



Drainage Statutes & Rules

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April 13, 2017

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NORTH DAKOTA CENTURY CODE

CHAPTER 61-32 WETLANDS

61-32-01. Legislative policy and intent. Repealed by S.L. 1995, ch. 599, § 3.

61-32-02. Definitions. Repealed by S.L. 1995, ch. 599, § 3.

61-32-03. Permit to drain waters required - Penalty. Any person, before draining a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more, shall first secure a permit to do so. The permit application must be submitted to the state engineer. The state engineer shall refer the application to the water resource district or districts within which is found a majority of the watershed or drainage area of the pond, slough, lake, or sheetwater for consideration and approval, but the state engineer may require that applications proposing drainage of statewide or interdistrict significance be returned to the state engineer for final approval. A permit may not be granted until an investigation discloses that the quantity of water which will be drained from the pond, slough, lake, or sheetwater, or any series thereof, will not flood or adversely affect downstream lands. If the investigation shows that the proposed drainage will flood or adversely affect lands of downstream landowners, the water resource board may not issue a permit until flowage easements are obtained. The flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. An owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required investigation. This section does not apply to the construction or maintenance of any existing or prospective drain constructed under the supervision of a state or federal agency, as determined by the state engineer.

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

History: Enacted 1987; amended 1991, 1995, 1997, 2001.

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

1. a. Installation of a subsurface water management system comprising 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. Installation of a subsurface water management system comprising less than eighty acres [32.37 hectares] of land area does not require a permit.
2. a. The state engineer shall develop an application form for a permit required under this section. A person seeking to construct a subsurface water management system that requires a permit under this section must submit a completed application to the water resource district board within which is found a majority of the land area for consideration and approval. The water resource district board may charge permit applicants a fee up to one hundred fifty dollars. Water resource districts shall forward copies of all approved permits to the state engineer.
 - b. Upon submission of a completed application for a permit, the water resource district board 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. If the water resource board receives notarized letters of approval from all downstream landowners entitled to notice, the board shall approve the completed permit application as soon as practicable but no later than thirty days after receipt of the last letter. Otherwise, the water resource board shall review the completed application at its next meeting that is at least thirty days after receipt of the application. 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 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 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 completed permit application by the board. A notified landowner may not object to the proposed system unless the landowner presents technical evidence under this subsection.

- 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 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. Any condition to locate the project a minimum distance from rural water supply lines may not extend beyond an existing easement for lines, or no greater than twenty feet [6.1 meters] from either side of the water line if the rural water line 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 resource district board may not deny a completed 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 hydraulic impacts, including erosion or other adverse impacts that degrade the physical integrity of a roadway or real property within one mile [1.61 kilometers] downstream of the system's outlet. The board shall include a written explanation of the reasons for a denial of a completed 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 completed 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 completed 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 completed 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 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.
7. A person that installs a subsurface water management system requiring a permit under this section without first securing the permit is guilty of an infraction.

History: Enacted 2011; amended 2017 (eff. April 13, 2017).

61-32-04. Administration - Rulemaking authority - Guidelines. Repealed by S.L. 1995, ch. 599, § 3.

61-32-05. Wetlands bank. Repealed by S.L. 1995, ch. 599, § 3.

61-32-06. Uniform wetlands classification. Repealed by S.L. 1995, ch. 599, § 3.

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

1. Only a landowner experiencing flooding or adverse effects from an unauthorized drain constructed before January 1, 1975, may file a complaint with the water resource board. Any person may file a complaint about an unauthorized drain constructed after January 1, 1975. Upon receipt of a complaint of unauthorized drainage, the water resource board shall promptly investigate and make a determination of the facts with respect to the complaint. If the board determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to this title or any rules adopted by the board, the board shall notify the landowner by certified mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if known. The notice must specify the nature and extent of the noncompliance and must state that if the drain, lateral drain, or ditch is not closed or filled within a

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

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

History: Enacted 1987; amended 1989, 1991, 1995, 1999, 2013.

61-32-08. Appeal of board decisions - State engineer review - Closing of noncomplying drains.

1. The board shall make the decision required by section 61-32-07 within a reasonable time, but not to exceed one hundred twenty days, after receiving the complaint. The board shall notify all parties of its decision by certified mail. Any aggrieved party may appeal the board's decision to the state engineer. The appeal to the state engineer must be made within thirty days from the date notice of the board's decision has been received. The appeal must be made by submitting a written notice to the state engineer, which must specifically set forth the reason why the board's decision is erroneous. The appealing party shall also submit copies of the written appeal notice to the board and to all nonappealing parties. Upon receipt of this notice the board, if it has ordered closure of a drain, lateral drain, or ditch, is relieved of its obligation to procure the closing or filling of the drain, lateral drain, or ditch. The state engineer shall handle the appeal by conducting an independent investigation and making an independent determination of the matter. The state engineer may enter property affected by the complaint to investigate the complaint.

2. If the board fails to investigate and make a determination concerning the complaint within a reasonable time, but not to exceed one hundred twenty days, the person filing the complaint may file the complaint with the state engineer within one hundred fifty days of the submittal date of the original complaint. The state engineer shall, without reference to chapter 28-32, cause the investigation and determination to be made, either by action against the board or by conducting the investigation and making the determination.
3. If the state engineer determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to title 61 or any rules adopted by the board, the state engineer shall take one of three actions:
 - a. Notify the landowner by certified mail at the landowner's post-office address of record;
 - b. Return the matter to the jurisdiction of the board along with the investigation report; or
 - c. Forward the drainage complaint and investigation report to the state's attorney.
4. If the state engineer decides to notify the landowner, the notice must specify the nature and extent of the noncompliance and state that if the drain, lateral drain, or ditch is not closed or filled within a reasonable time as determined by the state engineer, but not less than thirty days, the state engineer shall procure the closing or filling of the drain, lateral drain, or ditch and assess the cost, against the responsible landowner's property. The notice from the state engineer must state that the affected landowner may, within fifteen days of the date the notice is mailed, demand in writing a hearing on the matter. Upon receipt of the demand, the state engineer shall set a hearing date within fifteen days from the date the demand is received. If, in the opinion of the state engineer, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. Upon assessment of costs, the state engineer shall certify the assessment to the county auditor of the county where the noncomplying drain, lateral drain, or ditch is located. The county auditor shall extend the assessment against the property assessed. Each assessment must be collected and paid as other property taxes are collected and paid. Assessments collected must be deposited with the state treasurer and credited to the contract fund established by section 61-02-64.1. Any person aggrieved by action of the state engineer under the provisions of this section may appeal the decision of the state engineer to the district

court under chapter 28-32. A hearing by the state engineer as provided for in this section is a prerequisite to an appeal.

5. If the state engineer, after completing the investigation required under this section, decides to return the matter to the board, a complete copy of the investigation report must be forwarded to the board and it must include the nature and extent of the noncompliance. Upon having the matter returned to its jurisdiction, the board shall carry out the state engineer's decision under the terms of this section.
6. If the state engineer, after completing the investigation required under this section, decides to forward the drainage complaint to the state's attorney, a complete copy of the investigation report must also be forwarded, which must include the nature and extent of the noncompliance. The state's attorney shall prosecute the complaint under the statutory responsibilities prescribed in chapter 11-16.
7. In addition to the penalty imposed by the court on conviction under this statute, the court shall order the drain, lateral drain, or ditch closed or filled within a reasonable time period as the court determines, but not less than thirty days. If the drain, lateral drain, or ditch is not closed or filled within the time prescribed by the court, the court shall procure the closing or filling of the drain, lateral drain, or ditch, and assess the cost against the property of the landowner responsible, in the same manner as other assessments under chapter 61-16.1 are levied. If, in the opinion of the court, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners.

History: Enacted 1987, amended 2013, 2015.

61-32-09. Wetlands replacement fund - Continuing appropriation. Repealed by S.L. 1995, ch. 599, § 3.

61-32-10. Exemption. The wetland replacement requirements of sections 61-32-01 through 61-32-11 do not apply to surface coal mining operations until reclamation of the wetland area begins pursuant to chapter 38-14.1.

History: Enacted 1987.

61-32-11. Application of prior law. Repealed by S.L. 1995, ch. 599, § 3.

ARTICLE 89-02

DRAINAGE OF WATER

Chapter	
89-02-01	Drainage of Ponds, Sloughs, Lakes, Sheetwater, or Any Series Thereof
89-02-02	Drainage of Wetlands [Repealed]
89-02-03	Wetlands Bank [Repealed]
89-02-04	Drainage Complaint Appeals
89-02-05	Licenses for Emergency Drainage [Repealed]
89-02-05.1	Emergency Drain Permits

CHAPTER 89-02-01

DRAINAGE OF PONDS, SLOUGHS, LAKES, SHEETWATER, OR ANY SERIES THEREOF

Section	
89-02-01-01	Intent [Repealed]
89-02-02-02	Definitions
89-02-01-03	Permit Required
89-02-01-04	Permits for Assessment Drains [Repealed]
89-02-01-05	Exceptions to the Need for a Permit
89-02-01-06	Determination of Watershed Area
89-02-01-07	Filing Application
89-02-01-08	Referral of Applications to Appropriate District
89-02-01-09	Criteria for Determining Whether Drainage Is of Statewide or Interdistrict Significance
89-02-01-09.1	Board Procedure for Processing Applications to Drain
89-02-01-09.2	Evaluation of Applications - Factors Considered
89-02-01-09.3	Time for Determination by Board
89-02-01-09.4	Evaluation of Applications by the State Engineer of Statewide or Interdistrict Significance - Information to Be Used
89-02-01-09.5	Procedure, Availability, and Contents of Notice of State Engineer's Decision to Grant or Deny Application of Statewide or Interdistrict Significance
89-02-01-09.6	Request for State Engineer's Hearing
89-02-01-09.7	Notice of State Engineer's Hearing
89-02-01-09.8	Evidence at the State Engineer's Hearing
89-02-01-09.9	Time for Determination by the State Engineer - Copies of Decision
89-02-01-09.10	Consideration of Evidence Not Contained in the State Engineer's Record
89-02-01-09.11	Conditions to Permits
89-02-01-09.12	Extending Time to Complete Construction of Drain
89-02-01-10	District Hearing on Applications of Statewide or Interdistrict Significance [Repealed]
89-02-01-11	Emergency Drainage [Repealed]

89-02-01-12	Notice of District Hearings [Repealed]
89-02-01-13	Content of Notice of Hearing [Repealed]
89-02-01-14	Affidavit of Mailing and Affidavit of Notice [Repealed]
89-02-01-15	Time for Determination by Board of Managers [Repealed]
89-02-01-16	Consideration by the State Engineer and Districts [Repealed]
89-02-01-17	Approval of Drainage Permit Applications by District [Repealed]
89-02-01-18	Denial of Application by the District [Repealed]
89-02-01-18.1	Notice by State Engineer of Public Hearing on Application of Statewide or Interdistrict Significance [Repealed]
89-02-01-18.2	Evidence Presented at the State Engineer's Public Hearing [Repealed]
89-02-01-19	Consideration by State Engineer of Applications of Statewide or Interdistrict Significance [Repealed]
89-02-01-20	Criteria to Determine Whether Drainage Will Adversely Affect Lands of Lower Landowners [Repealed]
89-02-01-20.1	Time for Determination by the State Engineer [Repealed]
89-02-01-20.2	Consideration of Evidence Not Contained in the Record [Repealed]
89-02-01-21	Conditions to Permits [Repealed]
89-02-01-22	Requirements for a Valid Permit to Drain [Repealed]
89-02-01-23	Procedure Upon Complaint of Violation [Repealed]
89-02-01-24	Enforcement Action Without Receipt of Complaint [Repealed]
89-02-01-25	Criminal Complaint [Repealed]
89-02-01-26	Ditches or Drains Existing for Ten Years or More [Repealed]
89-02-01-27	Notice of Drainage Application Denies to Commissioner of Agriculture [Repealed]
89-02-01-28	Landowner Assessment Appeal to State Engineer

89-02-01-01. Intent. Repealed effective January 1, 2015.

89-02-01-02. Definitions. Unless the context otherwise requires, the following definitions apply to this article:

1. "Assessment drain" is defined in North Dakota Century Code section 61-16.1-02.
2. "Board" is defined in North Dakota Century Code section 61-21-01.
3. "District" means water resource district.
4. "Drain" is defined in North Dakota Century Code section 61-21-01.
5. "Emergency" means a situation that will cause significant damage to people or property if not addressed immediately and that would not occur under normal circumstances. An emergency may exist because of an extremely wet hydrologic cycle. Damages caused by deliberate acts may not constitute an emergency.

6. "Lake" means a well-defined basin that characteristically holds water throughout the year. Lakes go dry only after successive years of below normal runoff and precipitation.
7. "Lateral drain" is defined in North Dakota Century Code section 61-21-01.
8. "Maintenance" means removal of silt and vegetation from a drain. Maintenance does not include deepening or widening a drain.
9. "Parties of record" means each person named or admitted as a party or properly seeking and entitled to be admitted as a party.
10. "Pond" means a well-defined land depression or basin that holds water in normal years throughout the summer. Ponds generally go dry only in years of below normal runoff and precipitation.
11. "Pond, slough, lake, sheetwater, or any series thereof" means ponds, sloughs, lakes, or sheetwater that are hydrologically linked.
12. "Sheetwater" is defined in North Dakota Century Code section 61-32-03.
13. "Slough" includes two types:
 - a. Seasonal slough: a depression that holds water in normal years from spring runoff until approximately mid-July. In years of normal runoff and precipitation, a seasonal slough is usually not tilled, but can be used for hayland or pasture. In low runoff, dry years, these areas generally are tilled for crop production, but commonly reflood with frequent or heavy summer or fall rains.
 - b. Temporary slough: a shallow depression that holds water from spring runoff until approximately early June. In years of normal runoff and precipitation, a temporary slough is usually tilled for crop production. In years of high runoff or heavy spring rain, a temporary slough may not dry out until mid-July and generally would not be tilled, but may be used for hayland or pasture. A temporary slough frequently refloods during heavy summer or fall rains.
14. "Supplemental hearing" means a hearing held to review evidence not contained in the record of the state engineer's public hearing.
15. "Watercourse" is defined in North Dakota Century Code section 61-01-06.

16. "Watershed" means the area that drains into a pond, slough, lake, or any series thereof.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-03. Permit required. In addition to North Dakota Century Code section 61-32-03, a permit is required for:

1. An assessment drain.
2. Construction of a lateral drain.
3. Modification of a previous permit, which includes deepening, widening, or extending a drain.
4. Pumping, gravity, or placement of fill.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-04. Permits for assessment drains. Repealed effective February 1, 1997.

89-02-01-05. Exceptions to the need for a permit.

1. A drainage permit under section 89-02-01-03 is not required for maintenance of a drain.
2. The provisions of section 89-02-01-03 do not apply to any drain constructed under the direct and comprehensive supervision of the following federal or state agencies:
 - a. The state water commission;
 - b. The army corps of engineers;
 - c. The natural resources conservation service for projects constructed under the Watershed Protection and Flood Prevention Act [Pub. L. 83-566; 16 U.S.C. 1001];

- d. The bureau of reclamation for projects that are part of the originally (1965) authorized Garrison diversion unit;
- e. The state department of transportation for federal aid projects; and
- f. The public service commission for surface mining projects.

However, these agencies must notify the state engineer of any proposed drainage projects under their direct supervision during the planning stages.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; April 1, 2004; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-06. Determination of watershed area. The determination of the watershed area must be made using the best available maps or surveys. LiDAR information or a survey conducted under the supervision of a registered land surveyor are preferred. Published seven and one-half minute topographic maps may also be utilized. This information may be supplemented by aerial photographs of the watershed or by an onsite investigation requested by the applicant or board or if the state engineer determines it is necessary.

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

89-02-01-07. Filing application. Any person desiring a drainage permit must file an application with the state engineer on a form provided by the state engineer. If requested by the state engineer or the board, the applicant must provide an engineering analysis showing the downstream impacts of the proposed drainage. The analysis may need to include a determination of the drain's and receiving watercourse's capacities and a volume and timing comparison of predrainage and postdrainage flows. If the application is incomplete or the information is insufficient to enable the state engineer or board to make an informed decision on the application, it will be returned to the applicant for correction.

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

89-02-01-08. Referral of applications to appropriate district. Upon receipt of a properly completed application, the state engineer must determine whether the application involves drainage of statewide or interdistrict significance under section 89-02-01-09. The state engineer must attach to the application any comments, recommendations, and engineering data that may assist the district in making a determination on the application. The application must then be referred to the district within which a majority of the watershed of the pond, slough, lake, sheetwater, or any series thereof is found.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

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.

- b. Notice must be published in a newspaper of general circulation in the area of the proposed drainage once a week for two consecutive weeks. Final notice must be published between five and fifteen days before the date set for the meeting.

- c. The notice must give the essential facts of the proposed drain including:
 - (1) Name and address of applicant;
 - (2) Legal description of the area to be drained;
 - (3) Drain purpose;

- (4) Watercourse into which the water will be drained;
 - (5) Legal description of the drain's confluence with the watercourse into which the water will be drained;
 - (6) The time, date, and place of the meeting; and
 - (7) The location and date of availability of information regarding the project.
- d. At least fourteen days before the meeting, the applicant must submit to the board all documentary information the applicant intends to present at the meeting. The board must immediately place the information in the board's office if the office is open for public access at least twenty hours each week. If the board's office is not open to the public at least twenty hours each week, the information must be immediately placed with the county auditor of the county in which the majority of the watershed of the drain will be built. The information must be available for public review. The board must notify the applicant of this requirement upon its receipt of an application to drain. If the information is placed in the auditor's office, the auditor must return the information to the board one working day before the meeting.
 - e. The board must allow submission of all relevant oral or written evidence.
 - f. In evaluating applications, the board must consider the factors in section 89-02-01-09.2.
 - g. The board must stenographically or electronically record the meeting at which it receives information concerning the application. If the board approves the permit application, the record and all documentary information the board received must be transferred to the state engineer. The board must provide a meeting transcript at the request of the state engineer. The cost of providing a transcript must be borne by the applicant.
 - h. At the meeting's conclusion, the board must announce that:
 - (1) The board's permit denial constitutes final denial. Appeals must be taken to the district court within thirty days.
 - (2) A board-approved application will be forwarded to the state engineer.

- (3) Those who wish to be notified of the board's decision must provide their names and addresses in writing to the board at the end of the meeting.
 - (4) The board must send notice and a copy of the board's determination and rationale to all parties of record, anyone who has requested in writing to be notified, and the state engineer.
 - i. If the board denies the application, it must return the application to the applicant, along with a copy of the board's determination and rationale. A copy of the board's determination and rationale must also be sent to all parties of record, anyone who has requested in writing to be notified, and the state engineer.
 - j. If the board approves the application, the approval must be noted on the application and a copy of the determination and rationale sent to the applicant. The board must send notice and a copy of the board's determination and rationale to all parties of record and anyone who has requested in writing to be notified. The application, a copy of the determination and rationale, and all information reviewed by the board in considering the application must be forwarded to the state engineer for review within twenty days of the determination. The board's decision approving the application must contain a determination of the location and surface acre size of ponds, sloughs, and lakes to be drained by the proposed drain.
 - k. The board's notice to an applicant must state that the application approval is not a permit to drain until the state engineer approves the application.
- 2. The board must use the procedure in this subsection to process a drainage permit application that is not of statewide or interdistrict significance:
 - a. The board must review the permit application and any supporting documentation and determine whether public and private interests would be better served by a specific public meeting to consider the project.
 - b. If a specific public meeting is necessary, the board must process the permit application under procedures established by the board.

- c. If a specific public meeting is unnecessary, the board must consider the project under the criteria in section 89-02-01-09.2 and must deny or grant the application and any modifications or conditions based upon those criteria. Written notice of the board's decision must be provided to all parties of record, anyone who has requested in writing to be notified, and the state engineer.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.2. Evaluation of applications - Factors considered. All applications to drain must consider the following factors:

1. The water volume proposed to be drained and its impact upon the watercourse into which it will be drained.
2. Adverse effects that may occur to downstream landowners. This factor is limited to the project's hydrologic effects, such as erosion, flood duration, sustained flows impacts, and downstream water control device operation impacts.
3. The engineering design and other physical aspects of the drain.
4. The project's impact on flooding problems in the project watershed.
5. The project's impact on ponds, sloughs, streams, or lakes having recognized fish and wildlife values.
6. The project's impact on agricultural lands.
7. Whether easements are required.
8. Other factors unique to the project.

History: Effective February 1, 1997; amended effective April 1, 2000; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-01-26, 61-16.1-10, 61-32-03

89-02-01-09.3. Time for determination by board. The board must make a determination on the application within one hundred twenty days of receipt. This time limit may be extended only with the written consent of the state engineer. A request for a time extension must be in writing to the state engineer and must set forth the reason for the request. If no determination has been made and no extension has been requested, unless the state engineer determines that a unique or complex situation exists, the application is void.

For applications involving assessment drains, the one hundred twenty-day time period does not begin until the date the assessments are established by the board and no longer subject to appeal.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.4. Evaluation of applications by the state engineer of statewide or interdistrict significance - Information to be used. In the state engineer's evaluation of statewide or interdistrict significance applications, the state engineer must use all relevant documentary information submitted and oral testimony given for the board's consideration at its meeting. The state engineer may use any information in the files and records retained by the state engineer's office or engineering information developed or obtained through investigation of the project area by the state engineer's staff.

The state engineer may also request information or comment from independent sources, but is not required to delay the decision for more than thirty days from the date of request while waiting for comment from these sources. All information used must be relevant and is part of the record.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-06, 61-32-03

89-02-01-09.5. Procedure, availability, and contents of notice of state engineer's decision to grant or deny application of statewide or interdistrict significance.

1. The state engineer must provide a copy of the determination to the parties of record. Other members of the public may view the record at the office of the state engineer, 900 east boulevard, Bismarck, during normal business hours.
2. Upon written request, one copy of the determination may be provided to any person not provided a copy under subsection 1.
3. The notice of decision must include:
 - (a) The name of the drain;
 - (b) The applicant's name;
 - (c) Whether the application was granted or denied;

- (d) The date of the decision;
- (e) The availability of the full text of the decision;
- (f) That a hearing may be requested on the project within thirty days of the date of service of the state engineer's decision; and
- (g) The request for a hearing must be in writing, specifically state facts from which the person requesting the hearing is factually aggrieved by the state engineer's decision, and what material facts or conclusions are believed to be erroneous and why they are believed to be erroneous.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

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

89-02-01-09.6. Request for state engineer's hearing. All requests for a formal hearing on a project must be made in writing to the state engineer within thirty days of the date of service of the state engineer's decision. The request must specifically state facts from which it is evident the person requesting the hearing is factually aggrieved by the state engineer's decision and must state which material facts or conclusions are believed to be erroneous and why they are believed to be erroneous.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.7. Notice of state engineer's hearing. If the state engineer determines that a request for a hearing on an application of statewide or interdistrict significance is valid and well-founded, the state engineer must set a date for a hearing and publish notice in the official newspaper of the county where a majority of the drainage basin is located. Publication must be once a week for two consecutive weeks. One of the publications must be published at least twenty days before the hearing. The person requesting the hearing must give notice by certified mail to the state department of health, the state game and fish department, the state department of transportation, and all parties of record to the board's hearing at least twenty-one days before the hearing. If such notice is not provided, the hearing will not be held. The notice must give essential information about the proposed drainage application, including the date, time, and location of the hearing. All hearings will be held in Bismarck.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-05

89-02-01-09.8. Evidence at the state engineer's hearing. Evidence at the state engineer's hearing may be confined to the matters raised by any request of hearing described in section 89-02-01-09.6.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-06, 61-32-03

89-02-01-09.9. Time for determination by the state engineer - Copies of decision. Unless the state engineer determines the hearing raises complex or unique issues, the state engineer must render a decision within thirty days of the close of the hearing. A copy of the decision must be served on all parties of record either personally, or by certified mail, regular mail, or email. The state engineer will retain a certificate of service indicating upon whom a copy of the decision was served.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 28-32-13, 61-03-13

Law Implemented: NDCC 28-32-13

89-02-01-09.10. Consideration of evidence not contained in the state engineer's record. The record of the state engineer's hearing must be closed at the conclusion of the state engineer's formal hearing. It is in the state engineer's discretion to receive testimony and evidence not contained in the record. However, before considering any evidence not contained in the record, the state engineer must provide notice to the parties of record where the evidence may be obtained for their examination and comment. Written comment or a request for a supplemental hearing must be submitted to the state engineer within ten days after transmittal of the additional evidence. Any request for a supplemental hearing must provide sufficient information to allow the state engineer to determine if a supplemental hearing is warranted. If a supplemental hearing is warranted, ten days' notice by personal service, certified mail, or email must be given to the parties of record to inform them of the date, time, place, and nature of the hearing. All supplemental hearings must be held in Bismarck.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-07

89-02-01-09.11. Conditions to permits. Unless otherwise specifically stated:

1. All permits must include the following conditions:
 - a. The project and the rights granted under the permit are subject to modification to protect the public health, safety, and welfare.

- b. Construction must be completed within two years from the date of final approval or the permit is void. The two-year period does not begin until any appeal is complete.
2. All permits of statewide or interdistrict significance must include the following conditions:
- a. All highly erodible drainage channels must be seeded to a sod-forming grass.
 - b. Vegetative cover must be adequately maintained for the life of the project or control structures must be installed.
 - c. Receipt of a permit does not relieve an applicant from liability for damages resulting from any activity conducted under the permit.

The state engineer or board may attach other conditions to the permit if necessary.

History: Effective February 1, 1997; amended effective April 1, 2000; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.12. Extending time to complete construction of drain. If the two-year period expires before construction is complete, the permit recipient may make a written request to the board for a one-year extension. Only two extensions may be granted. All requests for extensions must be made at least sixty days before the expiration date and must specifically state why construction has not been completed. If the request is for an extension relating to a permit of statewide or interdistrict significance, the extension must be submitted to and approved by both the state engineer and the board.

History: Effective February 1, 1997; amended effective April 1, 2004; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-13, 61-32-03

89-02-01-10. District hearing on applications of statewide or interdistrict significance. Repealed effective February 1, 1997.

89-02-01-11. Emergency drainage. Repealed effective February 1, 1997.

89-02-01-12. Notice of district hearing. Repealed effective February 1, 1997.

89-02-01-13. Content of notice of hearing. Repealed effective February 1, 1997.

89-02-01-14. Affidavit of mailing and affidavit of notice. Repealed effective December 1, 1979.

89-02-01-15. Time for determination by board of managers. Repealed effective February 1, 1997.

89-02-01-16. Consideration by the state engineer and districts. Repealed effective February 1, 1997.

89-02-01-17. Approval of drainage permit applications by district. Repealed effective February 1, 1997.

89-02-01-18. Denial of application by the district. Repealed effective February 1, 1997.

89-02-01-18.1. Notice by state engineer of public hearing on application of statewide or interdistrict significance. Repealed effective February 1, 1997.

89-02-01-18.2. Evidence presented at the state engineer's public hearing. Repealed effective February 1, 1997.

89-02-01-19. Consideration by state engineer of applications of statewide or interdistrict significance. Repealed effective February 1, 1997.

89-02-01-20. Criteria to determine whether drainage will adversely affect lands of lower landowners. Repealed effective February 1, 1997.

89-02-01-20.1. Time for determination by the state engineer. Repealed effective February 1, 1997.

89-02-01-20.2. Consideration of evidence not contained in the record. Repealed effective February 1, 1997.

89-02-01-21. Conditions to permits. Repealed effective February 1, 1997.

89-02-01-22. Requirements for a valid permit to drain. Repealed effective December 1, 1979.

89-02-01-23. Procedure upon complaint of violation. Repealed effective February 1, 1997.

89-02-01-24. Enforcement action without receipt of complaint. Repealed effective October 1, 1982.

89-02-01-25. Criminal complaint. Repealed effective October 1, 1982.

89-02-01-26. Ditches or drains existing for ten years or more. Repealed effective December 1, 1979.

89-02-01-27. Notice of drainage application denials to commissioner of agriculture. Repealed effective August 1, 1994.

89-02-01-28. Landowner assessment appeal to state engineer. A landowner's appeal to the state engineer claiming that the landowner will receive no benefit from the construction of a new drain must be made within ten days after the assessment hearing. The appeal must be in writing and must specifically state the facts upon which the claim is based.

History: Effective April 1, 2000; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-21-22

**CHAPTER 89-02-02
DRAINAGE OF WETLANDS**

[Repealed effective February 1, 1997]

**CHAPTER 89-02-03
WETLANDS BANK**

[Repealed effective February 1, 1997]

**CHAPTER 89-02-04
DRAINAGE COMPLAINT APPEALS**

Section	
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89-02-04-23	Decision of State Engineer on Record of Hearing

89-02-04-01. Scope of chapter. This chapter contains the procedure for appealing the decision of a water resource board on a complaint of drainage constructed without proper approval.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-02. Definitions. Unless the context otherwise provides, the following definitions apply:

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

2. "Aggrieved party" means any individual or entity who participated in the state engineer's or board's consideration of an appeal and who is actually damaged by the board's or state engineer's decision.
3. "Appeal" means an appeal from the decision of a board concerning a drain constructed.
4. "Board" means the board of the water resource district in which the complaint is brought.
5. "Complaint" is a document which alleges drainage has been conducted without proper authorization. It is filed on a form supplied to the water resource board by the state engineer.
6. "Party" includes the petitioner and any respondent, the board from which the decision is appealed, and any entity or individual that participated in the complaint process in front of the board. The designation as a party does not bestow standing to appeal a decision of the board to the state engineer or the decision of the state engineer to a court of law.
7. "Petitioner" means any aggrieved party who files a timely and proper appeal, or an affected landowner who files a timely and proper demand for hearing with the state engineer.
8. "Respondent" is a person who, within twenty days of notice of an appeal of a board's decision on a drainage complaint, files a notice with the state engineer of the person's intent to participate in the appeal. The person who filed the complaint, and the person against whom the complaint was filed, must be either a respondent or a petitioner. These persons and the board must be allowed to participate whether or not any notice of participation is filed with the state engineer. A person may not be a respondent to an appeal of a board's decision unless the person participated by providing information to the board for its consideration.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-03. Filing of complaint. All complaints are filed with the water resource board in the county where the drainage is located. Complaints filed with the state engineer will be forwarded to the appropriate board, unless the complaint is filed because of the board's inaction on a complaint under section 89-02-04-04.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-04. Complaint to state engineer - State engineer's action when board fails to act. If a board does not make a decision upon a drainage complaint within one hundred twenty days of its filing with the board, the person filing the complaint with the board may file a request for state engineer action with the state engineer. The request must include a copy of the complaint filed with the board and any documentation the landowner wishes the state engineer to consider. The state engineer must then determine whether to commence action against the board or conduct an investigation.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-05. Form of appeal. If a board makes a decision on a drainage complaint, any appeal to the state engineer by an aggrieved party must be made within thirty days from the date notice of the board's decision was received in writing on the form prescribed by the state engineer, and must include:

1. The identity of all parties to the complaint.
2. Petitioner's interest in the water resource board's decision, including a statement of the impact the decision will have upon the petitioner.
3. The relief petitioner seeks.
4. A statement identifying the errors in the water resource board's decision that entitle the petitioner to the relief sought.
5. All facts presented to the water resource board that support the petitioner's position.
6. A legal description of the drainage area involved.
7. A map depicting the drainage area and identifying the drainage complained of.
8. A cashier's check to cover the cost of preparing a transcript of the proceedings before the board.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-06. State engineer's review of board's decision. Upon receipt of a written appeal by an aggrieved party from a decision of a water resource district under North Dakota Century Code section 61-32-07, the state engineer must review the board's decision. In the review the state engineer will consider only:

1. Ownership of the land on which the drain is located.
2. Topographic maps and aerial photographs of the area.
3. Any existing surveys of the area.
4. The documentation and testimony given to the board for its consideration.
5. Any pertinent rules of the appropriate board.
6. The board's decision.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

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

1. Once the state engineer's review under section 89-02-04-06 is complete, the state engineer will determine whether the information reviewed is sufficient to make a sound decision.
2. If the information is not sufficient, the state engineer will either conduct further investigations or return the record to the board for its further investigation.
3. If the information is sufficient, the state engineer must determine whether a drain, lateral drain, or ditch has been opened or established contrary to North Dakota Century Code title 61 or any rules adopted by the state engineer or the board. If so, the state engineer will take one of the three actions set forth in North Dakota Century Code section 61-32-08. If the drain has not been opened contrary to North Dakota Century Code title 61 or a drainage rule, the complaint will be dismissed. In either case the state engineer will notify all parties of the state engineer's decision by certified mail or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom the decision was served. The notice of decision will include the names and addresses of all parties.

History: Effective October 1, 1988; amended effective August 1, 1994; January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-13, 61-32-08

89-02-04-08. State engineer's independent investigation. After reviewing the board's decision and the items identified in section 89-02-04-06, the state engineer may conduct an investigation if the information is insufficient. The investigation may include an onsite inspection and survey of the property involved and other activities deemed appropriate by the state engineer. Any investigation the state engineer undertakes in response to a complaint filed with the state engineer because a board has not acted will be conducted under this rule.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-09. Demand for hearing by affected landowner. Hearings demanded under North Dakota Century Code section 61-32-08 by an affected landowner must be made by certified mail within fifteen days of notice of the state engineer's decision. The affected landowner must also notify all parties by certified mail of the state engineer's demand for hearing within fifteen days of the state engineer's decision. Hearings will be conducted as set forth in sections 89-02-04-11 through 89-02-04-23. The demand must state the issues to be addressed at the hearing.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-10. Request for hearing by others than affected landowners. Any aggrieved party may request a hearing on the state engineer's decision. A request for a hearing must specifically state the reason for the request, and a copy of the request must be sent by certified mail to the state engineer and to each party within fifteen days after notice of the state engineer's decision. If granted, the hearing must be conducted as set forth in sections 89-02-04-11 through 89-02-04-23.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

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

89-02-04-11. Appointment of hearing officer. Upon receipt of an appeal or demand for a hearing, the state engineer will appoint a hearing officer to:

1. Determine if the appeal is timely and proper.
2. Preside over the hearing.

3. Administer the prehearing activities.
4. Prepare a recommended decision.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

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

89-02-04-12. Purpose of hearing. If the hearing officer determines a hearing should be held, one will be conducted to:

1. Obtain further testimony from the parties.
2. Allow the state engineer to examine other witnesses and evidence.
3. Provide the parties with an opportunity to cross-examine witnesses called by the state engineer.
4. Allow the parties to call other witnesses to present evidence.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

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

89-02-04-13. Qualifications of witnesses at state engineer's hearings. Unless agreed to by both petitioner and respondent and allowed by the hearing officer, people who failed to participate in the water resource board's determination under North Dakota Century Code section 61-32-07 may not be called to present evidence or testimony for consideration. However, the state engineer may call witnesses on the state engineer's own motion without the agreement of any party if the state engineer feels information known by the person will assist the hearing officer in making a recommended decision.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

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

89-02-04-14. Notice of hearing. When the hearing officer determines a date for a hearing, the hearing officer will notify the water resource board, the petitioner, and the respondent of the time and date of the hearing. In the case of a demand by an affected landowner under section 89-02-04-09, the hearing officer must give the notice of the hearing date within fifteen days of the demand. The notice must be given by certified mail at least forty-five days before the date set for the hearing. All hearings will be held in Bismarck, North Dakota.

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

History: Effective October 1, 1988; amended effective August 1, 1994; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-05, 61-03-22, 61-32-08

89-02-04-15. Issues limited to those contained in notice. The notice of hearing will identify the issues to be addressed and identified in the demand or the request for a hearing. Evidence and testimony at the hearing will be limited to the issues set forth in the notice of hearing.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-08, 61-03-22, 61-32-08

89-02-04-16. Notice of witnesses at hearing - Time frame. At least thirty days before the date set for the hearing, the petitioner must notify other parties, the board, the state engineer, and the hearing officer by certified mail of all witnesses the petitioner will call and the content of their testimony. At least thirty days before the date set for the hearing, the respondent must notify other parties, the board, the state engineer, and the hearing officer by certified mail of witnesses to be called by the respondent and the content of their testimony. Within twenty days of the date of the hearing, the petitioner must notify the parties, the board, the state engineer, and the hearing officer by certified mail of any rebuttal witnesses to be called and the content of their testimony. The state engineer must notify the parties, the board, and the hearing officer of any witnesses the state engineer intends to call in the notice of hearing. However, if testimony or evidence not provided to the board and not considered in the state engineer's determination will be presented by others, the failure of the state engineer to identify a witness should not preclude the state engineer from providing other testimony and evidence of a technical nature.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

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

89-02-04-17. Subpoena of witnesses. If any party desires the hearing officer to subpoena any witness for attendance at the hearing, the hearing officer must be notified of the intent to subpoena the witness at least seven days before the date of the hearing. The hearing officer may not subpoena a witness unless the request for a subpoena:

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

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-05(13), 61-03-13

Law Implemented: NDCC 28-32-09, 61-03-05, 61-32-08

89-02-04-18. Prehearing conference. A prehearing conference to clarify issues, resolve any conflicts, and stipulate to any matter will be held at least seven days before the date of the hearing. At the conference the parties must provide sufficient copies of exhibits to be presented to all parties, the board, the state engineer, and the hearing officer. The hearing officer may allow the prehearing conference to be held by telephone if exhibits are provided to all parties, the board, the state engineer, and the hearing officer at least three days before the prehearing conference.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

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

89-02-04-19. Order of presentation at hearing. At the hearing the petitioner must present the petitioner's case first. The respondent then presents the respondent's case, followed by the board and the state engineer. After all participants have presented their case, a participant may present other evidence or testimony to rebut that presented by another participant.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

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

89-02-04-20. Cross-examination. Oral cross-examination of adverse witnesses will be allowed by the petitioner and the respondent. Petitioner and respondent must designate one individual to cross-examine witnesses that side did not call. In addition,

the state engineer and the board may cross-examine any witnesses they did not call. However, if a party demonstrates to the hearing officer that the party's position is not adequately represented by any other party it may be allowed to cross-examine witnesses on the party's own.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

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

89-02-04-21. Record of hearing - Consideration by hearing officer. After the hearing is over the record will be closed. The hearing officer will consider only material contained in the record and will not accept and consider any information after the hearing unless the evidence was not provided at the hearing because of circumstances beyond the control of the party presenting the evidence. Information submitted after the hearing may be considered by the state engineer in making the state engineer's decision, but only under North Dakota Century Code section 28-32-25.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-07, 61-32-08

89-02-04-22. Recommendation of hearing officer. After the hearing officer completes the consideration required under section 89-02-04-20, a written recommendation must be made to the state engineer.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-08

89-02-04-23. Decision of state engineer on record of hearing. The state engineer will review the record, the hearing officer's recommendation, and any additional evidence received under North Dakota Century Code section 28-32-25, and make a final determination. If the conclusion is the drain, lateral drain, or ditch was constructed contrary to a board rule or title 61, the state engineer will take one of the actions prescribed by North Dakota Century Code section 61-32-08.

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

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-07, 61-32-08

**CHAPTER 89-02-05
LICENSES FOR EMERGENCY DRAINAGE**

[Repealed effective February 1, 1997]

**CHAPTER 89-02-05.1
EMERGENCY DRAIN PERMITS**

Section	
89-02-05.1-01	Scope of Chapter [Repealed]
89-02-05.1-02	Definitions [Repealed]
89-02-05.1-03	Permit to be Temporary
89-02-05.1-04	Emergency Defined [Repealed]
89-02-05.1-05	Application Form
89-02-05.1-06	Consideration of Permit Application
89-02-05.1-07	Decision on Permit Application – Conditions
89-02-05.1-08	Requirement for Permanent Permit Application
89-02-05.1-09	Closure of Drain
89-02-05.1-09.1	Extension of Permit
89-02-05.1-10	License Does Not Absolve Liability for Damages [Repealed]

89-02-05.1-01. Scope of chapter. Repealed effective January 1, 2015.

89-02-05.1-02. Definitions. Repealed effective January 1, 2015.

89-02-05.1-03. Permit to be temporary. Emergency drain permits received under this chapter are only valid for six months plus any valid extensions.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-04. Emergency defined. Repealed effective January 1, 2015.

89-02-05.1-05. Application form. An emergency drain permit application must be written and include:

1. Landowner's name and address.
2. Legal description of land where the emergency drain will be located.
3. A map showing the drain location.
4. An estimate of the surface acreage of the pond, slough, lake, sheetwater, or any series thereof and the volume of water to be drained by the emergency drain.
5. A list of all downstream adjacent landowners for a distance of one mile [1.6 kilometers] from the discharge point, along with the addresses and telephone numbers of these landowners.

6. Copies of any written permission received from downstream landowners.
7. A compilation of any written or oral permission and refusals from downstream landowners.
8. A description of the emergency.
9. Written permission allowing the state engineer and board to inspect the drain.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-06. Consideration of permit application. An emergency drain permit application must be sent simultaneously to the board and the state engineer. The application will be reviewed for completeness by the board and the state engineer. The state engineer must make a preliminary determination as to the existence of an emergency. As soon as possible, a conference call or onsite meeting among the board, the state engineer, and other affected parties as determined by the state engineer must be held. The applicant or any other affected party may make a statement concerning the emergency drain permit application during the conference call or onsite meeting. Any conference call or onsite meeting must be electronically recorded. During the call or onsite meeting, but after all parties have been given an opportunity to present their views, the board must make a recommendation to the state engineer whether the permit should be granted.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-07. Decision on permit application - Conditions. After completion of the conference call or onsite meeting, the state engineer must consider:

1. The written information received;
2. The matters discussed;
3. The board's recommendation; and
4. Whether the emergency permit should be granted.

If the permit is granted, the state engineer may place any condition upon it, including a requirement for a bond and that receipt of an emergency drain permit does not relieve an applicant from liability for damages resulting from any activity conducted under the permit.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-08. Requirement for permanent permit application. If the emergency drain is to be permanent, the applicant must submit a drain permit application to the state engineer under chapter 89-02-01. If the application is submitted at least thirty days before the emergency permit expires and the permanent drain has the same alignment as the emergency drain, the state engineer may extend the term of the emergency permit until final action on the drain permit application has been taken. If the watershed of the permanent drain is the same as the emergency drain, but has a different alignment, the emergency drain permit must only be extended under section 89-02-05.1-09.1.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-09. Closure of drain. If a permanent drain permit application is not submitted thirty days before the emergency permit expires, the applicant must immediately prepare to close the drain unless the applicant has applied for an extension under section 89-02-05.1-09.1. Preparations must include obtaining any permission or authorizations. Closure of the drain must be completed by the emergency permit expiration date. The applicant must keep the board and state engineer informed of the applicant's progress in closing the drain. The applicant must notify the board and the state engineer in writing when the emergency drain has been completely closed.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-09.1. Extension of permit. The applicant must submit a written request for an extension at least thirty days before the expiration of the emergency permit. If it is determined that an emergency still exists, the state engineer may issue a one-time, six-month extension to the permit's expiration date. If an emergency continues to exist after the one-time extension, an applicant may reapply under 89-02-05.1 for a new emergency drain permit.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-10. License does not absolve liability for damages. Repealed January 1, 2015.