

Comments

Bill Drafts 23.0024.03000 and 23.0025.03000 - Department of Water Resources

Interim Water Drainage Committee

Representative Luick, Chairman

August 23, 2022

The Department of Water Resources (DWR) has prepared these comments at the request of the committee chairmen and staff. These comments are narrowly focused on the draft bill documents as presented in versions 23.0024.03000 and 23.0025.03000. These comments do not represent an official DWR position at this time but are offered from the context of technical expertise and application as discussions by the committee continue.

23.0024.03000:

1. General Comments

- a. No definition of Benefit
- b. No Benefit Methodology or procedure like Section 6 bill draft 23.0025.02000. References 61-16-1.18 but this section does not define the process as it does in 23-0025.0300 or 23-0145.0100
- c. While not proposed to be changed from version 1000 to version 2000, the DWR submits the following regarding the Assessment Appeal to DWR process in N.D.C.C. § 61-16.1-23 (Section 15):
 - i. The process is currently inconsistent with other DWR appeal dispensations (please see enclosed appeal chart).
 - ii. "May" gives DWR leeway, but perhaps there should be additional options to address appeals, like those options available in the drainage and dam, dike or other device complaint appeal actions in N.D.C.C. §§ 61-32-08 and 61-16.1-53.1, respectively.

2. Section 1

- a. Added DWR recommended definition of Waterway.

3. Section 2

- a. The reference of "State Water Commission" on page 2, after the creation of the Department of Water Resources, may be worth reviewing on intent. Typically, the State Water Commission has financial obligations and Department of Water Resources carries the regulatory responsibilities.
- b. The obstruction process here conflicts with the process in 61-16.1-51.

- c. This section could just speak to general authorities rather than the specific process and let N.D.C.C. § 61-16.1-51 (section 23 of this draft) carry the obstruction process. If considered, changing “watercourse” in section 23 to “waterway” may help make clear the WRD’s jurisdictional authority.
- d. As proposed results in two different ways Obstructions are handled, with 61-01-23 addressing obstructions to “waterways” with heavy SWC and WRD involvement based on a landowner “request” and 61-16.1-51 following the typical “complaint” process.

4. Section 4 – page 3 – lines 15 – 17 – Cleaning out drain

- a. This seems to be a copy and paste from N.D.C.C. ch. 61-21, but it continues to combine maintenance and modification in one definition.
- b. This differs from SWC cost-share and DWR drain permitting.
- c. It should define “repair” and would suggest something that accounts for original design and functional intent. Project owners should be able to repair drains to original design or address minor defects in function from the original design, but deepening and widening and big changes to side slopes is not a repair but a modification.
- d. To aid in code clarity, specific definitions for “Maintenance”, “Repair”, and “Modification” need to be provided.
 - i. On September 1, 2020, the ND Attorney General issued Opinion 2020-L-04 regarding several questions from Senator Rich Wardner regarding assessment drains, including review of definitions contained in law.
 - 1. Please see Letter Opinion 2020-L-04, Definitions, pages 3-8.
 - ii. The DWR puts forward the following language for consideration:
 - 1. Maintenance: Actions that preserve the original design, form, and function of a project without altering its original design, form, or function.
 - 2. Repair: Actions that rebuild or restore damaged or eroded portions of a project to its original design, form, or function.
 - 3. Modifications: Actions that change the original design, form, or function of a project.
- e. There should be some articulated sideboards that preclude maintenance funding from being used for new and redesign where the project is significantly altered and the assessed have no recourse or vote.
 - i. On September 1, 2020, the ND Attorney General issued Opinion 2020-L-04 regarding several questions from Senator Rich Wardner regarding assessment drains, including the use of maintenance funding for projects. The below excerpts are worth considering.

ii. Letter Opinion 2020-L-04, Analysis, Section IV, pages 12-13:

Further, you ask a number of related questions concerning whether a vote of the landowners is required before commencing a project under N.D.C.C. ch. 61-16.1 referred to as maintenance by a “Resolution of Necessity” when the project, as a whole, will exceed the maximum six-year levy under N.D.C.C. § 61-16.1-45, and also whether the maximum accumulated maintenance levy under N.D.C.C. §§ 61-16.1-45 and 61-21-46 are calculated on a project-by-project basis.

Several assumptions must be made to answer the initial portion of this question. First, because you have limited your question to projects under N.D.C.C. ch. 61-16.1, the provisions of N.D.C.C. ch. 61-21 do not apply; however, for drains managed under that chapter, N.D.C.C. §§ 61-21-46 and 61-21-47 could be relevant to your question.

Second, I am assuming the “project” is not one constructed by a federal agency such that N.D.C.C. § 61-16.1-40.1 (dealing with federally constructed projects) would apply to this question.

Third, as discussed above, “project” is defined quite broadly in N.D.C.C. § 61-16.1-02. Because your question explicitly references N.D.C.C. § 61-16.1-45, and due to the context of the remainder of your questions, I will assume your request is limited to drains/assessment drains, rather than the entire scope of “projects” defined in N.D.C.C. § 61-16.1-02.

Finally, I am aware that some water resource boards use a “Resolution of Necessity” simply as a means to “authorize” particular actions or projects the board wishes to undertake. Therefore, I presume the term “Resolution of Necessity” does not imply a particular legal meaning within the context of this question, but is just a formal substitute for the term authorization.

Under N.D.C.C. § 61-16.1-45,²⁹ water resource districts may establish a fund for the costs of clean out and repair of assessment drains. Each fund established under this section would be specific to a given assessment project. In other words, a water resource district could establish several distinct funds, each containing levy amounts that could only be expended on clean out and repairs for the specified project.

Each year, the water resource district may levy up to the maximum amount authorized by the statute, per drain fund, regardless of whether there is any planned clean out or repairs for that year. The water

resource district may accumulate up to six years' worth of levies in an account per drain fund.

Your questions all relate to the funding of a project that would cost more than the maximum allowable fund balance, how that project can be funded, and whether additional voting is required. A project such as this could be funded in several ways, which will determine whether additional voting is required.

The relevant portion of N.D.C.C. § 61-16.1-45 states: “[i]f the cost of, or obligation for, the cleaning and repairing of any drain exceeds the total amount that may be levied by the board in any six-year period, the board shall obtain approval of the majority of the landowners [by vote] *before obligating the district for the costs.*”³⁰

1. Footnote 29: This analysis would equally apply to N.D.C.C. § 61-21-46 because these statutes are identical in all material respects.
2. Footnote 30: N.D.C.C. § 61-16.1-45(3) (emphasis added).

iii. Letter Opinion 2020-L-04, Analysis, Section V, page 13

Next you ask who is responsible for ensuring that the maximum six-year accumulated maintenance levy under N.D.C.C. §§ 61-16.1-45 and 61-21-46 is not exceeded.

When a levy is sought, a water resource board must file with the county auditor of each county in the district a financial report for the preceding calendar year showing the ending balances of each fund held by the water resource district during that year.³¹ The report and the proposed budget are provided to the county commission for approval.³² Initial responsibility for all water resource district budget related items falls to the board of the water resource district. The county auditor has oversight responsibility for a district's financial expenditures, as does the board of county commissioners.³³ Additionally, the country treasurer has some oversight responsibility.³⁴ Thus, the budget and levy process provide many opportunities for review by various county officials.³⁵ Ultimately, it is the county commission that has the authority to direct that any accounts of the county be audited and verified.³⁶

1. Footnote 31: N.D.C.C. § 61-16.1-06.
2. Footnote 32: *Id.*
3. Footnote 33: N.D.C.C. § 61-16.1-06; *see also*, N.D.C.C. §§ 11-13-02, 11-13-04.
4. Footnote 34: N.D.C.C. §§ 11-14-06 through 11-14-10.

5. Footnote 35: All county records regarding its accounts and levy status are subject to the North Dakota open record laws. See, N.D.C.C. § 44-04-18.
6. Footnote 36: N.D.C.C. § 11-11-11(3).
5. Section 8 – pages 12 and 13 – lines 29 – 8
 - a. N.D.C.C. ch 61-16.1, with the proposed repeal of N.D.C.C. ch. 61-21, is the only vehicle for assessment projects, including drains.
 - b. Proposed language references “proposed drain” instead of “proposed project” as done elsewhere in draft bill.
 - c. This could have unintended limitations of “request” projects.
6. Section 11
 - a. Page 16 – lines 18-19
 - i. The deletion of the official county newspaper is problematic because then WRD could publish in the Bismarck Tribune, Fargo Forum, etc. Not everyone gets those or has access.
7. Section 13 – page 19 - lines 20 – 30
 - a. Same issue remains that the WRD may adjust the assessments at the hearing but there is no finality to the hearing, which leaves the appeal start date open under 16.1-23.
8. Section 20 – page 23 – lines 19 - 20
 - a. “shall make necessary openings... at its own expense” continues to makes it seem like 100% cost of culvert replacement due to assessment drains is a road authority expense. May need more clarification.
9. Section 23 – page 26 (See comments on Section 2 above)
 - a. Changed to only apply to obstruction of artificial drains, removing existing coverage and process for obstructions to “waterways” and “watercourses”
 - b. In order to keep the obstruction procedure as clear as possible, “waterway” could be moved from N.D.C.C. § 61-01-23 as proposed and instead be inserted as part of N.D.C.C. § 61-16.1-51.
10. Section 29 – lines 3 – 5
 - a. The “area in which the drain will lie” appears to only focus on drain footprint and not contributing area of the drain.
11. Section 32
 - a. Appears to be in conflict with N.D.C.C. § 61-32-07 (drainage complaint code) and duplicates an existing administrative appeal process (see attached DWR appeal

chart for detailed outline of drainage complaint and appeal process under N.D.C.C. ch. 61-32).

- b. N.D.C.C. § 61-32-07 not proposed to be repealed with this bill
- c. N.D.C.C. ch. 61-32 specific to authorized drainage of water, so complaint regarding unauthorized drainage may make sense to keep in same N.D.C.C. chapter.

23.0025.03000:

1. Section 6

- a. DWR supports leaving language as proposed in draft 25.02000 because it affords the water resource districts the latitude to use DWR EA guidance document but does not force them to use DWR EA tool.
- b. The DWR does not currently have available staffing resources to support broad EA tool usage outside of the current State Water Commission cost-share application review support as outlined in N.D.C.C. § 61-03-21.4.

2. Section 12

- a. Same as comment 1(d) for bill 23.0024.03000.