



North Dakota Legislative Council

Prepared for the Water Drainage Committee
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WATER DRAINAGE COMMITTEE STUDY DIRECTIVE - BACKGROUND MEMORANDUM

Pursuant to North Dakota Century Code Section 54-35-02, the Legislative Management created the Water Drainage Committee and directed the committee to:

- Study and propose amendments to Chapters [61-16.1](#), [61-21](#), and [61-32](#) to eliminate redundancy and conflicts and to provide for uniform assessment procedures for all water projects;
- Study and recommend procedures to appeal water resource board decisions;
- Study the structural relationship between the State Water Commission and water resource boards and identify methods for improving water resource board accountability; and
- Study methods, including the use of an independent organization, for assessing the cost of a project in relation to the benefits received and recommend a method to ensure the cost to a landowner does not exceed the benefit to the landowner.

BACKGROUND

[Senate Bill No. 2208 \(2021\)](#) provided for an optional study of more than 16 significant, water-related topics by a committee comprised of 7 legislators and 13 citizen members. At a June 9, 2021, meeting, the Legislative Management voted to revise the study ([appendix](#)) to make it more manageable and to avoid duplication of efforts undertaken by the Water Topics Overview Committee. The revision provided for the four study topics listed above and new committee membership. The committee members include three senators, three representatives, and the following five citizen members:

- A member of the State Water Commission appointed by the Governor;
- A county road engineer appointed by the executive committee of the North Dakota Association of Counties;
- A county commissioner appointed by the executive committee of the North Dakota Association of Counties;
- A water resource board member appointed by the North Dakota Water Resource Districts Association; and
- A representative of agriculture producers appointed by the Agriculture Commissioner.

Legislative History of Relevant Statutes

The Legislative Assembly has enacted legislation regulating drainage, water resource boards and their predecessors, and assessment projects for many decades. A comprehensive review of all relevant legislation is impracticable, but the following are some key highlights. In 1955, the Legislative Assembly passed [Senate Bill No. 33](#), which authorized boards of county commissioners to appoint drain boards and levy up to one-tenth mill on all taxable real and personal property in the county for the operation of the drain board. Each drain board was required to report annually to its board of county commissioners but otherwise had broad authority to regulate drainage in the county.

Provisions in Senate Bill No. 33 were codified in Chapter 61-21, which governs assessment drains. Many of the assessment drain procedures in that bill are similar to the ones still in effect today. A drain board could receive a petition for a drain, hold a public meeting on the drain, and, if the drain were approved by the voting landowners, issue a notice of order to establish the drain. A person whose land would be assessed for an approved drain could appeal the drain board decision to a district court. The drain board also would assess properties "in accordance with the benefits received" from the drain. Public hearings were held on the proposed assessments, and a person subject to an assessment could appeal the assessment to the State Engineer.

Senate Bill No. 33 also authorized drain boards to construct bridges and culverts over or in connection with drains as the boards deemed necessary. The bill also had a provision allowing drain boards from multiple counties

or states to work together on drains crossing multiple jurisdictions. Other sections of the bill addressed regulation of lateral drains, collections of taxes and assessments, responsibility for keeping drains open and in good repair, reassessment of benefits, warrants, liens, bonds, penalties for violations, and other drainage-related topics.

In 1957, [House Bill No. 579](#) was passed to require permits for certain drains of ponds, sloughs, lakes, or series of those water bodies which drained 80 acres or more. The authority to grant permits was largely delegated to the State Water Conservation Commission, but the commission had to refer certain application to boards of commissioners of water conservation districts. In 1975, Senate Bill No. 2428 amended the statute requiring drain permits so the State Water Conservation Commission was required to refer a permit application to the board of commissioners of the relevant water management district, and the threshold for drainage permits was expanded so certain drains that drained at least 40 acres of land needed permits. That threshold was increased back to 80 acres of land 2 years later by House Bill No. 1565 (1977). That bill also required drain permit applications to be submitted to the State Engineer, who was required to refer the applications to the board of commissioners of the relevant water management district. However, the State Engineer could require a board to rerefer an application with statewide or interdistrict significance to the State Engineer for final approval.

In 1981 the Legislative Assembly passed [House Bill No. 1077](#) creating Chapter 61-16.1, which established water resource districts. The bill arose from a recommendation of the 1979-80 interim Natural Resources Committee. The legislation essentially combined drain boards and water management districts into the new water resource districts, which were given authority over drain permitting and assessment projects. Many of the provisions were similar to those codified in Chapter 61-21 by earlier legislation. However, much of Chapter 61-21 regarding assessment drains was not repealed. Instead, references to water management districts in parts of Chapter 61-21 were changed to references to water resource districts. Additionally, although some provisions in Chapter 61-16 regarding water management districts were repealed, others were amended to replace "water management district" with "water resource district." So water resource district authority and regulation was codified in Chapters 61-16, 61-16.1, and 61-21. All three chapters have been amended multiple times since then.

House Bill No. 1077 also authorized landowners and political subdivisions affected by proposed assessments for assessment projects subject to regulation under Chapter 61-16.1 and which had at least 25 percent of the vote on the project to appeal the proposed assessments to the State Engineer. The appeal had to be initiated within 10 days of the public hearing on the proposed assessments. The State Engineer had final authority to change the assessments or require new plans for the project. An individual landowner or political subdivision subject to assessment which believed it would receive no benefit from the assessment project also could appeal to the State Engineer for a determination whether any benefit would accrue to the appellant. House Bill No. 1099 (1981) gave persons aggrieved by State Water Conservation Commission decisions the right to have a hearing by the commission and to appeal commission decisions under the Administrative Agencies Practice Act in Chapter 28-32. Similarly, the bill gave persons aggrieved by the State Engineer's decisions the right to a hearing by the State Engineer and to appeal the decisions under the Administrative Agencies Practice Act.

In addition to Chapters 61-16, 61-16.1, and 61-21, new provisions regarding drainage and water resource boards were added to Chapter 61-32 in [Senate Bill No. 2035 \(1987\)](#). The bill required permits for certain drains of wetlands and repealed the language in Chapter 61-16.1 requiring permits for certain drains of ponds, sloughs, lakes, or series of those water bodies. However, this change was reversed in 1995. Also in 1987, the State Engineer was authorized to adopt rules for temporary drain permits in emergencies.

During the 1990s, drainage was addressed in several pieces of legislation, and various sections of the Century Code related to water resource boards and drainage were amended. Also, House Bill No. 1317 (1995) created Chapter 61-35, establishing water districts. Residents could petition the State Engineer to create a water district "for the purpose of providing an adequate supply of water for the residents of the area." Like water resource districts, water districts may levy assessments.

Statutes affecting water resource boards and drainage continued to be amended through the 2000s and 2010s. In 2011, the Legislative Assembly passed [House Bill No. 1459](#) and [Senate Bill No. 2280](#) creating a new section to Chapter 61-32. Both bills established a new permit process for subsurface drainage systems comprising 80 acres of land or more. A person who wishes to install one of the systems is required to obtain a permit from the relevant water resource district. Permit requirements for subsurface drainage systems have been amended several times since then.

During the 2021 legislative session, the Legislative Assembly passed several pieces of legislation impacting water issues. House Bill No. 1353 (2021) created the Department of Water Resources and a new director of the department who will appoint the State Engineer subject to the approval of the State Water Commission. [House Bill](#)

[No. 1475 \(2021\)](#) significantly amended the process and requirements for subsurface drainage systems in Chapter 61-32. [House Bill No. 1216 \(2021\)](#) established a minimum compensation of \$75 per day for water resource district board members. [Senate Bill No. 2208 \(2021\)](#) provided for an optional study of 16 water-related issues by a 20-person committee.

History of the Legislative Management Study Directive

Although the final version of Senate Bill No. 2208 (2021) was an optional Legislative Management study, the bill originally was intended to reconcile and correct the inconsistencies and duplications found in Chapters 61-16.1, 61-21, and 61-32. As complex and lengthy areas of the Century Code which have been amended many times over many decades, those chapters merit a thorough review to ensure the chapters work together seamlessly. To obtain additional stakeholder and public input into the review process, the Senate Agriculture Committee amended the introduced version of the [bill](#) into the proposed study for the interim. The Legislative Management opted for a more manageable study and adopted the study directive for this committee in lieu of Senate Bill No. 2208. The Legislative Management determined each of the study topics in Senate Bill No. 2208 which is not included in the directive is within the purview of the State Water Commission or the Water Topics Overview Committee.

SUGGESTED STUDY APPROACH

The committee's study directive will require a substantial amount of work. The following suggested study approach for each study topic is intended to make the work feasible during the interim.

Study Topic 1 - Study and propose amendments to Chapters 61-16.1, 61-21, and 61-32 to eliminate redundancy and conflicts and to provide for uniform assessment procedures for all water projects.

1. Review the introduced version of Senate Bill No. 2208 and associated documents.
2. Identify conflicts or redundancies in the chapters which the committee would like to address differently from the introduced version of Senate Bill No. 2208.
3. Task the Legislative Council staff with preparing a bill draft.
4. Review the bill draft for possible recommendation to the Legislative Management.

Study Topic 2 - Study and recommend procedures to appeal water resource board decisions.

1. Receive testimony regarding current appeal procedures.
2. Receive testimony regarding possible alternative appeal procedures.
3. Identify a preferred appeal procedure, if any, and task the Legislative Council staff with preparing a bill draft.
4. Review the bill draft for possible recommendation to the Legislative Management.

Study Topic 3 - Study the structural relationship between the State Water Commission and water resource boards and identify methods for improving water resource board accountability.

1. Receive testimony from the State Water Commission and other stakeholders regarding the structural relationship between the State Water Commission and water resource boards.
2. Identify any areas of concern or need for improvement.
3. Receive testimony from the State Water Commission and other stakeholders regarding methods for improvement.
4. Determine whether changes regarding water resource board accountability need to be made to the Century Code, State Water Commission policy, or elsewhere.

Study Topic 4 - Study methods, including the use of an independent organization, for assessing the cost of a project in relation to the benefits received and recommend a method to ensure the cost to a landowner does not exceed the benefit to the landowner.

1. Receive testimony from a representative of water resource boards regarding current methods for assessing project costs.
2. Receive testimony from stakeholders regarding alternate methods for assessing project costs and recommendations for change.
3. Receive testimony from landowners who have paid assessments for input regarding assessment methods and any suggestions for change.

4. Identify areas of concern or need for improvement.
5. Determine whether an assessment method should be included in the Century Code, State Water Commission policy, or elsewhere.
6. Prepare a bill draft or other recommendation to the Legislative Management.

ATTACH:1