

Testimony
Senate Bill 2208 – State Water Commission
Agriculture Committee
Senator Larry Luick, Chairman
January 28, 2021

Chairman Luick, and members of the Senate Agriculture Committee – I am Aaron Carranza, Regulatory Division Director of the State Water Commission. I am here today to provide testimony in support of Senate Bill No. 2208.

My office is aware of the necessity of this legislation, as the resolution of discrepancies between North Dakota Century Code (N.D.C.C.) chapters 61-16.1 and 61-21 is long overdue. The State Water Commission and Office of the State Engineer commends this legislature for tackling this issue. Given our office's knowledge of these chapters, we stand ready to provide any insight regarding the existing chapters and how the proposed changes may affect these issues moving forward.

My office supports this legislation, contingent upon consideration of several recommendations for enhancement.

We have noted that the drainage complaint and drainage complaint appeals sections from N.D.C.C. §§ 61-32-07 and 61-32-08 are missing from this proposed legislation. We strongly encourage this legislation be amended to include both of these sections. The complaint and complaint appeal process provides an administrative remedy to determine if a drain permit was needed, but not obtained, by a party. Without these statutes, anyone questioning the legal nature of a drain would need to file a lawsuit to get an answer.

Our office also believes several of the definition changes proposed could use some additional attention.

Specifically, our office believes the proposed new “maintenance” definition is confusing with respect to drainage permitting, especially since maintenance is already defined for drainage permitting in North Dakota Administrative Code (N.D.A.C.) § 89-02-01-02(8). The proposed maintenance definition assumes that all drains have received permits, which is not the case with many older or grandfathered drains predating drainage permitting requirements that began in 1957. Consequently, our office recommends not tying the maintenance definition explicitly to prior drainage permitting.

Additionally, the continued inclusion of the definition “cleaning out and repairing of a drain” muddies the distinction between maintenance and modification of a drain. While the cleaning definition is not a new definition, a new focus on maintenance will render the cleaning out and repairing of a drain definition redundant with the new maintenance definition. Our office recommends including the “cleaning out and repairing of a drain” language within the new “maintenance” definition.

Finally, the inclusion of “dikes” in the proposed definition of a “drain” in N.D.C.C. § 61-16.1-02(8) will likely create confusion as “dikes” are specifically permitted under N.D.C.C. § 61-16.1-38 through the construction permit process and are defined in N.D.A.C. § 89-08-01-01. To avoid confusion, the term “spoil piles” or something similar could be used instead of “dikes” in the “drain” definition.

In addition to these recommended considerations, the following are other items of note:

- The proposed changes to N.D.C.C. § 61-16.1-09.1 on page 5, lines 18-21 of the Senate Bill 2208 read “To the extent practicable, water resource boards in a common basin shall prepare and execute a basin-wide plan for snagging, clearing, and maintaining natural water courses; and removing debris from bridges and low-water crossings.” We respectfully request that a clear definition be provided regarding “common basin,” and

if it is the intent of the legislature to require the basin-wide plan as a condition of cost-share eligibility, to please make that clear.

- This legislation does not add clarity to the distinction of when the “hearing on assessments” has ended and when assessments may be appealed to the State Engineer under N.D.C.C. § 61-16.1-23. This is often a disputed fact when a party appeals assessments to the State Engineer.
- This legislation does not include any reference to assessment drains being required to meet the stream crossing standards of N.D.C.C. §§ 24-03-06 and 24-03-08.
- This legislation does not add clarity on a water resource district’s ownership or maintenance authority for any dam constructed by a federal agency but not maintained or operated by a federal agency as currently outlined in N.D.C.C. § 61-16.1-40.

The State Water Commission supports the passage of Senate Bill 2208 with the above recommended considerations. The State Water Commission supports the goal to provide clearer regulations and guidance to agency staff, water resource districts, and the general public regarding drains in North Dakota. If needing further background on current definitions for drainage, the State Water Commission has recently established a policy to refine definitions with respect to surface drainage permitting (see REG-2020-2 Drainage Permitting Definitions enclosed). This policy was developed to help provide clear, transparent, and definitive answers to recurring questions on definitions from landowners and water resource districts. This policy may help in crafting enhancements to Senate Bill 2208.

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



POLICY/GUIDELINES

REG-2020-2

DRAINAGE PERMITTING DEFINITIONS

REG-2020-2

DRAINAGE PERMITTING DEFINITIONS

EFFECTIVE: 02/21/2020

POLICY VERSION 1

POLICY OUTLINE

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1. POLICY STATEMENT

This policy intends to establish clearer definitions of “drain” and what constitutes “drainage” or “draining” requiring a permit under N.D. Century Code (N.D.C.C.) section 61-32-03 and N.D. Administrative Code (N.D.A.C.) chapter 89-02-01. Additionally, this policy aims to provide more clarity to the drainage permitting jurisdictional limits.

This policy harnesses the State Engineer’s mission, which is “managing the water resources of the state for the benefit of its people” by following specific agency goals to “regulate and manage water resources for the future welfare and prosperity of the people of North Dakota.”

1.1. POLICY AUTHORITY AND IMPLEMENTATION

This policy garners authority from N.D.C.C. section 61-32-03 and N.D.A.C. chapter 89-02-01 and will be implemented through drainage permit application and permit requirements.

1.2. STATE ENGINEER ACCEPTANCE OR ENFORCEMENT

The State Engineer reserves the right to change this policy as necessary to ensure the State Engineer fulfills his or her statutory duties. Additionally, the State Engineer reserves the right to return any application submittal under this policy to the applicant for correction if, in the State Engineer’s determination, it does not comply with the policy’s purpose or intent or is insufficient for the State Engineer to make an informed decision. The State Engineer reserves the right to enforce this policy as part of the drainage permit process outlined in N.D.C.C. section 61-32-03 and N.D.A.C. chapter 89-02-01.

1.3. APPEALS

State Engineer decisions may be appealed under N.D.C.C. section 61-03-22.

1.4. POLICY DEVIATIONS

Policy deviations will not be allowed. Unforeseen scenarios encountered during policy implementation may require policy changes from time to time.

2. PRE-APPLICATION CONSULTATION

The State Engineer strongly encourages pre-application consultation prior to a drainage permit application submittal. Early consultation, whether conference calls, meetings, or correspondence between the applicant, the applicant’s representatives, and the State Engineer, will ensure early understanding and compliance with this policy to limit any unexpected project costs, delays, or requirements.

3. GENERAL POLICY REQUIREMENTS

N.D.C.C. chapter 61-32 and N.D.A.C. article 89-02 require permits for “drainage of a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty areas or more.” In interpreting these statutes and rules, the following definitions apply:

- 3.1. “Appurtenant works to a drain” means drain features that are integral design and function components, including control structures, stream crossings, dikes, and spoil piles.
- 3.2. “Control structure” means a pump(s), sluice gate(s), stop-log structure(s), grade or drop control structure(s), or passive weir(s).
- 3.3. “Drain” means a physical feature, such as a ditch, pipe, or pump, constructed or used to accomplish drainage or draining of a pond, slough, lake, or sheetwater, or any series thereof, including appurtenant works. Other common terms that may be associated with a drain include legal drain, assessment drain, lateral drain, ditch, canal, channel, pipe, or diversion.

3.3.1. A drain means or includes:

- 3.3.1.1. A ditch or pipe constructed, installed, or operated to drain by gravity a pond, slough, lake, or sheetwater, or any series thereof.
- 3.3.1.2. A mechanical pump or siphon constructed, installed, or operated to drain a pond, slough, lake, or sheetwater, or any series thereof.
- 3.3.1.3. Placement of fill, as defined in this policy.
- 3.3.1.4. Modifications to a watercourse for the purpose of enhancing, opening, or improving the watercourse, including slope modifications or improvements, deepening, widening, straightening, rerouting, or diverting of watercourses.
- 3.3.1.5. Modifications to an existing drain or its appurtenant works for the purpose of modifying how the original drain operates or accomplishes drainage or draining, including slope modifications or improvements, deepening, widening, enlarging, rerouting, or extending existing drains, as well as changes to a drain’s previously authorized or permitted control(s) or operation plan(s).
- 3.3.1.6. Municipal or city stormwater management activities that occur within the jurisdictional limits of a municipality or city for the purposes of draining a watercourse, pond, slough, or lake, or any series thereof or constructing or modifying an assessment drain.

3.3.2. A drain does not mean or include:

- 3.3.2.1. Maintenance of a drain or watercourse, which includes removal of silt and vegetation from a drain or watercourse.
- 3.3.2.2. Construction, installation, modification or removal of a stream crossing.
- 3.3.2.3. Municipal or city stormwater management activities that occur within the jurisdictional limits of a municipality or city and for the purposes of managing sheetwater runoff. These activities include constructing, modifying, and maintaining storm sewer and appurtenant works to alter the sheetwater flow. It is recommended that such activities be

- regulated under a stormwater management plan recognized by the municipal or city government, as defined in N.D.C.C. chapter 40-01.
- 3.3.2.4. Land use changes, such as the construction, modification, or maintenance of buildings, parking lots, streets, lots, or similar activities, that alter sheetwater flow.
- 3.3.2.5. Agricultural practices, such as farming, plowing, or working the soil to prepare soil for planting or seeding agricultural crops.
- 3.3.2.6. Temporary dewatering of dam or pond reservoirs or construction sites for inspection, repair, or construction.
- 3.3.2.7. Reservoir operation of dam and pond spillways.
- 3.3.2.8. Beneficial use of water, as described in N.D.C.C. chapter 61-04, including domestic, municipal, livestock, irrigation, industrial, fish, wildlife, or recreational uses. This includes replacement of baseflow in a watercourse for the purpose of water supply, as is the case under drought conditions.
- 3.3.2.9. Highway or road ditch and drainage activities, including constructing, modifying, and maintaining reasonable road ditch drainage for and by federal, state, county, and township roadways within the state. This does not include:
 - 3.3.2.9.1. Drainage features constructed, modified, or maintained within a highway or road right-of-way by someone other than the road authority of jurisdiction;
 - 3.3.2.9.2. Modification of a watercourse;
 - 3.3.2.9.3. Assessment drains; or
 - 3.3.2.9.4. Drainage of ponds, sloughs, lakes, or any series thereof.
- 3.3.2.10. Subsurface water management, as described and regulated under N.D.C.C. section 61-32-03.1.
- 3.4. "Drainage" or "draining" means the removal of water from a pond, slough, lake, or sheetwater, or any series thereof by the construction of a new drain or modification of an existing drain. This includes the removal of water volume or storage or the removal of water faster than occurs under existing conditions.
- 3.5. "Placement of fill" means material, such as earth, soil, concrete, rubble, or riprap, placed in a pond, slough, lake, or any series thereof, with the intent to accomplish drainage or draining of one of those water features by storage removal.
 - 3.5.1. Placement of fill means or includes:
 - 3.5.1.1. More than ten-percent reduction in a pond, slough, lake, or any series thereof as a function of fill volume (acre-feet) versus the pond's, slough's, or lake's existing surface area (acres).
 - 3.5.2. Placement of fill does not mean or include:
 - 3.5.2.1. Fill placed in "sheetwater."

- 3.5.2.2. Fill placed in an existing drain or watercourse, as that action would either be a modification to or an obstruction of an existing drain or watercourse.
 - 3.5.2.3. Fill or earthwork to construct or modify a “dam, dike, or other device” under N.D.C.C. section 61-16.1-38 and N.D.A.C. article 89-08.
 - 3.5.2.4. Fill or earthwork necessary to construct or modify a road or highway embankment otherwise subject to the road authority’s jurisdiction.
 - 3.5.2.5. Transmission poles, pilings, foundations, or any other infrastructure of a similar footprint.
 - 3.5.2.6. Fill placed above the natural outlet elevation of a slough, pond, lake, or any series thereof, otherwise not removing available volume or storage of those water features.
- 3.6. “Sheetwater” is defined in N.D.C.C. section 61-32-03. Generally, sheetwater is synonymous with the terms overland flow, runoff, surface water, excess water, and floodwater. Specifically, sheetwater includes water running or flowing over land or the surface of the earth as the result of normal precipitation, such as rainfall or snowmelt, or as the result of water beyond normal runoff or precipitation, such as the case with flooding.

4. POLICY ADDENDUMS




State Engineer Technical Memo – dated February 21, 2020

No Policy Revisions available

TECHNICAL MEMORANDUM

DATE: **February 21, 2020**

TO:  Garland Erbele, P.E., State Engineer

FROM:  John Paczkowski, P.E., Assistant State Engineer
 Aaron Carranza, P.E., Director, Regulatory Division
 Matt Lindsay, P.E., Manager, Engineering and Permitting Section

SUBJECT: **DEFINITIONS FOR DRAINAGE PERMITTING**

There is often confusion between the definition of a "drain," which is listed in N.D. Century Code section 61-21-01(4), and what constitutes "drainage" requiring a permit under N.D. Century Code section 61-32-03 and N.D. Administrative Code article 89-02. Historically, the State Engineer and water resource districts have relied on the definition of a "drain" in N.D. Century Code section 61-21-01(4) to aid in identifying drainage requiring a permit under N.D. Century Code section 61-32-03. Additionally, N.D. Administrative Code section 89-02-01-03 has informed this definition by listing "Permit required" criteria that expanded on the types of drainage projects requiring a drainage permit. However, that criteria, like the definition of a "drain," have been and continue to be vague and broad, which has led to more uncertainty and inconsistency in what has been construed by the State Engineer and water resource districts as "drainage or draining" requiring a permit under N.D. Century Code section 61-32-03. Additionally, confusion over what activities constitute drainage requiring a permit, such as modifications to existing drains, drainage versus diversion channels, city versus county jurisdiction, placement of fill, etc. continue to persist. Consequently, further clarification and expansion upon the definition of a drain described above as well as further expansion on the intent of the language in N.D. Administrative Code chapter 89-02-01 is necessary to limit or minimize these ongoing jurisdictional questions.

The "Definitions for Drainage Permitting" policy (Policy) enclosed intends to establish clearer definitions of what a "drain" is that constitutes "drainage or draining" requiring a permit under N.D. Century Code section 61-32-03 and N.D. Administrative Code chapter 89-02-01. Additionally, the Policy aims to provide more clarity to the jurisdictional limits of drainage permitting via these definitions.

There are several areas where this policy is to more clearly articulate the jurisdictional limits of drainage permitting. Those areas are summarized below:

1) Clarifying the difference between "drain" and "drainage or draining"

The term "drain" has often referred to the physical feature (i.e., noun) constructed or modified while the terms "drainage or draining" have often referred to the action (i.e., verb) of drainage. However, these terminologies have never been differentiated in rule, statute, or policy. The definitions proposed in the Policy would expand upon these terms to provide

clearer context as to what types of projects or activities constitute a “drain,” “drainage,” or “draining.”

2) Clarifying the difference between “modification” and “maintenance” of a drain

There has often been confusion in distinguishing between “modification of a drain” and “maintenance of a drain.” While existing Administrative Code speaks broadly to these terms, further context is needed to address common scenarios. The Policy will clarify that modifications to watercourses, such as slope modifications or deepening, widening, extending, straightening, rerouting, and diverting all constitute drainage requiring a drainage permit. Also, the Policy will provide greater specificity to modifications to drains.

3) Clarifying the meaning of the term “sheetwater” and its context within drainage permitting

There is often confusion over the term “sheetwater” and its meaning regarding drainage permitting requirements. The State Engineer has historically interpreted the term to be synonymous with the terms “overland flow,” “runoff,” and “floodwater” as well as other terminology that describe nuisance water flowing unrestrained over the surface of the earth. While the State Engineer has interpreted the term this way in practice, these clarifications have never been codified or adopted in policy. Given the importance of the term and its context regarding the jurisdictional limits of drainage permitting, the definition was expanded upon in the Policy to provide more context.

4) More clearly identifying what types of projects are and are not drains

There are several common scenarios where the need for a drainage permit is a recurring question. In practice, the State Engineer has not required drainage permits for these scenarios. However, these scenarios have never been codified or adopted in policy. The scenarios below are therefore addressed in the Policy:

- a. Urban land use changes
- b. Agricultural practices, such as plowing, cultivating, planting, seeding, etc.
- c. Temporary dewatering of construction sites or dam or pond reservoirs
- d. Operation of dam or pond reservoirs
- e. Irrigation or water use

5) Providing clearer jurisdictional limits to the following scenarios:

- a. City vs. water resource district jurisdiction

Questions often arise as to the applicability of drainage permitting within city limits or stormwater management applications. Historically, the State Engineer has not regulated city or municipality management of sheetwater via stormwater management systems as drainage. However, such a distinction has never been codified or adopted in policy. Additionally, the State Engineer has historically asserted jurisdiction over drainage activities involving ponds, sloughs, lakes,

assessment drains, and watercourses within city limits. The Policy intends to clarify these jurisdictional questions within the definition of a “drain.”

b. Diversions vs. drains

There is often confusion over the difference between a “diversion” requiring a construction permit under N.D. Century Code section 61-16.1-38 and a “drain.” Consequently, a construction permit and drainage permit are often required for the same project. The Policy intends to clarify this issue by stipulating that a diversion of a watercourse is a “drain.” The State Engineer intends to further limit the scope of “diversion” permitting under N.D. Century Code section 61-16.1-38 under future Administrative Code changes.

c. Road ditches vs. drains

Questions often arise regarding the need for a road authority to obtain a drainage permit for the construction of road ditches within their road rights-of-way. Several North Dakota Supreme Court cases have discussed this topic to some degree and have concluded road authorities are required to provide drainage, but not “perfect” drainage. These court cases have also refined the jurisdictional limits between road authorities and water resource districts. Consequently, the State Engineer has historically recognized road authority’s ability to construct road ditches without the need for a drainage permit so long as the road ditches were specific to the road design needs. However, the State Engineer believes there is a limit to what road drainage is reasonable given how the construction of a road or highway can change drainage patterns beyond the scope of immediate road right-of-way. The Policy intends to clarify how these situations will be addressed to better distinguish between the jurisdiction of road authorities and water resource districts.

d. Placement of fill

Questions often arise as to what constitutes “placement of fill” requiring a permit for drainage. Without further context provided in N.D. Administrative Code section 89-02-01-03, the State Engineer is often left to determine many projects require a drainage permit because the intent of the rule is not clearly articulated. The Policy intends to provide a “placement of fill” definition that will more clearly identify what activities are regulated as drainage requiring a permit. The option proposed is to create a ten-percent threshold, where the volume of fill divided by the surface area of the pond, slough, or lake cannot exceed ten-percent without requiring a drainage permit. This was determined to be a reasonable as determining surface area of a pond, slough, or lake is a much easier task than determining its volume. Ten percent was chosen as a happy medium for what was thought to be a reasonable amount of fill to not constitute something as drainage requiring a permit.

e. Appurtenant works to a drain

Questions often arise regarding construction or modification to a drain’s appurtenant works and whether such activities require a drainage permit. Generally, appurtenant works have been considered control structures, such as sluice gates, stop-log structures, grade or drop structures, or passive weirs, stream

crossings, and spoil piles. The Policy intends to clarify when the construction or modification of these works requires a drainage permit. Generally, the construction, modification, or change in operation of a control structure requires a drainage permit. Additionally, since spoil piles are typically integral to a drain's design, spoil pile modifications require a drainage permit as well. However, activities completed in accordance with N.D. stream crossing standards, such as those through township, county, or state roads, do not require a drainage permit as those are required by statute.

RECOMMENDATION

I recommend the State Engineer adopt the enclosed “Definitions for Drainage Permitting” policy to better define the jurisdictional limits of drainage permitting for State Engineer staff, water resource districts, and the general public. If adopted, the policy may inform future N.D. Administrative Code amendments, if necessary. However, I believe the policy expands upon existing Century and Administrative Code such that it can be implemented immediately without the need for Century or Administrative Code changes.