, proper erosion control, reseeding of disturbed areas, installation of riprap or other ditch stabilization, and conditions that require all work to be done in a neat and professional manner.

d. A water resource district may require a subsurface water management system granted a permit under this section to incorporate a control structure at the outlet into the design of the system and may require the control structure be closed during critical flood periods.

e."

Page 3, line 31, replace "drainage" with "water management"

Page 4, line 1, replace "flowage easement" with "notarized letter of approval"

Page 4, line 8, replace "d." with "f."

Page 4, line 11, replace "5." with "4."

Page 4, line 16, replace "6." with "5."

Page 4, after line 17, insert:

"6. A person that installs a subsurface water management system requiring a permit under this section without first securing the permit is liable for all damages sustained by a person caused by the subsurface water management system."

Renumber accordingly

1. Subsurface drainage systems that use surface intakes shall be exclusively permitted under this section [61-32-03.1] if the system will have a drainage coefficient of 3/8 inch or less. Subsurface drainage systems that use surface intakes shall be exclusively permitted under section 61-32-03 if the system will have a drainage coefficient exceeding 3/8 inch.

#1
3/16/17
a.m.

Testimony
Senate Bill 2263
Senator Terry Wanzek
March, 16,2017

Good morning Chairman Johnson and members of the House Agriculture Committee. My name is Terry Wanzek, Senator from Jamestown representing district 29. Senate bill 2263 is about subsurface water management of farmland and the legal process of authorizing and permitting these projects for farmers in ND.

There are two main types of drainage systems employed in agriculture, (1) surface drainage and (2) sub-surface drainage. They are not necessarily the same. The surface drainage systems, start functioning as soon as there is an excess of rainfall or snow melt, etc. Surface drainage is conducted, like it says, on the surface, to remove surface water that exists above ground. It is accomplished by digging ditches or trenches to get water to flow off the land by gravity on top of the surface. It results in water heading down stream in a hurry or in more of a rush than subsurface drainage.

Subsurface drainage or water management is burying perforated poly pipe into the ground managing the below ground water table. This helps to enhance plant growing conditions in the field. Subsurface water management is not an attempt to remove all the water in the soil, but rather only the excessive water to create optimum growing conditions for plant root development. That is accomplished by gravity. Soil is like a sponge. It will hold a certain amount of water but when faced with excessive moisture it will not soak in and it will runoff. It is not about draining wetlands or ponds etc... it's about making the land we are already farming more productive. In many cases it results in no more water going downstream than it would without tiling. In most cases, there is at least a slower rate of water flow-age downstream than surface drainage, or even without drainage after a major rain or snow melt. It can actually result in less flooding downstream. Also control structures can be implemented into the system of tile pipes to control the flow of water from subsurface drain tiling.

Specific advantages of tile drainage are:

1. More consistent yields
   - allows for more efficient use of resources
   - Reduces financial risk
   - Increases local economy

Earlier and more timely planting

- Can get into field sooner and soil temps warmup faster for planting

3. Improved harvesting conditions
4. Less wear and tear on equipment
   - More conducive to minimum and no till
5. Less power required for field operations
6. Better plant stand
   - Better weed control – herbicides work better- need less applications
7. Less plant stress
8. Fewer plant diseases
9. Less soil compaction
10. Improve soil health –
    - reduces soil salinity
    - Reduces soil erosion

Another major advantage of tile drainage is the increase in sale value of the land. Subsurface water management is a long-term investment. The investment is made up-front but the benefits are spread over many future years. Farmers are willing to pay the investment.

Now to the bill. In the 2011 session, a group of legislators (myself included) worked together on legislation that created a separate section of law for subsurface water management, distinct from surface drainage law. Subsurface water management has its own section of law. Many of those individual legislators who helped draft the 2011 legislation will tell you our intention was to help farmers, by making subsurface water management easier, less onerous, not more difficult. The legislative intent was to promote subsurface water management. If you doubt this see SCR 4019 adopted in the same 2011 session. We thought our intent and law was clear. But apparently, it is not.

I understand that many water resource districts are following the law and legislative intent. For instance, in personally seeking our first permit last year, I believe our water board, in my county, followed the law correctly and in accordance with legislative intent. But I am told there are water resource boards that are not. Take for instance, some district boards are requiring a local permit for projects under 80 acres. The law says a permit is required if the footprint is over 80 acres but not required under 80 acres. I've been told some districts are charging a $1000-$1500 permit fee plus sending large attorney invoices to farmers who are seeking a tiling permit. Others are not charging any fees.

I've also heard there are long waits or delays by some boards in addressing subsurface tiling permits. I've even been told that at least one county water resource board has members who said "as long as I'm on this board there will be no subsurface [illegible]ng, I hate tiling". And I am told that is mild to what was actually said. Well that [illegible]ertainly is not within the intent of state law!

So, we need clarification on what the law says and how to administer it. I considered an attorney general's opinion last summer, but in visiting with the attorney general, he recommended we do it legislatively. So here is the bill... It is our belief, that being those legislators who helped draft the 2011 legislation, that this bill is a clarification of what is believed to be the law today and within the original intent of the legislature.

After all, all of us farmers can be either the one seeking a permit or the downstream landowner. I have many neighbors upstream of us. I personally will be the downstream individual as often as the permit applicant. But what we are trying to address are those situations where there is a general objection by a downstream landowner, with no proven scientific evidence to the contrary, just because he or she does not like subsurface tiling or the individual seeking the permit. Right now in current law there seems to be a low level of evidence required by an objector. An unreasonable downstream individual, with no evidence based analysis, appears to have veto power over a subsurface tiling project. We need to find that balance.

[illegible]summary, we are trying to provide clarity to our current law for farmers and water [illegible]esource districts. Farmers need more uniformity, continuity. and consistency from the water resource districts in administering this law. Our intent has always been to streamline the process, to enhance the opportunity of our farmers to implement subsurface water management systems on their land and increase productivity. Our intent is to encourage subsurface water management. Subsurface water management, done right, provides economic benefit to the farmer, the community and the state, improves soil quality and is an environmental benefit. It is an economic development opportunity that will not need to be subsidized. Farmers are willing to make the investment. We want to encourage farmers to look at the investment and the potential benefits and consider subsurface water management and then do it right.

The golden rule of any water drainage: drain only the amount necessary to create adequate field conditions and retain water that may contribute to healthy soil and plant growth!

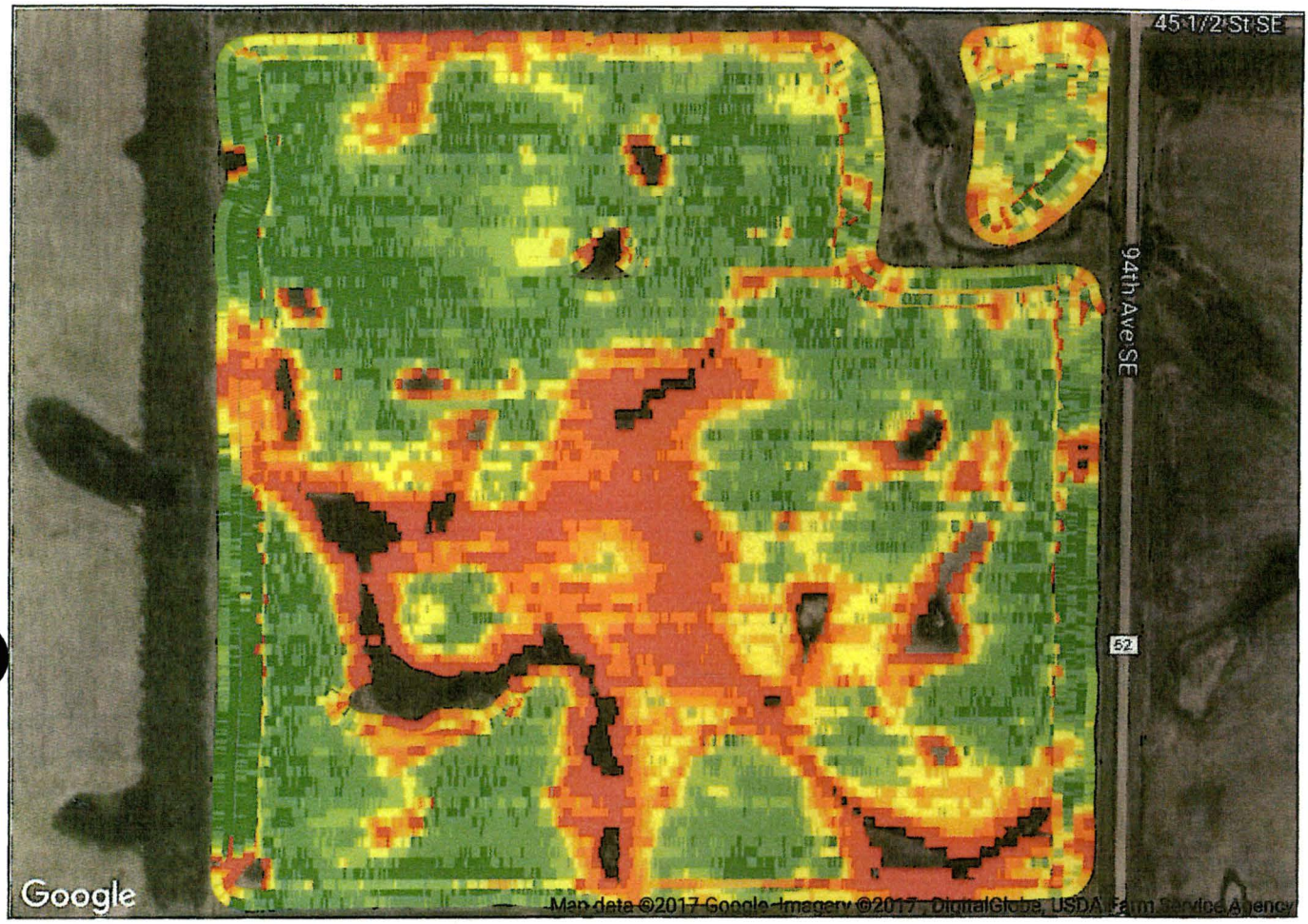
JOHN DEERE Before tile Operations Center

2015 Corn: Harvest

3

Layer: Yield

Josh Graves | Ypsi Land



Operation Dates: 10/28/2015 - 10/29/2015

AGRONOMIC DATA
TOTAL YIELD 17,114.62 bu
AVG. YIELD 120.61 bu/ac
AVG. MSTR 15.92 %
AREA WORKED 141.9 ac
WET WEIGHT 969,134.64 lb
AVG. WET WEIGHT 6,829.7 lb/ac

LEGEND

181	15 %
159	27 %
132	16 %
98	11 %
60	9 %
25	9 %
0	13 %

After tile

Dry Yield

TMT FARMS - Graves - 3

APEX Farm Management Software

Client Information:

Client: TMT FARMS

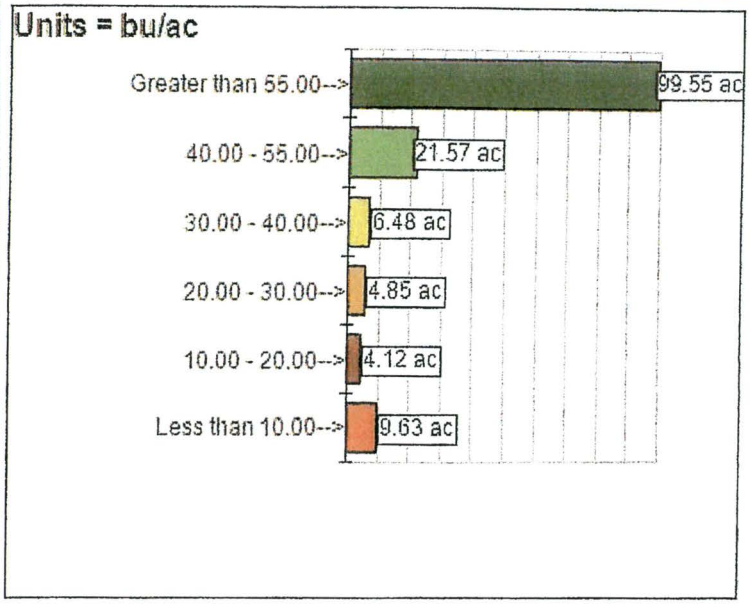
Farm: Graves

Field: 3

Field Information:

Crop:	Soybeans
Start Date:	10/13/2016
Product:	Soybeans
Elapsed Time:	10.741 h
Area:	146.20 ac
Average Yield:	61.4 bu/ac
Average Dry Weight:	3,683.3 lb/ac
Total Yield:	8,973.6 bu
Total Dry Weight:	538,501 lb
Average Moisture:	13.73 %
Productivity(area/hour):	13.61 ac/h

Legend Information:



Field information and legend apply to active map layer only.

1000 ft

N W E S

1/14/2017 11:35 AM

Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011

SENATE CONCURRENT RESOLUTION NO. 4019
(Senators Wanzek, Luick, Uglem)
(Representatives Belter, Headland, D. Johnson)

A concurrent resolution recognizing the benefits of subsurface drain tile projects and urging the State Water Commission, State Engineer, Natural Resources Conservation Service, and water resource districts to recognize the beneficial attributes of and to promote drain tile projects in this state.

WHEREAS, drain tile projects have proven beneficial to agricultural production by increasing agricultural productivity and property values; and

WHEREAS, drain tile projects alleviate downstream flooding by providing additional storage of water; and

WHEREAS, drain tile projects improve the soil by reducing salinity of the soil;

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF NORTH DAKOTA, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN:

That the Sixty-second Legislative Assembly recognizes the benefits of subsurface drain tile projects and urges the State Water Commission, State Engineer, Natural Resources Conservation Service, and water resource districts to recognize the beneficial attributes of and to promote drain tile projects in this state; and

BE IT FURTHER RESOLVED, that the State Water Commission, State Engineer, Natural Resources Conservation Service, and water resource district boards pursue the investigation and approval of drain tile projects; and

BE IT FURTHER RESOLVED, that the Secretary of State forward copies of this resolution to the Governor; Agriculture Commissioner; each member of the State Water Commission; State Engineer; state executive director, Farm Services Agency, United States Department of Agriculture; and state conservationist, Natural Resources Conservation Service, United States Department of Agriculture.

NDSU EXTENSION SERVICE
NORTH DAKOTA STATE UNIVERSITY

Making a difference

2013 Subsurface Water Management Education

The Situation

Subsurface drainage systems (tile) are being installed in farm fields throughout the Red River Valley watershed as well as other parts of North Dakota. The general public and government officials may have heard of this technology but do not always understand the principles of tile or why farmers have so rapidly adopted this farming practice. The wet spring of 2013 along with decreased crop production in saline fields, high crop and land values prompted many farmers to invest in tiling their current land rather than buy new. Many producers want help with design of subsurface drainage systems plus information on controlled drainage and sub-irrigation.

Extension Response

During 2013 we, either together or separately, gave presentations on various aspects of tile drainage at over 20 meetings and field days throughout North Dakota and the Red River basin area of Minnesota. We cooperated with the NDSU Soil Health Team, agents in 13 counties and several businesses to conduct subsurface water management seminars. We cooperated with SDSU Extension and the University of MN Extension to organized three, 2-day, tile-drainage design workshops. One was held in North Dakota, one in South Dakota and one in Minnesota. Total attendance for the three workshops was over 180.

Impacts

Subsurface water management education was provided to over 1,450 people this year. Each of the three tile design workshops was evaluated with an "end of the course" survey. One of the questions we asked was "If you were to place a dollar value on the information you received (when you apply the knowledge you learned in your business and not the price you paid today) what would it be?" When the responses from participants were tallied, they indicated the perceived value was well over 3.5 million dollars. In October, 600 copies of Extension bulletin AE1690, "Frequently Asked Questions about Subsurface (Tile) Drainage" was published, by December another 500 copies had to be printed to satisfy the demand.

Feedback

One of the farmers participating in the tile design school stated: "I have come to the realization that this (installing tile) is much more complex than I ever dreamed. All information is/was greatly useful and this was one of the better workshops I have been at in recent years." Another attendee wrote: "I'm not a farmer but this training was invaluable to me."

One other farmer said that the most important thing he learned was the importance of considering how tile layout may affect or limit management strategies. He also stated: "The team did a good job of tailoring training to recognize local issues." The following question was on the evaluation: "How useful was the information presented at this meeting?" 60% stated "very useful," and 40% stated "useful."

Contact

Tom Scherer
NDSU Extension Agricultural Engineer
Department of Agricultural and Biosystems Engineering
701-231-7239
Thomas.Scherer@ndsu.edu

Hans Kandel
NDSU Extension Agronomist Broadleaf Crops
Department of Plant Sciences
701-231-8135
Hans.Kandel@ndsu.edu

Drain Tile

SB 2263

Before Tile

Field Analyzer - Operations Center

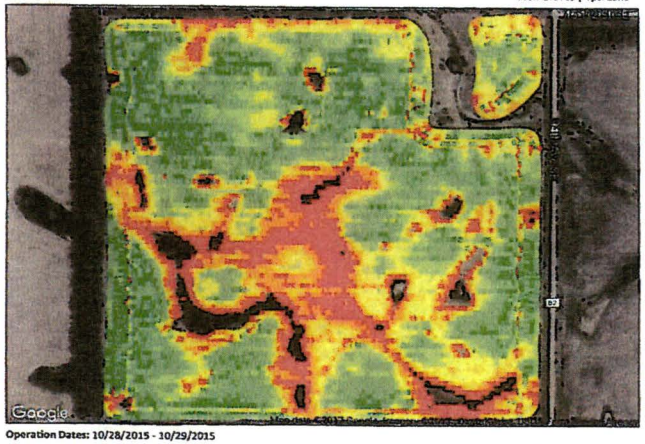
Page 1 of 1

JOHN DEERE Operations Center

2015 Corn: Harvest 3

Layer: Yield

Josh Graves | Ypsi Land



Operation Dates: 10/28/2015 - 10/29/2015

AGRONOMIC DATA
TOTAL YIELD
17,114.62 bu
AVG. YIELD
120.61 bu/ac
AVG. MSTR
15.92 %
AREA WORKED
141.9 ac
WET WEIGHT
969,134.64 lb
AVG. WET WEIGHT
6,829.7 lb/ac

LEGEND

181	15 %
159	27 %
132	16 %
98	11 %
60	9 %
25	9 %
0	13 %

https://my.deere.com/map

1/19/2017

After tile

Dry Yield

TMT FARMS - Graves - 3

Client Information:

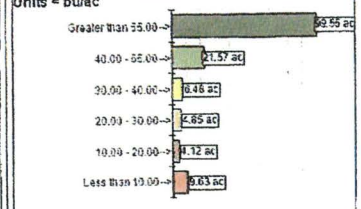
Client:	TMT FARMS
Farm:	Graves
Field:	3

Field Information:

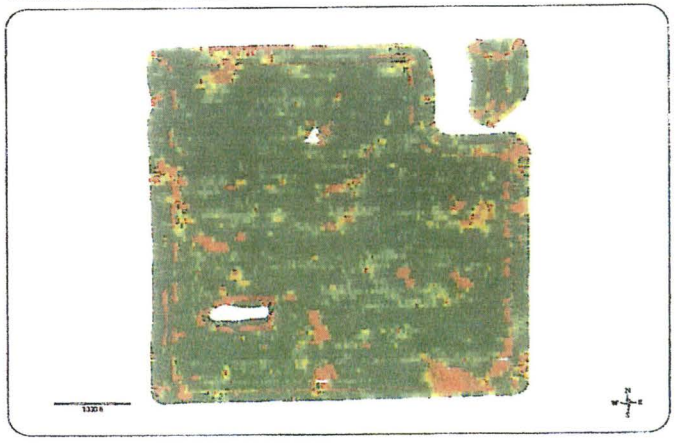
Crop:	Soybeans
Start Date:	10/13/2016
Product:	Soybeans
Elapsed Time:	10.741 h
Area:	146.20 ac
Average Yield:	61.4 bu/ac
Average Dry Weight:	3,683.3 lb/ac
Total Yield:	8,973.6 bu
Total Dry Weight:	538,501 lb
Average Moisture:	13.73 %
Productivity(area/hour):	13.61 ac/h

Legend Information:

Units = bu/ac



Field information and legend apply to active map layer only.



1/14/2017 11:35 AM

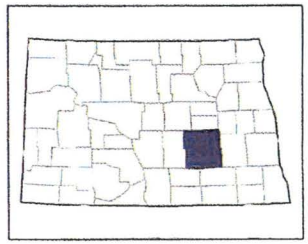
Page 1 of 1

Year	Edgeley Total Rain fall (inch)	Jamestown Total Rain fall (inch)	Marion Total Rain fall (inch)
2011	151M 19.04E	151M 19.42	151M 17.76
2012	152M 10.68	152M 10.34	152M 13.08
2013	151M 16.61E	151M 23.56E	151M 15.72E
2014	151M 17.10E	151M 15.32E	151M 15.21E
2015	151M 14.61	151M 17.18	151M 15.60
2016	152M 22.69	152M 24.20	152M 20.91
Totals:	3486M 382.68E	3940M 432.16E	1366M 148.69E
Max:	3486M 22.69E	3940M 24.20E	1366M 20.91E
Min:	3486M 9.77E	3940M 7.89E	1366M 13.08E

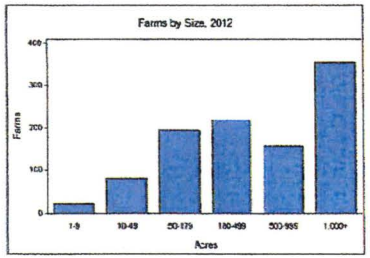
2012 CENSUS OF AGRICULTURE

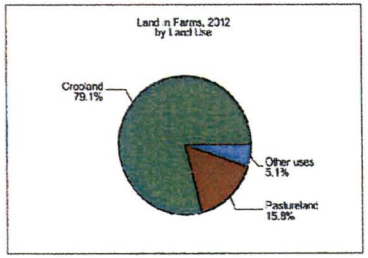
COUNTY PROFILE

Stutsman County
North Dakota



	2012	2007	% change
Number of Farms	1,028	1,043	- 1
Land in Farms	1,302,623 acres	1,193,231 acres	+ 9
Average Size of Farm	1,267 acres	1,144 acres	+ 11
Market Value of Products Sold	$464,568,000	$198,283,000	+ 134
Crop Sales $418,246,000 (90 percent) Livestock Sales $46,321,000 (10 percent)			
Average Per Farm	$451,914	$190,108	+ 138
Government Payments	$13,278,000	$13,790,000	- 4
Average Per Farm Receiving Payments	$16,494	$15,564	+ 6





USDA US Department of Agriculture
National Agricultural Statistics Service

www.agcensus.usda.gov

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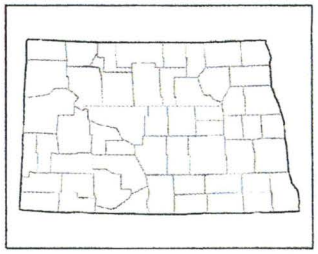
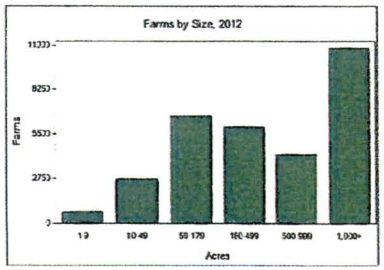
2012 CENSUS OF AGRICULTURE

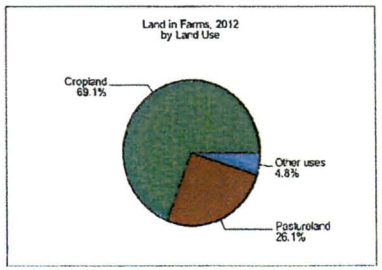
STATE PROFILE

North Dakota



	2012	2007	% change
Number of Farms	30,961	31,970	- 3
Land in Farms	39,262,613 acres	39,674,586 acres	- 1
Average Size of Farm	1,268 acres	1,241 acres	+ 2
Market Value of Products Sold	$10,950,680,000	$6,084,218,000	+ 80
Crop Sales $9,664,285,000 (88 percent) Livestock Sales $1,286,395,000 (12 percent)			
Average Per Farm	$353,693	$190,310	+ 86
Government Payments	$381,710,000	$359,532,000	+ 6
Average Per Farm Receiving Payments	$15,398	$13,462	+ 14





USDA US Department of Agriculture
National Agricultural Statistics Service
www.agcensus.usda.gov

Golden Rule of Tile Drainage

- Drain only that amount necessary to create adequate field conditions and retain water that may contribute to healthy crop production.

#2
3/16/17
Mike Dwyer
a.m.

17.0745.03000

Sixty-fifth
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED SENATE BILL NO. 2263

Introduced by

Senators Wanzek, Luick, Dotzenrod

Representatives D. Johnson, Kading, Pyle

A BILL for an Act to amend and reenact section 61-32-03.1 of the North Dakota Century Code, relating to subsurface water management system permits.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

61-32-03.1. ~~Permit to drain subsurface waters~~Permits for subsurface water management systems required - Permit form - Penalty.

1. a. Installation of ~~an artificial subsurface drainage system comprising~~a subsurface water management system that drains eighty acres [32.37 hectares] of land area or more requires a permit. The watershed area drained by a subsurface water management system may not be used to determine whether the system requires a permit under this section.

   b. Subsurface water management systems that use surface intakes must be permitted exclusively under this section if the system will have a drainage coefficient of three-eighths of an inch [0.95 centimeters] or less. Subsurface water management systems that use surface intakes must be permitted exclusively under section 61-32-03 if the system will have a drainage coefficient exceeding three-eighths of an inch [0.95 centimeters].

   c. A person that installs a water management system that encompasses less than eighty acres [32.37 hectares] shall notify the water resource district within which is found a majority of the land comprising the water management system of the installation before it occurs, but no permit for the installation may be required.

2. a. The state engineer shall develop an application form for a permit ~~for subsurface drainage of water~~required under this section. A person seeking to construct ~~an~~

~~artificial~~a subsurface ~~drainage~~water management system that requires a permit under this section must submit an application to the water resource district board within which is found a majority of the land area for consideration and approval. ~~Water resource districts may attach any necessary conditions to an approved permit, but may not deny an application unless the water resource district determines the application is of statewide significance or the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers] of the proposed subsurface drainage. Water resource districts must forward copies of all approved permits to the state engineer. Water resource districts shall determine if the application proposes drainage of statewide significance. If so, the application must be referred to the state engineer for consideration and approval, and the state engineer shall make a determination within thirty days. The permit applicant shall provide a thirty-day notice to downstream property owners within one mile [1.61 kilometers] of the proposed subsurface drainage. If an investigation by a water resource district or a downstream landowner within one mile [1.61 kilometers] shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers], the water resource district may require flowage easements before issuing a permit. If an artificial subsurface drainage system drains into an assessment drain, natural watercourse, or pond, slough, or lake, a flowage easement is not required. Flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. A person that installs an artificial subsurface drainage system without first securing a permit to do so, as provided in this section, is liable for all damage sustained by a person caused by the draining, and is guilty of an infraction.~~

b. Upon submission of an application for a permit, the applicant immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to

each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection.

3. a. The water resource district board shall review the application at its next meeting that is at least thirty days after receipt of the application and copies of the certified mail receipts. The board may charge the applicant a fee not to exceed five hundred dollars. The board shall consider any written, technical evidence generated by the board or provided by the applicant or a landowner notified under subsection 2 addressing whether the land of a notified landowner will be flooded or unreasonably harmed by the proposed subsurface water management system. For purposes of this section "technical evidence" means written information regarding the proposed subsurface water management system, prepared after consideration of the design and physical aspects of the proposed system, and any adverse ~~hydrologic~~ hydraulic effects, including erosion, flood duration, crop loss, and downstream water control device operation impacts, which may occur to land owned by a landowner provided under subsection 2. Technical evidence must be submitted to the permit applicant, notified landowners, and the board within thirty days of the receipt of the permit application by the board.

b. If the board finds, based on technical evidence, the proposed subsurface water management system will flood or unreasonably harm lands of a landowner notified under subsection 2, the board may require the applicant to obtain a notarized letter of approval before issuing a permit for the system. The board may not require a letter of approval for any ~~land downstream of a~~ system that outlets directly into an assessment drain, natural watercourse, or pond, slough, or lake ~~if notified landowners did not provide technical evidence to the district.~~

c. A water resource district may attach reasonable conditions to an approved permit for a subsurface water management system ~~that outlets directly into a legal assessment drain or public highway right-of-way~~. For purposes of this subsection, "reasonable conditions" means conditions that address the outlet location and operation, proper erosion control, reseeding of disturbed areas, installation of riprap or other ditch

Any condition to locate the project a minimum distance from rural water supply lines may not extend beyond an existing easement for the lines, or no greater than twenty-five feet either side of the waterline if the rural waterline was installed under a blanket easement.

stabilization, and conditions that require all work to be done in a neat and professional manner.

d. A water resource district may require a subsurface water management system granted a permit under this section to incorporate a control structure at the outlet into the design of the system and may require the control structure be closed during critical flood periods.

e. A water resources district board may not deny a permit application under this section unless the board determines, based on technical evidence submitted by a landowner notified under subsection 2, the proposed water management system will flood or unreasonably harm land of a notified landowner, and a notarized letter of approval required by the board has not been obtained by the applicant. For purposes of this section, "unreasonable harm" is limited to ~~hydrological~~ hydraulic impacts, including erosion or other adverse impacts that degrade the physical integrity of a roadway or land within one mile (1.61 k) downstream of the proposed system. The board shall include a written explanation of the reasons for a denial of an application and notify, by certified mail, the applicant and all landowners notified under subsection 2 of the approval or denial.

f. The board may not deny a permit more than sixty days after receipt of the application for the permit. If the board fails to deny the permit application within sixty days of receipt, the permit application is deemed approved.

4. A denial of a permit application by a water resource district board or the state engineer may be appealed, under section 28-34-01, to the district court of the county in which the permit application was filed. The court may approve a permit application denied by a water resource district board or the state engineer if the application meets the requirements of this section.

5. A water resource district board or the state engineer may not be held liable to any person for issuing a permit under this section.

6. A person that installs a subsurface water management system requiring a permit under this section without first securing the permit is liable for all damages sustained by a person caused by the subsurface water management system.

#3
3/16/17
a.m.

North Dakota
Grain Growers Association

Your voice for wheat and barley. www.ndgga.com

North Dakota Grain Growers Association
Testimony on SB 2263
House Agriculture Committee
March 16, 2017

Chairman Johnson, members of the House Agriculture Committee, for the record my name is Dan Wogsland, Executive Director of the North Dakota Grain Growers Association (NDGGA). Through our contracts with the North Dakota Wheat Commission and the North Dakota Barley Council NDGGA works on domestic policy issues on the state and federal levels on behalf of North Dakota wheat and barley farmers. NDGGA appears before you today in support of SB 2263.

Chairman Johnson, members of the House Agriculture Committee, one of the top priorities of the North Dakota Grain Growers Association is orderly water management.. Done right, orderly water management provides a benefit for all of the citizens in the state. That said, orderly water management is not without controversy. This Committee, and the North Dakota Legislature as a whole, is to be commended for the hard work all of you have done in this arena.

NDGGA is in support of SB 2263 for a number of reasons but mainly the legislation brings continuity and stability to the tiling process in the state. NDGGA has members in every county; right now inconsistencies in water law interpretations causes inequities in water management opportunities in North Dakota. This is to the detriment of North Dakota and North Dakota agriculture as a whole. It has got to stop; SB 2263 provides the guidance necessary to ensure that water laws in the state are interpreted fairly and equitably.

Chairman Johnson, members of the House Agriculture Committee, SB 2263 is a needed step in the right direction for orderly water management in the state. Therefore the North Dakota Grain Growers Association would respectfully request a Do Pass recommendation on the legislation.

#4
a.m.

North Dakota AG COALITION

P.O Box 1091
Bismarck, ND 58502
(701) 355-4458
FAX (701) 223-4645

VOTING MEMBERS

Ameriflax
Independent Beef Association of ND
Milk Producers Association of ND
Minn-Dak Farmers Cooperative
ND Ag Aviation Association
ND Agricultural Assn.
ND Ag Consultants
ND Agri-Women
ND Barley Council
ND Corn Growers Association
ND Corn Utilization Council
ND Crop Improvement & Seed Association
ND Dairy Coalition
ND Dry Bean Council
ND Dry Edible Bean Seed Growers Association
ND Elk Growers
ND Ethanol Council
ND Farm Credit Council
[redacted]armers Union
[redacted]rain Dealers Association
ND Grain Growers Association
ND Irrigation Association
ND Lamb & Wool Producers
ND Oilseed Council
ND Pork Producers Council
ND Soybean Growers Association
ND Stockmen's Association
ND Wheat Commission
Northern Canola Growers Association
Northern Plains Potato Growers
Northern Pulse Growers Association
Northwest Landowners Association
Red River Valley Sugarbeet Growers
U.S. Durum Growers Association

NON-VOTING MEMBERS

BNSF Railway Company
Ellingson Companies
Garrison Diversion Conservancy District
ND Association of Ag Educators
ND Association of Soil Conservation Districts
ND Beef Commission
[redacted]Department of Ag
[redacted]Soybean Council
ND State Seed Commission
NDSU Agricultural Affairs

Testimony of Paul Mathiason
North Dakota Ag Coalition Chairman
In Support of SB 2263
March 16, 2017

Chairman Johnson and members of the committee, my name is Paul Mathiason, and I am here today as the chairman of the North Dakota Ag Coalition in support of SB 2263.

The Ag Coalition has provided a unified voice for North Dakota agricultural interests for over 30 years. Today, we represent more than 40 statewide organizations and associations that represent specific commodities or have a direct interest in agriculture. Through the Ag Coalition, our members seek to enhance the climate for North Dakota's agricultural producers.

The Ag Coalition takes a position on a limited number of issues, brought to us by our members, which have significant impact on North Dakota's producers and agriculture industry. The Ag Coalition supports the intent of SB 2263 to streamline the drainage and water management process and make it equitable for producers in all townships across the state.

This bill attempts to reduce the roadblocks sometimes faced by producers when pursuing water management options and brings consistency to permitting and fees across the state. Therefore, we'd encourage your favorable consideration of SB 2263.

I'd be happy to answer any questions.

#5
a.m.

Testimony of Eric Volk, Executive Director

ND Rural Water Systems Association

Senate Bill 2263

House Agriculture Committee – March 16, 2017

Chairman Johnson and members of the House Agriculture Committee, my name is Eric Volk. I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA) which serves a membership of more than 250 cities, 27 rural/regional water systems, and four tribal systems.

The NDRWSA is committed to ensuring all North Dakota's residents receive affordable drinking water of excellent quality and sufficient quantity. NDRWSA is committed to completing and maintaining North Dakota's water infrastructure for economic growth and quality of life. Today I am submitting testimony in support of SB 2263 with amendments.

Rural Water Facts:

Serve 145,000 rural residents (50,000 connections)

Serve 100,000 city residents, that is 247 of the 357 Incorporated Cities

Provide service through nearly 40,000 miles of pipe

For the record, I want to say that we fully understand the importance of organized drain tiling in today's agricultural world. A large percentage of farmers who are drain tiling are served by a Rural Water System. We would support SB 2263 if the following language from HB 1390 was included: ***except a requirement to locate the project a minimum distance from rural water supply lines beyond an existing easement for the line.*** The rural water group is fine with this language, as it would ensure easement language is followed. One problem is, some older easements do not have a footage associated with them, e.g., 25 feet on either side of the

1

centerline of the waterline as laid. A blanket easement for the ¼ section or 80 acres or other was secured for the placement of the waterline. This is what drain tilers do not like. We will have problems if this is not addressed properly. The rural water group came up with a suggestion of 25 feet on either side of the centerline as a minimum distance for those easements without a footage associated with them. We would suggest the following: ***Any condition to locate the project a minimum distance from rural water supply lines may not extend beyond an existing easement for the lines, or no greater than twenty-five feet either side of the waterline if the rural waterline was installed under a blanket easement.***

Below are some conditions that rural water systems seek when dealing with drain tiling within areas of potable water lines:

- Contractor will notify XYZ Rural Water System (System) prior to any excavation over or around water line paint or flag markings.
- Contractor will send out construction crew to expose water line to verify depth and location of the line prior to engineer design and layout of drain tile with a System employee present.
- All System water line crossings with drain tile will be seamless, solid, non-perforated pipe and will extend no less than X feet either side of the water line. Crossings shall be at least eighteen inches (18") above or below System lines. All crossings need a System employee to be present when excavation of crossing to ensure proper support and bedding of water line is to System standards.
- All drain tile lines that parallel System lines need to be a distance no closer than X feet from either side of said water line.

I will say it again, we are not against drain tiling. Systems want to work with landowners on this issue. There may be instances where the landowner needs to be close to the water line for short distances and systems understand that. At the same time, it will probably be that same landowner that will not have water service because a system cannot find a leak due to the drain tile that was installed on their land. Communication is the key. For the reasons listed above, we support SB 2263 with amendments. I will stand for any questions. Thank You! EV, ericvolk@ndrw.org

DRAIN TILING

In the past few years, there has been a lot of drain tiling on farmland throughout the NRWD service area. Normally, the only notice we receive of a planned tiling project is when we receive a one-call notice just ahead of the installer.

As much advance notice as possible FROM THE LAND OWNER would be greatly appreciated. We will gladly work with the landowner to insure an adequate distance from existing rural water pipeline is maintained, not only for the protection and maintenance of the rural water pipe, but also the landowner's investment in his drain tile.

A big concern particularly on the North Valley Branch, which has a lot of the 1970's glued PVC pipe more prone to leakage, is that drain tile close to the pipe is likely to capture any pipe leakage. Leaks would then not surface, making it difficult to maintain.

YOUR COOPERATION WOULD BE GREATLY APPRECIATED!

4

APPLICATION TO INSTALL A SUBSURFACE DRAIN

Version 4/11

I, the undersigned, am applying for a permit to install a subsurface drain system on an area comprising 80 acres or more as required under NDCC 61-32

Date Received Stamp Location

(OSE USE ONLY) No. _____

(WRD USE ONLY) No. _____

This application must be accompanied by FSA aerial photo or equivalent showing the location of the proposed drain tile.

(1) Water Resource District in which project is located: Pembina County

(2) Legal description of land to be tiled: _____ ¼ NW ¼ Section 23 Township 161 Range 52

_____ ¼ _____ ¼ Section _____ Township _____ Range _____

Legal description /location outlet: _____ ¼ _____ ¼ Section _____ Township _____ Range _____

_____ ¼ _____ ¼ Section _____ Township _____ Range _____

(3) Design Data:

(a) Type of outlet (gravity, pump, other): Pump

(b) Design capacity of tile system (inches/day): 3/8" / 24hrs Outlet flow capacity: 4.27 cfs ☐ gpm ☑

Land area to be tiled (acres): 61

(c) Where does tile system discharge: road ditch ☑, private drain ☐, assessment drain ☐, natural waterway ☐

Other ☐: _____

(d) If discharging into road ditch include approval document from appropriate Federal, State, County, or Township road authority.

(4) Do you own land to be tiled? ☑ Yes ☐ No If "No", give name and address of landowner: _____

_____

(5) Do you own location where tile system outlets? ☑ Yes ☐ No

(6) Have downstream landowners been notified ☑ Yes ☐ No Date of notice: 3/1/2017

Before the Water Resource District will process a tile drain application, all downstream landowners for a distance of 1 mile from project outlet must have received 30 days notice by certified mail.

(7) Contractor if known: Agassiz Drain tile

(8) Anticipated construction start date: Sept 1st 2017 Completion date: Sept 23 2017

APPLICANT'S CERTIFICATION

I understand that I must undertake and agree to pay the expense incurred in making an investigation. If the investigation discloses that the quantity of water to be drained will flood or adversely affect downstream lands, I may be required to obtain flowage easements and must file the easements in the office of the county recorder before a permit may be issued. My signature below acknowledges that I have read and agree to these statements, and will adhere to the conditions given on the back of this application.

Land Owner (Print): DONALD KEMP

Address: 15552 95th St NE

HAMILTON ND 58238

Phone: 701 265 3104

Signature: _____ Date: 3/1/2017

The filing of this application and its approval does not relieve the applicant and/or landowner(s) from any responsibility or liability for damages resulting from the construction, operation or failure of this drain.

5

In the Matter of APPLICATION TO INSTALL A SUBSURFACE DRAIN;
Applicant: _____

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF PEMBINA)

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

Donald Kemp, being first duly sworn and being of legal age, states the following:

1. I am the Applicant under an APPLICATION TO INSTALL A SUBSURFACE DRAIN dated 3/1, 2017 (the "Application").

2. I recently filed the Application with the Pembina County Water Resource District (the "District").

3. As required under North Dakota law, I conducted a good faith search of records on file with the all County Recorder's Offices to determine the record owners of property within one mile of the discharge of my proposed tile project.

4. The landowners listed below represent all of the landowners within one mile of the discharge of my proposed tile project:

Name:	NE Regional Water	Name:	
Address:	13532 Hwy 5 West	Address:	
	Cavalier ND 58220		
Name:	Robert Switzer	Name:	
Address:	2692 NE Hwy 70 #718	Address:	
	Arcadia FL 34266		
Name:		Name:	
Address:		Address:	

(Please attach additional pages, if necessary.)

Agassiz Drain Tile
Kemp Farms
S Carlsilse 23

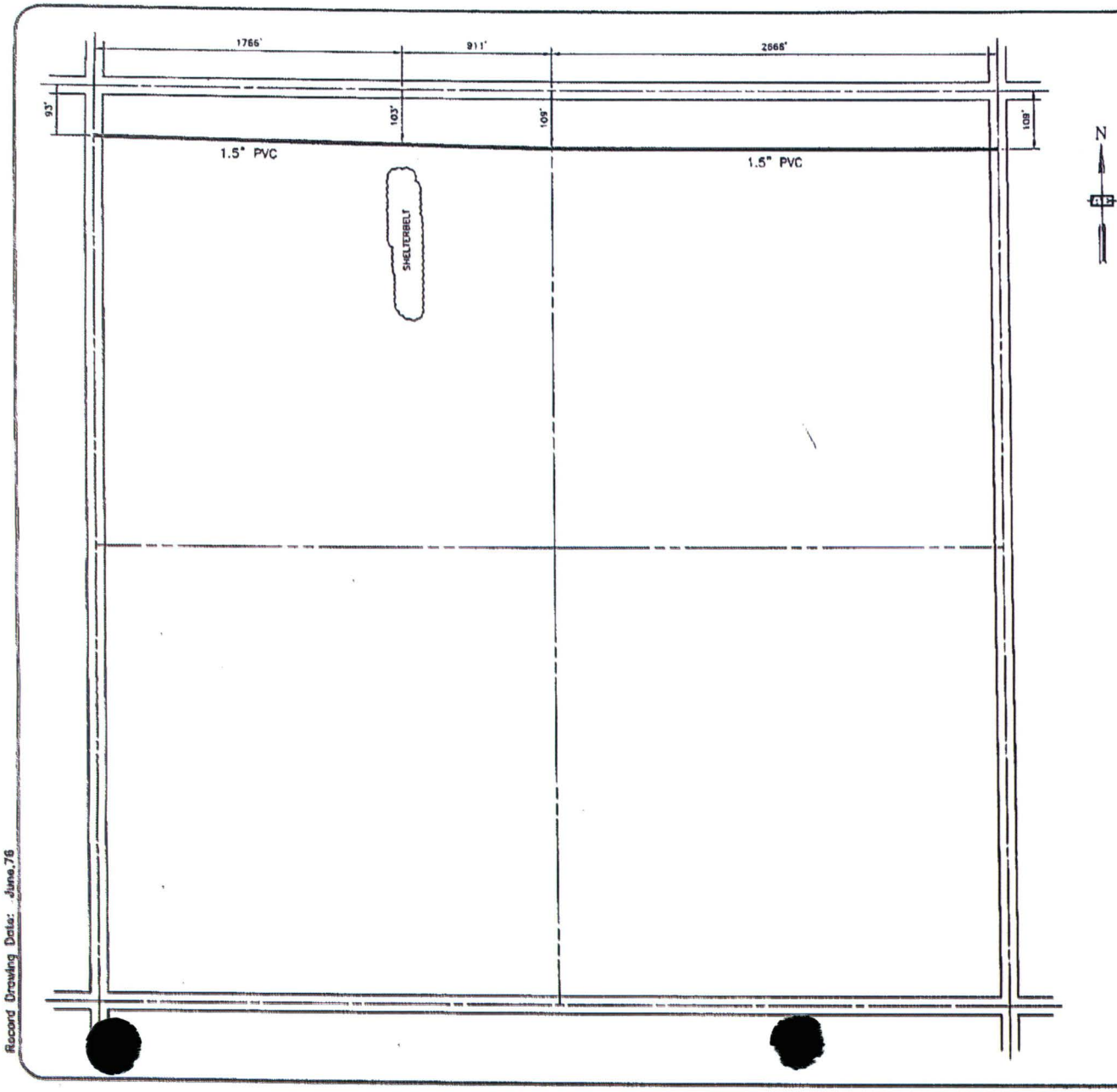
LidarImport

03 inch Pipe - 58945 ft
06 inch Pipe - 5751 ft
08 inch Pipe - 2677 ft
10 inch Pipe - 1076 ft

Notes

2

8



Record Drawing Date: June,76

NOTE:
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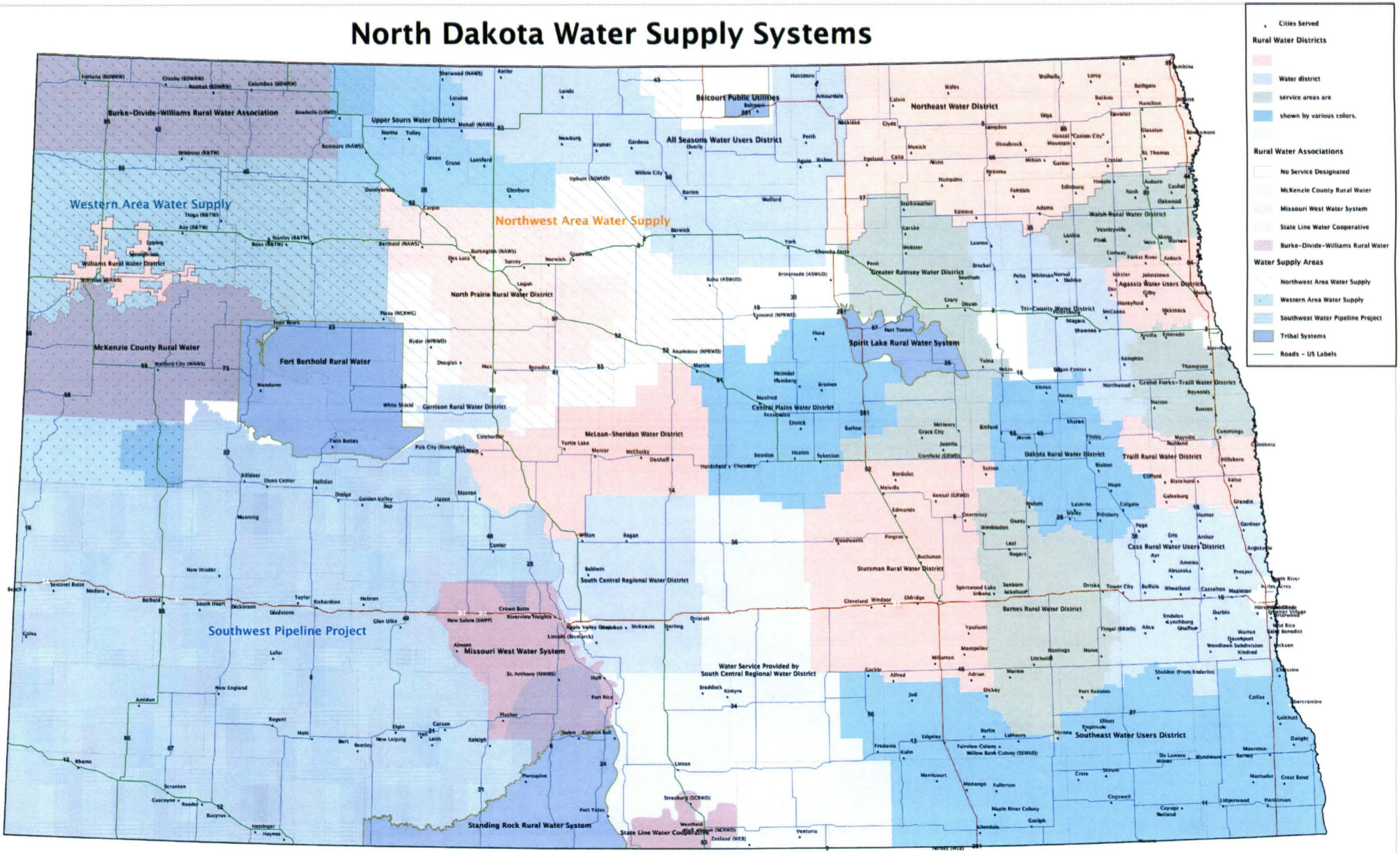
ADVANCED ENGINEERING & ENVIRONMENTAL SERVICES, INC.
Grand Forks, ND Bismarck, ND Rockford, MN

NORTH VALLEY WATER ASSOCIATION, INC.
CAVALIER, NORTH DAKOTA

FILE NAME	D:\NorthValley 1815223.dwg
DRAWN BY	CL
DATE	08-11-98
JOB NO.	P139-03.0
TWP - RGE	161-52
TWP. NO.	39
TWP. NAME	SOUTH CARLISLE
SECTION NO.	23

North Dakota Water Supply Systems



January 2016

#6
a.m.
3/16/17

TESTIMONY ON ENGROSSED SENATE BILL NO. 2263

House Agriculture Committee

Aaron Carranza, Chief – Engineering and Permitting Section
Office of the State Engineer

March 16, 2017

Chairman Johnson and members of the House Agriculture Committee, my name is Aaron Carranza. I am the Chief of the Engineering and Permitting Section for the Office of the State Engineer. I am here testifying on behalf of State Engineer Garland Erbele regarding Engrossed Senate Bill 2263. The State Engineer is in favor of Engrossed Senate Bill 2263 but has a few concerns.

The specific concerns are as follows:

- (Page 3, lines 5-6) The proposed language is unclear as to when the application is to be considered complete as it relates to the certified mail receipts.

- (Page 3, line 7) The proposed language does not provide water resource districts the tool of a statewide significance designation. Generally speaking, the statewide process allows for water resource boards to engage in a more comprehensive public comment period, as well as a public hearing, to fully explore the potential issues and benefits of a proposed project. As stated in previous testimony, only 1.2% of the roughly 770 subsurface water management projects permitted in ND since the 2011 tile law went into effect were designated as being of statewide significance.

- (Page 3, line 8) The proposed language does not allow for a water resource board to consider technical evidence that is generated by the board. This has the potential to reduce the ability of a water resource board to effectively review and consider a proposed project.

- (Page 3, line 14) The word "hydrologic" should be replaced with the word "hydraulic." While hydrology generally involves the study of the hydrologic cycle and water movement (rainfall), hydraulics (in this context) involves analyzing how water flows through a system (river, stream, ditch, etc.) from one point to another. (Hydrology will quantify the rate of water entering into a system while hydraulics quantifies how the system reacts after the water enters.)

- (Page 3, lines 27-28) Limiting water resource boards to only condition a project that outlets directly into a legal assessment drain or public highway right-of-way could reduce the ability of a water resource board to properly manage water resources within their district.

- (Page 4, line 12) As stated previously, the word "hydraulic" is more appropriate than "hydrological" in this context.

- (Page 4, line 14) Generally speaking, roadways are not the only features downstream of a subsurface water management system that are susceptible to unreasonable harm.

Attached to this testimony, for your convenience, is a marked-up version of Engrossed Senate Bill 2263, which provides some potential modifications that could reduce or eliminate the State Engineer's concerns

The State Engineer fully supports the sound management of North Dakota water resources through ongoing cooperation and education between producers, subsurface water management system installers, water resource districts, and the state.

Thank you for the opportunity to comment and I would be happy to answer any questions you might have.

17.0745.03000

Sixty-fifth
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED SENATE BILL NO. 2263

Introduced by

Senators Wanzek, Luick, Dotzenrod

Representatives D. Johnson, Kading, Pyle

A BILL for an Act to amend and reenact section 61-32-03.1 of the North Dakota Century Code, relating to subsurface water management system permits.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

61-32-03.1. ~~Permit to drain subsurface waters~~Permits for subsurface water management systems required - Permit form - Penalty.

1. a. Installation of ~~an artificial subsurface drainage system comprising~~a subsurface water management system that drains eighty acres [32.37 hectares] of land area or more requires a permit. The watershed area drained by a subsurface water management system may not be used to determine whether the system requires a permit under this section.

   b. Subsurface water management systems that use surface intakes must be permitted exclusively under this section if the system will have a drainage coefficient of three-eighths of an inch [0.95 centimeters] or less. Subsurface water management systems that use surface intakes must be permitted exclusively under section 61-32-03 if the system will have a drainage coefficient exceeding three-eighths of an inch [0.95 centimeters].

   c. A person that installs a water management system that encompasses less than eighty acres [32.37 hectares] shall notify the water resource district within which is found a majority of the land comprising the water management system of the installation before it occurs, but no permit for the installation may be required.

2. a. The state engineer shall develop an application form for a permit ~~for subsurface drainage of water~~required under this section. A person seeking to construct ~~an~~

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~~artificial~~a subsurface ~~drainage~~water management system that requires a permit under this section must submit an application to the water resource district board within which is found a majority of the land area for consideration and approval. ~~Water resource districts may attach any necessary conditions to an approved permit, but may not deny an application unless the water resource district determines the application is of statewide significance or the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers] of the proposed subsurface drainage. Water resource districts must forward copies of all approved permits to the state engineer. Water resource districts shall determine if the application proposes drainage of statewide significance. If so, the application must be referred to the state engineer for consideration and approval, and the state engineer shall make a determination within thirty days. The permit applicant shall provide a thirty-day notice to downstream property owners within one mile [1.61 kilometers] of the proposed subsurface drainage. If an investigation by a water resource district or a downstream landowner within one mile [1.61 kilometers] shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers], the water resource district may require flowage easements before issuing a permit. If an artificial subsurface drainage system drains into an assessment drain, natural watercourse, or pond, slough, or lake, a flowage easement is not required. Flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. A person that installs an artificial subsurface drainage system without first securing a permit to do so, as provided in this section, is liable for all damage sustained by a person caused by the draining, and is guilty of an infraction.~~

b. Upon submission of an application for a permit, the applicant immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to

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each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection.

3. a. The water resource district board shall review the application at its next meeting that is at least thirty days after receipt of the application and copies of the certified mail receipts. The board may charge the applicant a fee not to exceed five hundred dollars. Water resource districts shall determine if the application proposes subsurface water management of statewide significance. If so, the application must be referred to the state engineer for consideration and approval, and the state engineer shall make a determination within thirty days. If the state engineer has not approved or denied the permit within thirty days after receipt of the permit application, the application must be referred back to the water resource district and the water resource district will be the permitting authority. The board shall consider any written, technical evidence generated by the board or provided by the applicant or a landowner notified under subsection 2 addressing whether the land of a notified landowner will be flooded or unreasonably harmed by the proposed subsurface water management system. For purposes of this section "technical evidence" means written information regarding the proposed subsurface water management system, prepared after consideration of the design and physical aspects of the proposed system, and any adverse ~~hydrologic~~ hydraulic effects, including erosion, flood duration, crop loss, and downstream water control device operation impacts, which may occur to land owned by a landowner provided under subsection 2. Technical evidence must be submitted to the permit applicant, notified landowners, and the board within thirty days of the receipt of the permit application by the board.

b. If the board finds, based on technical evidence, the proposed subsurface water management system will flood or unreasonably harm lands of a landowner notified under subsection 2, the board may require the applicant to obtain a notarized letter of approval before issuing a permit for the system. The board may not require a letter of approval for any land downstream of a system that outlets into an assessment drain, natural watercourse, or pond, slough, or lake if notified landowners did not provide technical evidence to the district.

c. A water resource district may attach reasonable conditions to an approved permit

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for a subsurface water management system ~~that outlets directly into a legal assessment drain or public highway right-of-way~~. For purposes of this subsection, "reasonable conditions" means conditions that address the outlet location and operation, proper erosion control, reseeding of disturbed areas, installation of riprap or other ditch

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stabilization, and conditions that require all work to be done in a neat and professional manner. Any condition to locate the project a minimum distance from rural water supply lines may not extend beyond an existing easement for the lines, or no greater than twenty-five feet either side of the waterline if the rural waterline was installed under a blanket easement.

d. A water resource district may require a subsurface water management system granted a permit under this section to incorporate a control structure at the outlet into the design of the system and may require the control structure be closed during critical flood periods.

e. A water resources district board may not deny a permit application under this section unless the board determines, based on technical evidence submitted by a landowner notified under subsection 2, the proposed water management system will flood or unreasonably harm land of a notified landowner, and a notarized letter of approval required by the board has not been obtained by the applicant. For purposes of this section, "unreasonable harm" is limited to ~~hydrological~~ hydraulic impacts, including erosion or other adverse impacts that degrade the physical integrity of ~~a roadway~~ land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet. The board shall include a written explanation of the reasons for a denial of an application and notify, by certified mail, the applicant and all landowners notified under subsection 2 of the approval or denial.

f. The board may not deny a permit more than sixty days after receipt of the application for the permit. If the board fails to deny the permit application within sixty days of receipt, the permit application is deemed approved.

4. A denial of a permit application by a water resource district board or the state engineer may be appealed, under section 28-34-01, to the district court of the county in which the permit application was filed. The court may approve a permit application denied by a water resource district board or the state engineer if the application meets the requirements of this section.

5. A water resource district board or the state engineer may not be held liable to any person for issuing a permit under this section.

6. A person that installs a subsurface water management system requiring a permit under this section without first securing the permit is liable for all damages sustained by a person caused by the subsurface water management system.

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SB 2263

#7
3/16/17
a.m.

Ducks Unlimited, Inc.

To: ND House Agriculture Committee
From: Carmen Miller, Director of Public Policy, Ducks Unlimited
RE: Testimony on Senate Bill 2263
Date: March 16, 2017

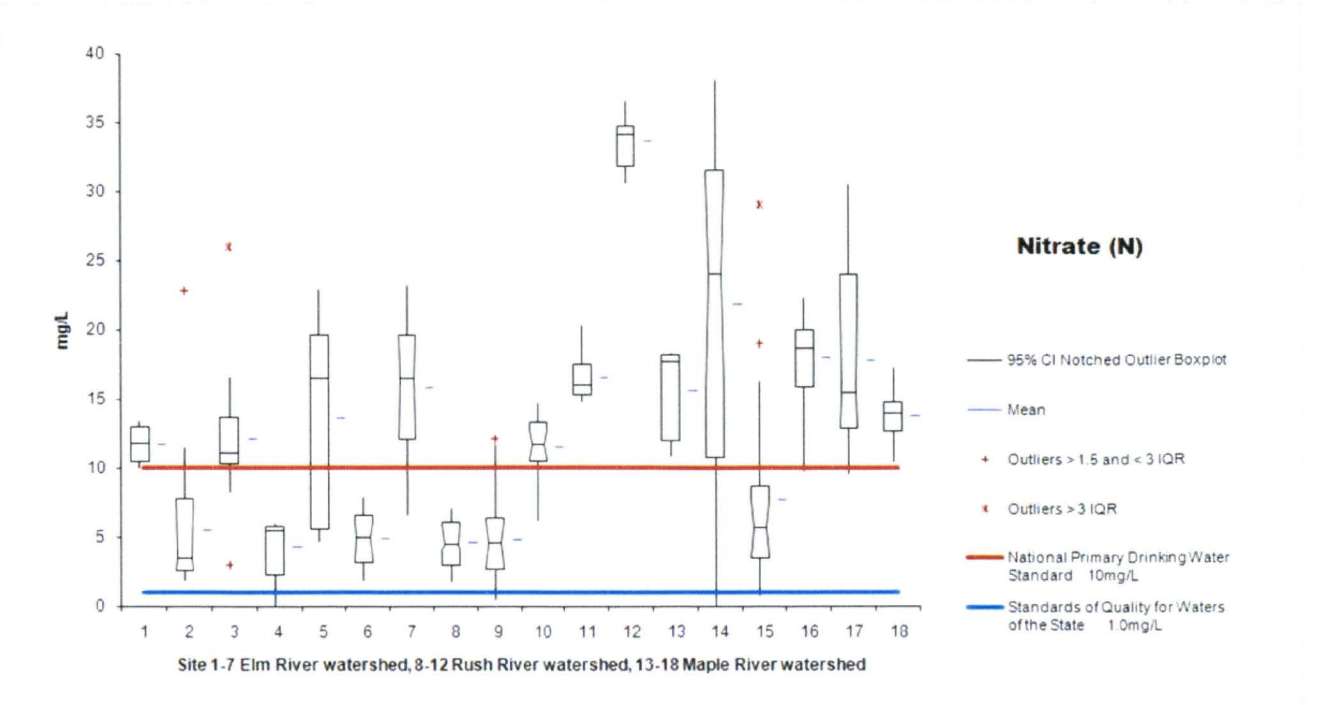
Good morning, Chairman Johnson, and distinguished members of the committee. My name is Carmen Miller and I live in Bismarck. I'm here today representing Ducks Unlimited, and our more than 6,000 members across North Dakota. Ducks Unlimited was founded in 1937 and is now the world's largest private waterfowl and wetlands conservation organization, with 80 years of experience restoring and protecting wetlands and other aquatic habitat. DU has been working in North Dakota for over 30 years, and employs a staff of over 40 in an office here in Bismarck which serves as a regional headquarters for 7 states.

We appreciate the time and effort the committee has taken on both this bill and HB 1390 during this legislative session. As the world's largest private wetlands organization, Ducks Unlimited is concerned about the impacts of subsurface tile drainage on North Dakota's wetlands, a globally unique resource and home to 900 different plant and animal species. Unfortunately, ND has already drained half of our original wetlands (4.9M acres) and we continue to lose the remaining ones (2.4M acres or only ~5% of our state's total land area) at an alarming rate (Dahl 1990, 2014). These wetlands are also a major driving force behind ND's $1.4 billion hunting and fishing industry each year (Taylor et al. 2013).

These "natural assets" provide many ecological and societal benefits for our state and its residents. The detrimental effects of tile drainage on wetlands, wildlife habitat and downstream water quality are well-documented and supported by decades of independent peer-reviewed research (see Blann et al. 2009).

A recent study by NDSU researchers who monitored 18 tile outlet sites in Cass and Trail Counties found that all sites (100%) exceeded state water quality standards for nitrate levels, and 12 out of 18 sites (67%) exceeded federal drinking water standards (see Figure 1). According to the Center of Disease Control (CDC), increased exposure to excess nitrates poses serious health risks to humans (e.g., higher risks of cancer, birth and reproductive defects, thyroid disruption, etc. https://www.atsdr.cdc.gov/csem/csem.asp?csem=28&po=10). Researchers also found elevated levels of sulfates (13 of 18 sites; increased water treatment costs), arsenic (carcinogen; 7 of 18 sites), barium (all sites, may cause increased blood pressure) and selenium (all sites; may cause reproductive failures, birth defects or death in livestock, wildlife and fish; see Johnson 2010).

Figure 1. from NDSU's "Red River Valley Tile Drainage Water Quality Assessment Phase I Final Report"



"It is well known that nitrogen levels are higher in tile drain water than in surface water. Phase I confirmed higher than recommended levels of nitrate nitrogen were leaving the tile at levels higher than state standards of quality for waters of the state. Best management practices including split application of fertilizer can be suggested to the producers to reduce the amount of NO3(N) leaving the fields. Drinking water standards were exceeded at twelve sites. Although this water is not used for drinking purposes it may be reflected in increased costs to remove it at water treatment facilities." (Johnson 2010)

We have followed both HB 1390 and SB 2263 closely throughout this legislative session, and acknowledge that this committee and the Senate Agriculture Committee have much work left to do on these bills. Ducks Unlimited's primary concerns regarding this bills are: (1) wetlands; (2) downstream impacts; and (3) water quality. Both of the bills were amended considerably prior to crossover, and in our opinion, HB 1390, which was previously considered, amended and passed by this committee, is the preferable of the two. In its current form, SB 2263 is concerning for the following reasons:

- It completely eliminates State Engineer oversight of the permitting process. Restoring the "statewide significance" determination, and ensuring that permits are forwarded to the State Engineer, would be major improvements.
- Because the "statewide significance" determination is the only consideration of fish and wildlife values, eliminating this determination also allows drainage without regard to fish and wildlife impacts.
- Both HB 1390 and SB 2263 replace flowage easement requirements with "notarized letters of approval." It is unclear whether these documents will provide the same type of notice to subsequent landowners as would be accomplished with a recorded flowage easement.

Thank you for your time, consideration and service to the people of ND. I'd be happy to entertain any questions if time allows.

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SB 2263

#8
3/16/17
a.m.

North Dakota Wildlife Federation

Ensuring abundant wildlife, wildlife habitat, and access to wildlife recreational opportunities

TESTIMONY OF MICHAEL McENROE
NORTH DAKOTA WILDLIFE FEDERATION
SENATE BILL 2263
HOUSE AGRICULTURE COMMITTEE
MARCH 16, 2017

Chairman Johnson and Members of the House Agriculture Committee:

For the record, I am Mike McEnroe and I am representing the North Dakota Wildlife Federation. The Federation has 1,400 members in nineteen affiliated clubs and organizations across the State of North Dakota. The Federation is the largest sportsmen's club in the State.

The North Dakota Wildlife Federation strongly opposes SB 2263 as it almost entirely eliminates all regulation of tile drainage. The bill eliminates consideration of the watershed drained by a tile drainage system from the 80-acre land area permit requirement. SB 2263 eliminates much of the County Water Resource District's and State Engineer's review of tile drainage permit applications.

SB 2263 requires notice to landowners for only one mile downstream of the outlet. This is a very minimal notice to potentially affected parties located downstream. Downstream landowners or other parties could only object to hydrological impacts, such as flooding, erosion, or crop loss. Downstream water quality impacts must be considered in the permit review process.

PO Box 1091 • Bismarck, North Dakota 58502 • E-mail: ndwf@ndwf.org • Fax: 701-223-4645
Office Manager: 701-222-2557 • 1-888-827-2557 • Web: www.ndwf.org

Given the problems nationwide with nitrogen and nitrate nutrient loading in municipal and rural water supplies, proposed tile drainage projects must be given more strict review rather than less review by downstream interests, municipalities, agencies, land owners and the public. We only have to look at the neighboring states of South Dakota and Minnesota, and Iowa to see the impacts of nitrate problems in municipal and recreational rivers, and streams and lakes.

The House has already passed HB 1390 which deals with tile drainage permits in a more responsible manner. HB 1390 was heard in the Senate Ag Committee last Friday. We suggest that HB 1390 is a more responsible way to address the tile drainage permit process than SB 2263 and respectfully request a Do Not Pass vote on SB 2263.

I would stand for any questions the Committee may have.

#1

3/16/17 - p.m.

N.D. HOUSE AGRICULTURE COMMITTEE
SENATE BILL 2263

TESTIMONY OF KALE R. VAN BRUGGEN
RINKE NOONAN LAW FIRM

Key Points of the SB 2263 Bill:

1. Maintains the permitting threshold of 80 acres established in the 2011 law; but, Section 1(c) adds a requirement that if you install a water management system that drains less than 80 acres, you notify the water resource district board. No permit is required; just notice.

2. Counties have varied greatly as to how they permit water management systems that use surface intakes. Some systems use surface intakes to remove water inundating the ground surface; some use surface intakes coupled with a catch basin simply to help reduce erosion or runoff areas.

   SB 2263 uses a drainage coefficient standard to determine whether the water management system requires a permit under 61-32-03 or 61-32-03.1. Systems with a surface intake and a drainage coefficient greater than 3/8" must obtain a permit under 61-32-03, which will require the applicant to perform an assessment of the drainage capacity of the outlet to handle the system.

3. SB 2263 clarifies who is responsible for notifying landowners downstream of the system and how that notice takes place. Under Section 2(b), the applicant must notify landowners within one mile downstream or to the nearest assessment drain, natural watercourse, slough, or lake.

   The current law requires notice one mile downstream; but once the system reaches a nearest assessment drain, natural watercourse, slough, or lake, the water resource district could not require a flowage easement. Therefore, those landowners downstream of those water bodies were notified of the permit application, but the law prohibited the water board from doing anything about it.

   Section 2(b) also clarifies that notice must be sent by certified mail, which will generate a certified mail receipt when the notice is sent that the applicant can submit to the board as evidence that notice has been mailed.

4. Section 2(b) allows the notice downstream to be waived if the applicant submits letters of permission from the landowners entitled to notice, which would evidence that those landowners are aware of the project and do not object to its installation. In such cases, a

permit would be granted at the next meeting taking place within 30 days after the permit application was submitted.

5. Section 3(a) requires there to be a minimum 30 day waiting period to allow the board and downstream landowners entitled to notice to review the application. It states that the board shall consider the application at its next meeting which is at least 30 days after the application was submitted.

6. Section 3(a) permits the charging of a permit fee of $500. Current law does not allow the water resource district to charge for its investigation costs. This is supported by N.D. Attorney General Opinion L-01 issued on January 10, 2012. In that opinion, the Pembina County Water Resource District Board asked whether water boards had the authority to assess costs they incur when investigating a drainage complaint and enforcing a removal order.

   In his response, the Attorney General states:

   "[T]he Legislature has only provided a water board with the express authority to assess a landowner for the costs of removing an obstruction or noncomplying dike or dam. This language is not ambiguous and it is apparent that the Legislature has concluded investigations are distinct regulatory tasks for water boards rather than a general or generic function that may be cast as another regulatory function.

   For example, under NDCC 61-32-03, a drainage permit may not be granted until an investigation discloses that the quantity of water which will be drained . . . will not flood or adversely affect downstream lands." In addition, the law further provides that if the . . . investigation shows that the proposed drainage will flood or adversely affect lands of downstream landowners . . . [a]n owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required flowage easement investigation.

   By comparison, NDCC 61-32-03.1, which has passed by the 2011 Legislature provides that "[i]f an investigation by a water resource district or a downstream landowner within one mile . . . shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile . . . the water resource district may require flowage easement." There is no requirement in section 61-32-03.1 for an owner of land to pay for an investigation. Thus, it is logical to conclude that the mention of investigation costs under section 61-32-03 implies that such a directive would not be authorized under section 61-32-03.1 if it is not expressly stated.

7. Section 3(a) sets out a standard for the type of evidence that the water resource district board should be considering when contemplating a permit application. The evidence should be technical in nature and speak to whether the downstream landowners will be unreasonably harmed or flooded.

"Unreasonably harmed" matches the definition used by the courts to describe what drainage improvements are reasonable and do not cause liability for damages downstream.

"Drainage of surface waters complies with reasonable use rule if: (1) there is a reasonable necessity for such drainage; (2) if reasonable care is taken to avoid unnecessary injury to land receiving the burden; (3) if utility or benefit accruing to land drained reasonably outweighs gravity of harm resulting to land receiving the burden; and if (4) where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted."

Martin v. Weckerly, 364 N.W.2d 93 (N.D. 1985).

8. Section 3(b) allows a board to require the applicant to get a letter of permission from a downstream landowner that submits technical evidence demonstrating he or she will be unreasonably harmed by the project. Letters of permission could be easements that are recorded, or could simply be a letter evidencing that the current landowner does not object to the project without actually recording something against the property.

9. For projects that outlet directly into a roadway ditch or an assessment legal drain, water resource districts may attach conditions to the permit under Section 3(c). The conditions address proper outlet location and erosion control measures. This was an amendment to the original bill written to address concerns of water resource districts about managing legal drain infrastructure. In addition, Section 3(d) allows the water resource district to require that systems have a control structure and attach conditions to the permit which require the control structure to be closed during critical flood events.

10. Finally, there are some misconceptions among water boards regarding their liability for issuing a drain tile permit. While boards can be sued when they do not follow the permitting procedure, Section 5 clarifies that water boards cannot be liable for damages from a system just by merely approving the drain tile permit.