

Testimony
Senate Bill 2036 – Department of Water Resources
House Energy and Natural Resources Committee
Representative Todd Porter Chairman
March 2, 2023

Chairman Porter, and members of the House Energy and Natural Resources Committee – I am Matt Lindsay, Engineering & Permitting Section Manager of the Department of Water Resources (Department). I am here today to provide general support for Senate Bill 2036, which proposes to amend portions of North Dakota Century Code title 61, relating to water-related definitions and regulatory oversight.

Senate Bill 2036 was created by the Interim Water Drainage Committee as a result of SB 2208 passed by the 67th legislative assembly. In particular, the committee was charged to study and answer certain questions to optimize water and drainage law in North Dakota.

Senate Bill 2036 largely addresses local Water Resource District and Board actions. The Department previously provided comments for consideration to the Interim Water Drainage Committee on this bill which are attached. As a result, the Department has identified a couple of sections within Senate Bill 2036 worth highlighting for this committee.

In Section 1, the incorporation of a “waterway” definition was completed with Department engagement. The Department created an exhibit during the interim committee work, which is attached to this testimony for additional context. Again, a “waterway” is proposed to mean all natural features that convey surface water, while a “watercourse” is a special type of “waterway” with specific legislative jurisdictional considerations. The Department supports the proposed language in Section 1.

In Sections 2 and 23, the Department believes the inclusion of authority over obstruction to drain complaints was inadvertently broadened to include all water regulatory entities, including federal, state, and local entities. This may not have

been the legislature's intent and could confuse the jurisdictional authorities over channel obstructions.

The existing language in SB 2036 could have the result of expanding section 61-01-23 beyond its original intent, which was for emergency flooding and ice jam situations. Consequently, the Department recommends retaining obstruction complaint authority to only water resource boards as section 61-16.1-51 currently reads. To accomplish this, the Department recommends returning sections 61-01-23 and 61-16.1-51 each to their original forms (i.e., pre-SB2036) and addressing the natural and artificial obstruction issue within Section 23 or section 61-16.1-51.

Specifically, the Department recommends the following revisions to SB 2036:

- Return sections 61-01-23 and 61-16.1-51 to their original forms.
- Amending existing section 61-16.1-51(1) as follows:
 - “If a water resource board determines that an obstruction to a drain has been caused by the result of a natural occurrence, such as sedimentation or vegetation, or by the negligent act or omission of a landowner or tenant, ...”
- Amending existing section 61-16.1-51(2) as follows:
 - “For the purposes of this section, an “obstruction to a drain” means a natural or artificial barrier to a watercourse or waterway, as defined by section 61-01-06, or an artificial drain...”

In Section 4, the Department believes additional clarity is necessary to advance the goal of clear legislative guidance and intent. The Department recommends the following two definitions be added to SB 2036:

- “Benefited property” means property that accrues benefits from a project.
- “Benefits” means the extent to which society and economies impacted by a project are made better off through lower costs, fewer damages, or enhancements.

Thank you for the opportunity to comment and I would be happy to answer any questions you might have.

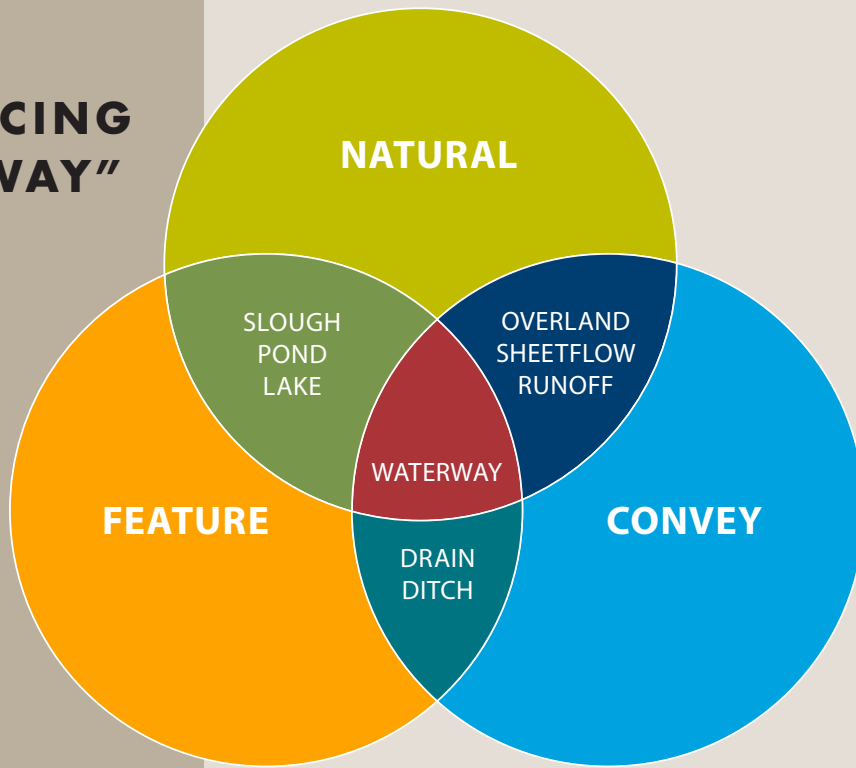
EXISTING DEFINITIONS

"Watercourse" is defined in N.D.C.C. § 61-01-06.
"Assessment drain" is defined in N.D.C.C. § 61-16.1-02(2).
"Drain" is defined in N.D.C.C. § 61-21-01(4) and elsewhere.

PROPOSED NEW DEFINITION BY DWR

"Waterway" is a natural, geologic feature that conveys surface water over land.

**INTRODUCING
"WATERWAY"**



DOES NOT CONVEY

Generally, sloughs, ponds, or lakes do not convey sheetwater or surface runoff. They are all features that retain or temporarily detain water naturally.



IS NOT A FEATURE

There is not a confining feature to overland flow or runoff. Land forms may convey natural runoff, but there is not a discernible water feature beyond temporary inundation or flooding.



IS NOT NATURAL

Drains and ditches are artificial features, such as channels or pipes, that convey surface waters. They are not natural, but may be augmentations of natural systems, such as the case with straightening of a watercourse or constructing a drain in a waterway.

"WATERWAY" HIERARCHY

WHAT DO YOU WANT TO CONSIDER A "WATERWAY?"

- What is considered a waterway depends on what you want to regulate and why.
- A "waterway" would be a broader term applied to all natural water features that convey flow over land.
- A "watercourse" is a specific type of waterway that includes a plainly defined channel of permanent character.
- OTHER WATER FEATURES**
Sloughs, ponds, lakes, wetlands, and other depressional-type, natural water features are generally not considered "waterways" but may infrequently exhibit characteristics of a waterway.



WATERWAY

This is an overarching term for "a geologic feature that conveys surface water over land."

EXAMPLE WATERWAYS

Draw, swale, valley, coulee, ravine, floodplain, floodway, tributary, brook, creek, stream, river, watercourse.

WATERCOURSE

A "watercourse" is a specific type of waterway that is defined in N.D. Century Code § 61-01-06.

NOT DISTINCT & DEFINED

There must be a distinct and defined channel to constitute a watercourse.



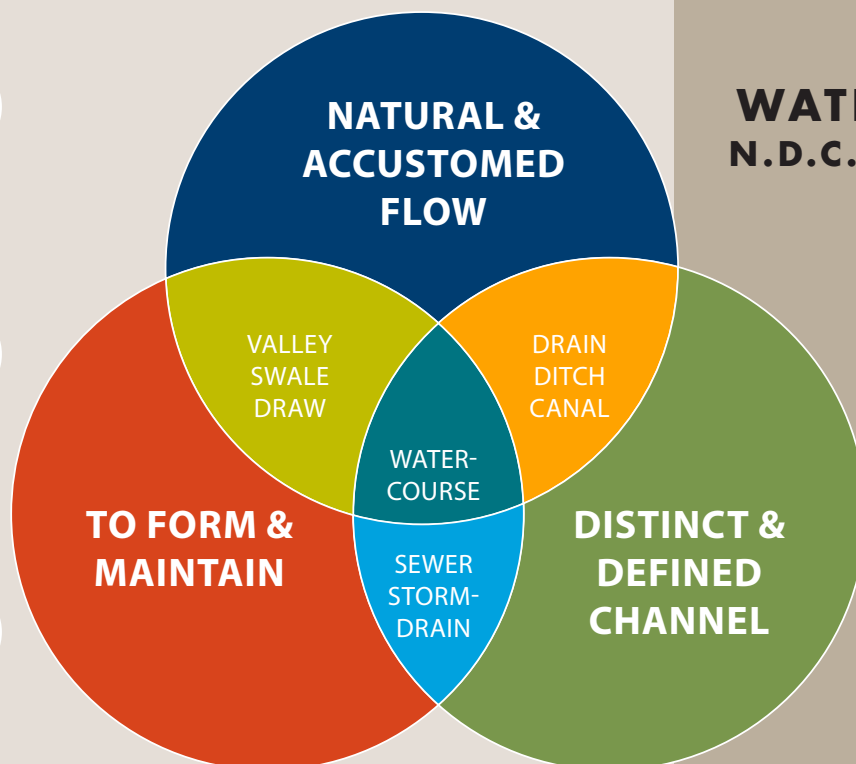
INSUFFICIENT FLOW

There must be sufficient flow, whether periodic or continuous, to form and maintain a distinct and defined channel.



NOT FROM NATURAL SOURCES

Watercourses are inherently natural, however, there can be instances where natural systems are improved or modified. The flow would still be from a natural source and still accustomed enough to form and maintain a channel.



WATERCOURSE
N.D.C.C. § 61-01-06