

ARTICLE 89-02 DRAINAGE OF WATER

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CHAPTER 89-02-01 DRAINAGE OF PONDS, SLOUGHS, LAKES, SHEETWATER, OR ANY SERIES THEREOF

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89-02-01-01. Intent.

Repealed effective January 1, 2015.

89-02-01-02. Definitions.

Unless the context otherwise requires, the following definitions apply:

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~~61-16.1-02.
3. "District" ~~means water resource district~~ is defined in North Dakota Century Code section 61-16.1-02.
4. "Drain" is defined in North Dakota Century Code section ~~61-21-01~~61-16.1-02.
5. "Department" is defined in North Dakota Century Code section 61-03-01.2.
6. "Director" is defined in North Dakota Century Code section 61-03-01.2.
7. "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.
8. "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.
9. "Lateral drain" is defined in North Dakota Century Code section ~~61-21-01~~61-16.1-02.
10. "Maintenance" means removal of silt and vegetation from a drain. Maintenance does not include deepening or widening a drain.
11. "Parties of record" means each person named or admitted as a party or properly seeking and entitled to be admitted as a party.
12. "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.
13. "Pond, slough, lake, sheetwater, or any series thereof" means ponds, sloughs, lakes, or sheetwater that are hydrologically linked.
14. "Sheetwater" is defined in North Dakota Century Code section 61-32-03.

15. "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.

~~16. "Supplemental hearing" means a hearing held to review evidence not contained in the record of the department's public hearing.~~

~~17.~~16. "Watercourse" is defined in North Dakota Century Code section 61-01-06.

~~18.~~17. "Watershed area" means the area that drains into a pond, slough, lake, sheetwater, or any series thereof.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015; January 1, 2023;_____.

General Authority: NDCC 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 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 department;

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

However, these agencies must notify the department 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; January 1, 2023.

General Authority: NDCC 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.~~ As a part of a drainage permit application, applicants must report to the department the watershed area proposed to be drained by the project and how it was determined. This information may be verified by the department through publicly available information from relevant local, state, or federal agencies. This information may be supplemented by aerial photographs of the watershed or by any information obtained from an onsite investigation requested by the applicant or board or if the department determines it is necessary.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; January 1, 2015; January 1, 2023;_____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-07. Filing application – application completeness.

Any person desiring a drainage permit must file an a complete application form with the department on a form provided by the department. ~~If requested by the department 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 director or board to make an informed decision on the application, it will be returned to the applicant for correction.~~

If the application is deemed complete, the department will begin its review of the application for statewide or interdistrict significance under section 89-02-01-07.4.

If the application is deemed incomplete, the department will notify the applicant, in writing, within fifteen working days of the application being submitted, that the application is deemed incomplete and detail the application's deficiencies. Applicants may resubmit a new application with deficiencies addressed for department consideration under this section.

Applications are subject to department requirements at the time the application is submitted to the department.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; January 1, 2015; January 1, 2023;_____.

89-02-01-07.1. Application amendments.

1. If an applicant wishes to make a change to their application after the application contents have been submitted to the department and without an identified deficiency by the department or board, they must withdraw the application and submit a new application.
2. If the department or board identifies a deficiency in the application during the department review under section 89-02-01-09.2, the department will notify the applicant of the deficiency in writing. The applicant may amend the application if it is in response to an application deficiency identified by the board or department during the initial or department review. The department will cease its review of the application upon notification to the applicant that a deficiency has been identified. The applicant has sixty working days from the notification by the department to make any necessary amendments to the application. This timeline may be extended in consultation with the department. If the department does not receive an application amendment or extension request within sixty working days, the application will be denied. The department will have sixty working days to review and approve or deny the application from the receipt of the most recent amendment. All amended applications will be subject to department review under section 89-02-01-09.2.

History: Effective _____.
General Authority: NDCC 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-07.2. Department and applicant coordination.

If the department needs further information or support materials from the applicant during the department review, the department review will cease and the applicant will be notified, in writing, of the department's need for information or additional support materials.

The applicant has sixty working days from the notification by the department to provide the requested information or materials. This timeline may be extended in consultation with the department.

If the department does not receive the requested information, materials, or extension request within sixty working days, the application will be denied.

The department will have sixty working days to review and approve or deny the application from the receipt of the most recently requested information or materials from the applicant.

History: Effective _____.
General Authority: NDCC 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-07.3. Extension of department review.

In unique or complex situations, the department and applicant may agree to suspend the working day requirements detailed in this chapter.

History: Effective _____.
General Authority: NDCC 61-03-13
Law Implemented: NDCC 61-32-03

89-02-01-07.4. Review for statewide or interdistrict significance – Determination.

The department will not begin its review of the application for statewide or interdistrict significance until the application is deemed complete in section 89-02-01-07. The department must consider the criteria in section 89-02-01-09 in making its determination on whether the drain is of statewide or interdistrict significance.

Upon completion of the department's determination, or within sixty working days, the department will refer the application to the district or districts within which is found a majority of the watershed or drainage area of the pond, slough, lake, sheetwater, or any series thereof for consideration along with any application comments, recommendations, or engineering data.

The department will require applications proposing drainage of statewide or interdistrict significance to be returned to the department if approved by the district. The district is responsible for returning the application to the department for the department's final review and approval.

History: Effective _____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-08. Referral of applications to appropriate district.

~~[Repealed effective _____] Upon receipt of a properly completed application, the department must determine whether the application involves drainage of statewide or interdistrict significance under section 89-02-01-09. The department 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; January 1, 2023.~~

~~**General Authority:** NDCC 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 department must consider the following criteria:

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. The review may include a solicitation of comments. For good cause, the department may classify or refuse to classify determine or refuse to determine any proposed drainage as having statewide or interdistrict significance.~~

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; January 1, 2015; January 1, 2023; _____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.1. ~~Board procedure for processing applications to drain~~Department information gathering meeting.

- ~~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 department of environmental quality.~~
 - ~~(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 department.~~
 - ~~(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 board's consideration 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 department. The board must provide a meeting transcript at the request of the department. 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 department.~~

~~(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 department.~~

~~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 department.~~

~~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 department 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 director 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 department.~~

Upon receipt of the board's approval of a drainage application for drains determined to have statewide or interdistrict significance in section 89-02-01-07.4 and any information received or considered by the board as a part of that permit application, the department will hold an information-gathering public meeting.

The procedure for notice and meeting must be as follows:

1. The department must publish a notice of meeting 30 days prior to holding the meeting.
2. The meeting must be conducted by the department and the meeting may be held in Bismarck.
3. The meeting is not an adjudicative proceeding hearing under North Dakota Century Code chapter 28-32.

History: Effective February 1, 1997; amended effective January 1, 2015; January 1, 2023;_____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.2. ~~Evaluation of applications~~ Department review - Factors considered – Drains of statewide or interdistrict significance.

~~All applications to drain, must consider the following factors:~~ The department will have sixty working days to review and approve or deny drainage applications for drains determined to have statewide or interdistrict significance in section 89-02-01-07.4 from the time the most recent application amendment detailed in section 89-02-01-07.1 is received and subject to department and applicant coordination detailed in section 89-02-01-07.2. The sixty working day review period begins the day after the information gathering meeting in section 89-02-01-09.1.

The department will review the board's approval of the application, any information received or considered by the board as a part of the board's review, and information gathered from the department information gathering meeting in section 89-02-01-09.1. The department may request additional information such as plans and specifications of the drain, an operation and maintenance manual, proof of flowage easements, or additional engineering analysis of the downstream impacts as a part of the review.

As a part of the department review of applications proposing drainage of statewide or interdistrict significance, the department 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 required easements ~~are required~~ have been obtained; and
8. Other factors unique to the project.

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

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-01-26, 61-16.1-10(3), 61-32-03

89-02-01-09.3. Time for determination by board.

[Repealed effective _____] ~~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 director. A request for a time extension must be in writing to the department and must set forth the reason for the request. If no determination has been made and no extension has been requested, unless the director 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-32-03~~

89-02-01-09.4. Evaluation of applications by the director of statewide or interdistrict significance - Information to be used.

[Repealed effective _____] ~~In the director's evaluation of statewide or interdistrict significance applications, the director must use all relevant documentary information submitted and oral testimony given for the board's consideration at its meeting. The director may use any information in the files and records retained by the department or engineering information developed or obtained through investigation of the project area by the department's staff.~~

~~The director 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-32-03~~

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

1. The department must provide a copy of the ~~determination~~ decision to the parties of record.
2. 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; and
- f. That a hearing may be requested on the project ~~within thirty days of the date of service of the director's decision; and~~ under North Dakota Century Code 61-03-22.
- ~~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 director'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; January 1, 2023; _____.

General Authority: NDCC 61-03-13

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

89-02-01-09.6. Request for department's hearing.

[Repealed effective _____] ~~All requests for a formal hearing on a project must be made in writing to the department within thirty days of the date of service of the director's decision. The request must specifically state facts from which it is evident the person requesting the hearing is factually aggrieved by the director'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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

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

89-02-01-09.7. Notice of department's hearing.

[Repealed effective _____] ~~If the director determines that a request for a hearing on an application of statewide or interdistrict significance is valid and well founded, the department 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 department of environmental quality, 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-03-22~~

89-02-01-09.8. Evidence at the department's hearing.

[Repealed effective _____] ~~Evidence at the department'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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

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

89-02-01-09.9. Time for determination by the director - Copies of decision.

~~[Repealed effective _____] Unless the director determines the hearing raises complex or unique issues, the director 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 department 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-03-22~~

89-02-01-09.10. Consideration of evidence not contained in the department's record.

~~[Repealed effective _____] The record of the department's hearing must be closed at the conclusion of the department's formal hearing. It is in the director's discretion to receive testimony and evidence not contained in the record. However, before considering any evidence not contained in the record, the department 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 department within ten days after transmittal of the additional evidence. Any request for a supplemental hearing must provide sufficient information to allow the director 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-03-22~~

89-02-01-09.11. Conditions to permits.

~~Unless otherwise specifically stated, the department may attach conditions to permits of statewide or interdistrict significance.~~

~~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 director or board may attach other conditions to the permit if necessary.~~

History: Effective February 1, 1997; amended effective April 1, 2000; January 1, 2015; January 1, 2023; _____.

General Authority: NDCC 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~~ The permit recipient may make a written request to the board for a one-year extension to the time to complete construction of the drain. 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 director and the board.

History: Effective February 1, 1997; amended effective April 1, 2004; January 1, 2015; January 1, 2023;_____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 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 department.

~~[Repealed effective _____] A landowner's appeal to the department 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-03-22, 61-21-22~~

CHAPTER 89-02-04 DRAINAGE COMPLAINT APPEALS

Section

89-02-04-01	Scope of Chapter [Repealed]
89-02-04-02	Definitions [Repealed]
89-02-04-03	Filing of Complaint [Repealed]
89-02-04-04	Complaint to Department - Director's Action When Board Fails to Act [Repealed]
89-02-04-05	Form and Acceptance of Appeal
89-02-04-05.1	Form and Acceptance of Complaint
89-02-04-06	Department's Review of Board's Decision [Repealed]
89-02-04-07	Sufficiency of Information on Appeal [Repealed]
89-02-04-08	Department's Independent Investigation
89-02-04-09	Demand for Hearing by Affected Landowner [Repealed]
89-02-04-10	Request for Hearing by Others than Affected Landowners [Repealed]
89-02-04-11	Appointment of Hearing Officer [Repealed]
89-02-04-12	Purpose of Hearing [Repealed]
89-02-04-13	Qualifications of Witnesses at Department's Hearings [Repealed]
89-02-04-14	Notice of Hearing [Repealed]
89-02-04-15	Issues Limited to those Contained in Notice [Repealed]
89-02-04-16	Notice of Witnesses at Hearing - Time Frame [Repealed]
89-02-04-17	Subpoena of Witnesses [Repealed]
89-02-04-18	Prehearing Conference [Repealed]
89-02-04-19	Order of Presentation at Hearing [Repealed]
89-02-04-20	Cross-examination [Repealed]
89-02-04-21	Record of Hearing - Consideration by Hearing Officer [Repealed]
89-02-04-22	Recommendation of Hearing Officer [Repealed]
89-02-04-23	Decision of Director on Record of Hearing [Repealed]

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 61-03-13

Law Implemented: NDCC 61-32-08

[Repealed effective _____](#)

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 department's or board's consideration of an appeal and who is actually damaged by the board's or director'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 department.~~

6. ~~"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 department.~~

7. ~~"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 department 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 department. 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; January 1, 2023.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-08 Repealed effective _____]

89-02-04-03. Filing of complaint.

Repealed effective _____ ~~All complaints are filed with the water resource board in the county where the drainage is located. Complaints filed with the department 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; January 1, 2023.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-08

89-02-04-04. Complaint to department - Director's action when board fails to act.

Repealed effective _____ ~~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 director action with the department. The request must include a copy of the complaint filed with the board and any documentation the landowner wishes the department to consider. The director must then determine whether to commence action against the board or conduct an investigation.~~

History: Effective October 1, 1988; amended effective January 1, 2015; January 1, 2023.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-08

89-02-04-05. Form and acceptance of appeal.

~~If a board makes a decision on a drainage complaint, any appeal to the department 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 department, and must include:~~ Any aggrieved party under North Dakota Century Code section 61-32-08(1) may appeal the board's decision to the department of water resources. The following information is required by the department in order to be considered a complete appeal. Only the information below will be accepted as a part of an appeal.

1. ~~The identity of all parties to the complaint.~~ A completed appeal form that includes the location of the alleged unauthorized drainage and the ownership information of the land on which the alleged drainage is located;
2. ~~Petitioner's interest in the water resource board's decision, including a statement of the impact the decision will have upon the petitioner.~~ A copy of the original complaint to the board and all of the materials required as a part of that complaint under North Dakota Century Code section 61-32-07;
3. ~~The relief petitioner seeks.~~ The board's decision; and
4. ~~A statement identifying the errors in the water resource board's decision that entitle the~~

- ~~petitioner to the relief sought specifying the reason why the board's position is erroneous.~~
- ~~4. All facts presented to the water resource board that support the petitioner's position.~~
 - ~~5. A legal description of the drainage area involved.~~
 - ~~6. A map depicting the drainage area and identifying the drainage complained of.~~
 - ~~7. A cashier's check to cover the cost of preparing a transcript of the proceedings before the board.~~

The department will not begin evaluating the appeal until all necessary documentation is provided to the department by the aggrieved party. If all required documentation is not provided to the department within the statutory submission timeline, the appeal will be deemed incomplete and void.

History: Effective October 1, 1988; amended effective January 1, 2015; January 1, 2023; _____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-08

89-02-04-05.1 Form and acceptance of complaint.

A person may file a complaint with the department if the board fails to investigate and make a determination concerning the complaint within a reasonable time as outlined in North Dakota Century Code section 61-32-08(2). The following information is required by the department in order to be considered a complete complaint. Only the information below will be accepted as a part of a complaint.

1. A copy of original complaint to the board and all of the materials required as a part of that complaint under North Dakota Century Code section 61-32-07; and
2. Proof that the complaint was submitted to the board. This must include the date the complaint was submitted to the board.

The department will not begin evaluating the complaint until all necessary documentation is provided to the department by the aggrieved party. If all required documentation is not provided to the department within the statutory submission timeline, the complaint will be deemed incomplete and void.

History: Effective _____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-08

89-02-04-06. Department's review of board's decision.

Repealed effective _____

~~Upon receipt of an appeal on a form provided by the department by an aggrieved party from a decision of a water resource district under North Dakota Century Code section 61-32-07, the department must review the board's decision. In the review, the department 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-32-08~~

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

Repealed effective _____

~~1. Once the department's review under section 89-02-04-06 is complete, the department will determine whether the information reviewed is sufficient to make a sound decision.~~

~~2. If the information is not sufficient, the department will either conduct further investigations or return the record to the board for its further investigation.~~

~~3. If the information is sufficient, the director 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 department or the board. If so, the director 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 department will notify all parties of the director's decision. 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-32-08~~

89-02-04-08. Department's independent investigation.

In addition to the information required in sections 89-02-04-05 or 89-02-04-05.1, the department may review the information below as a part of its independent investigation for appeals of the board's decision to the department and complaints to the department as a result of board inaction:

1. Topographic information and aerial photographs of the area;
2. Any existing surveys of the area;
3. Department records;
4. Laws, rules, and department policies that were in effect at the time of the alleged unauthorized drainage; or
5. Publicly available information from relevant local, state, or federal agencies.

The department may choose to conduct a site visit under North Dakota Century Code section 61-32-08 to obtain additional information.

~~After reviewing the board's decision and the items identified in section 89-02-04-06, the department 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 department. Any investigation the department undertakes in response to a complaint filed with the department because a board has not acted will be conducted under this rule.~~

History: Effective October 1, 1988; amended effective January 1, 2015; January 1, 2023;_____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-08

89-02-04-09. Demand for hearing by affected landowner.

Repealed effective _____ ~~Hearings demanded under North Dakota Century Code section 61-32-08 by an affected landowner must be made within fifteen days of notice of the director's decision. The affected landowner must also notify all parties of the landowner's demand for hearing within fifteen days of the director'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; January 1, 2023.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-32-08

89-02-04-10. Request for hearing by others than affected landowners.

Repealed effective _____

~~Any aggrieved party may request a hearing on the director's decision. A request for a hearing must specifically state the reason for the request, and a copy of the request must be sent to the department and to each party within fifteen days after notice of the director'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; January 1, 2023.

General Authority: NDCC 61-03-13

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

89-02-04-11. Appointment of hearing officer.

Repealed effective _____

~~Upon receipt of an appeal or demand for a hearing, the director 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; amended effective January 1, 2023.

General Authority: NDCC 61-03-13

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

89-02-04-12. Purpose of hearing.

Repealed effective _____ ~~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 department to examine other witnesses and evidence.~~
- ~~3. Provide the parties with an opportunity to cross-examine witnesses called by the department.~~
- ~~4. Allow the parties to call other witnesses to present evidence.~~

History: Effective October 1, 1988; amended effective January 1, 2023.

General Authority: NDCC 61-03-13

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

89-02-04-13. Qualifications of witnesses at department's hearings.

Repealed effective _____ ~~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 department may call witnesses on the department's own motion without the agreement of any party if the department 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; January 1, 2023.

General Authority: NDCC 61-03-13

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

89-02-04-14. Notice of hearing.

Repealed effective 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 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 director to adopt. Those urging the director's decision should be affirmed must be designated respondents. Those urging reversal or modification of the director's decision must be designated petitioners.

History: Effective October 1, 1988; amended effective August 1, 1994; January 1, 2015; January 1, 2023.

General Authority: NDCC 61-03-13

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

89-02-04-15. Issues limited to those contained in notice.

Repealed effective 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 61-03-13

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

89-02-04-16. Notice of witnesses at hearing - Time frame.

Repealed effective At least thirty days before the date set for the hearing, the petitioner must notify other parties, the board, the department, and the hearing officer 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 department, and the hearing officer 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 department, and the hearing officer of any rebuttal witnesses to be called and the content of their testimony. At least forty-five days before the date set for the hearing, the parties may agree to and submit an alternative scheduling order, as approved by the hearing officer. The department must notify the parties, the board, and the hearing officer of any witnesses the department intends to call in the notice of hearing. However, if testimony or evidence not provided to the board and not considered in the director's determination will

~~be presented by others, the failure of the department to identify a witness should not preclude the department from providing other testimony and evidence of a technical nature.~~

History: ~~Effective October 1, 1988; amended effective January 1, 2015; January 1, 2023.~~

General Authority: ~~NDCC 61-03-13~~

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

89-02-04-17. Subpoena of witnesses.

~~**Repealed effective** _____ 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 department's staff, the salary for that individual.~~

History: ~~Effective October 1, 1988; amended effective January 1, 2015; January 1, 2023.~~

General Authority: ~~NDCC 61-03-05(13), 61-03-13~~

Law Implemented: ~~NDCC 61-03-05, 61-32-08~~

89-02-04-18. Prehearing conference.

~~**Repealed effective** _____ 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 department, 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 department, and the hearing officer at least three days before the prehearing conference.~~

History: ~~Effective October 1, 1988; amended effective January 1, 2015; January 1, 2023.~~

General Authority: ~~NDCC 61-03-13~~

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

89-02-04-19. Order of presentation at hearing.

~~**Repealed effective** _____ 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 department. 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; January 1, 2023.~~

General Authority: ~~NDCC 61-03-13~~

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

89-02-04-20. Cross-examination.

~~Repealed effective _____ Oral cross-examination of adverse witnesses will be allowed by the petitioner and the respondent. The petitioner and respondent must designate one individual to cross-examine witnesses that side did not call. In addition, the department 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

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

89-02-04-21. Record of hearing - Consideration by hearing officer.

~~Repealed effective _____ 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 director in making the director's decision, but only under North Dakota Century Code section 28-32-25.~~

~~**History:** Effective October 1, 1988; amended effective January 1, 2015; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-32-08~~

89-02-04-22. Recommendation of hearing officer.

~~Repealed effective _____ After the hearing officer completes the consideration required under section 89-02-04-20, a written recommendation must be made to the director.~~

~~**History:** Effective October 1, 1988; amended effective January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-32-08~~

89-02-04-23. Decision of director on record of hearing.

~~Repealed effective _____ The director 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 director 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; January 1, 2023.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-32-08~~

**ARTICLE 89-08
DAMS, DIKES, AND OTHER DEVICES**

Chapter 89-08-01	Definitions
89-08-02	Construction Permits
89-08-03	Inspections
89-08-04	Operation and Maintenance <u>[Repealed]</u>

**CHAPTER 89-08-01
DEFINITIONS**

Section	
89-08-01-01	Definitions
89-08-01-02	Definition of Unsafe Dam, Dike, or Other Device [Repealed]

89-08-01-01. Definitions.

The following definitions apply in this article:

1. "Agricultural dike" means a dike capable of protecting land used for agriculture or similar purposes.
2. "Appurtenant works" means all works incident or attached to a dam, dike, or other device, including:
 - a. A spillway, either in the dam or separate from it;
 - b. The reservoir and its rim;
 - c. A low-level outlet; and
 - d. A water conduit, such as a tunnel, pipeline, or penstock, either through the dam, dike, or other device or their abutments.
3. "Capable of protecting" means flood-risk reduction to land, structures, or public infrastructure as the result of a dike.
4. "Construction" or "construct" means any activity for which a permit is required by North Dakota Century Code section 61-16.1-38, including construction, alteration, enlargement, or modification of a dam, dike, or other device.
5. "Dam" means any barrier, including any appurtenant works, constructed across a watercourse or an area that drains naturally to impound or attenuate the flow of water. All structures necessary to impound a single body of water are considered a single dam.
6. "Department" is defined in North Dakota Century Code section 61-03-01.2.
7. "Dike" means any artificial structures, including an embankment, floodwall, levee, or any appurtenant works, constructed with the primary intent to divert surface water for real or personal property protection or to otherwise provide storm or flood-risk reduction resulting from flooding due to seasonally high water or precipitation.
8. "Director" is defined in North Dakota Century Code section 61-03-01.2.
9. "Diversion" means any open channel, culvert, or ditch constructed to reroute a watercourse as defined by North Dakota Century Code section 61-01-06.

10. "Embankment" means a structure created by an artificial deposit of material upon the natural surface of the land that is designed to act as a water control device, support roads or railways, or for other similar purposes.
11. "Engineer" means a person who has been duly registered and licensed as an engineer by the North Dakota state board of registration for professional engineers and land surveyors.
12. "Farmstead" means an individual rural or farm property including a single dwelling or associated buildings, and up to ten acres [4.05 hectares] of land.
13. "Farmstead ring dike" means a dike capable of protecting only a farmstead.
14. "Height" means the maximum vertical distance from the stream channel bottom or lowest elevation of a naturally draining area to the top of dam.
15. "High-hazard dam" means a dam with high-hazard potential where failure or misoperation will probably cause loss of human life.
16. "Holding pond, lagoon, or dugout" means any artificial, hydraulically disconnected structure, including any appurtenant works, constructed to store water.
17. "Inspection" means a visual or mechanical check, a measurement, a boring, or any other method necessary for determination of the adequacy of construction techniques, conformity of work with approved plans and specifications, or the safety and operating performance of a dam, dike, or other device.
18. "Low-hazard dam" means a dam with low-hazard potential where failure or misoperation results in no probable loss of human life and low economic losses.
19. "Medium-hazard dam" means a dam with medium-hazard potential where failure or misoperation results in no probable loss of human life but can cause economic loss, disruption of lifeline facilities, or can impact other concerns.
20. "Other device" means a water control structure, other than a dam or dike, including diversions and holding ponds, lagoons, or dugouts.
21. "Owner" means any person who owns, controls, operates, maintains, manages, or proposes to construct a dam, dike, or other device. For the purpose of a construction permit application, "owner" means the person who owns the property or interest in property where the dam, dike, or other device will be built.
22. "Significant-hazard dam" means the same as "medium-hazard dam" and may be used interchangeably.
23. "Top of dam" means the top of the settled embankment or the elevation of the uppermost surface of a nonembankment dam, excluding accessory features, such as railings.
24. "Unsafe dam, dike, or other device" means any such structure that threatens harm to life or property or is improperly maintained.

History: Effective November 1, 1989; amended effective January 1, 2015; January 1, 2023; July 1, 2024.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-01-02. Definition of unsafe dam, dike, or other device.

Repealed effective January 1, 2015.

CHAPTER 89-08-02

CONSTRUCTION PERMITS

Section

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89-08-02-01. Determining if a permit is required.

1. The impounding capacity of a dam is calculated based upon the elevation at the top of dam. Storage below the existing adjacent ground surface is generally excluded from the capacity of a holding pond, lagoon, or dugout.
2. The area protected by a dike is calculated based upon the area protected as measured from the effective top of dike.
3. The diverting capacity of a diversion is calculated based upon the runoff from the National Oceanic and Atmospheric Administration Atlas 14 twenty-five year, twenty-four hour, precipitation event.
4. No construction can begin until a construction permit is obtained.

History: Effective November 1, 1989; amended effective April 1, 2004; January 1, 2015; January 1, 2023; July 1, 2024.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-01.1. Exceptions to the need for a permit.

The provisions of North Dakota Century Code section 61-16.1-38 do not apply to the following works with the sole intent to provide an opening to permit water flow:

1. Highway, street, or road stream-crossings;
2. Private driveway culverts;
3. Approach-crossing culverts or bridges; and
4. Railroad-crossing culverts or bridges.

History: Effective July 1, 2024.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-02. Initial review - Contents of application.

The department has forty-five working days to complete an initial review of the application and its contents. The initial review will determine what type of construction permit is required and if the application is complete.

The following information is required by the department in order for a construction permit application to be deemed complete.

1. ~~A completed construction permit application must include: plans~~ A completed application form;
2. Plans and specifications as stipulated by the department;
3. ~~evidence~~ Evidence establishing a property right for the property ownership or easement for the properties that will be affected by the construction of the dam, dike, or other device; and
4. ~~any~~ Any additional information required by the department.

If the application is deemed complete, the department will forward the application to the water resource board of the district within which the contemplated project is located, along with any identified changes, conditions, or modifications within the initial forty-five working days. If the water resource board is the applicant, the application will be processed under 89-08-02-02.1 without soliciting water resource board changes, conditions, or modifications.

If the application is deemed incomplete, the department will notify the applicant, in writing, that the application is deemed incomplete and detail the application's deficiencies. Applicants may resubmit a new application with deficiencies addressed for department consideration under this section.

Applications are subject to department requirements at the time the application is submitted to the department.

History: Effective November 1, 1989; amended effective June 1, 1998; April 1, 2004; January 1, 2015; January 1, 2023; July 1, 2024;_____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-02.1. Department review.

The department will begin its department review upon receipt of the board's suggested changes, conditions, or modifications to the application. If the board fails to send suggested changes, conditions, or modifications to the department within forty-five days, the board will be deemed to have no changes, conditions, or modifications to make, and the department will begin its department review.

The department will have sixty working days to review and approve or deny the application from the time the most recent application amendment detailed under section 89-08-02-02.2 is received and subject to department and applicant coordination detailed in section 89-08-02-02.3.

History: Effective_____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-02.2. Application amendments.

1. If an applicant wishes to make a change to their application after the application has been submitted to the department and without an identified deficiency by the department or board, they must withdraw the application and submit a new application.
2. If the department or board identifies a deficiency in the application during the department review under section 89-08-02-02.1, the department will notify the applicant of the deficiency in writing.

The applicant may amend the application if it is in response to an application deficiency identified by the board or department during the initial or department review. The department will cease its review of the application upon notification to the applicant that a deficiency has been identified. The applicant has sixty working days from the notification by the department to make any necessary amendments to the application. This timeline may be extended in consultation with the department. If the department does not receive an application amendment or extension request within sixty working days, the application will be denied. The department will have sixty working days to review and approve or deny the application from the receipt of the most recent amendment. All amended applications will be subject to department review under section 89-08-02-02.1.

History: Effective _____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-02.3. Department and applicant coordination.

If the department needs further information or support materials from the applicant during the department review, the department review will cease and the applicant will be notified, in writing, of the department's need for information or additional support materials.

The applicant has sixty working days from the notification by the department to provide the requested information or materials. This timeline may be extended in consultation with the department.

If the department does not receive the requested information, materials, or extension request within sixty working days, the application will be denied.

The department will have sixty working days to review and approve or deny the application from the receipt of the most recently requested information or materials from the applicant.

History: Effective _____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-02.4. Extension of department review

In unique or complex situations, the department and applicant may agree to suspend the working day requirements detailed in this chapter.

History: Effective _____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-03. Permit does not absolve liability for damages.

The receipt of a permit, including a permit for emergency construction, does not relieve an applicant from liability resulting from any activity conducted under the permit.

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

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-03.1. Time to complete construction of structure.

Construction may not begin until a construction permit is obtained. Construction must be completed

and the department must be notified of completion in writing within the period specified by the department on the permit, beginning from the date of final permit approval. The completion period does not begin until any appeal is complete.

History: Effective January 1, 2015, amended effective January 1, 2023.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-03.2. Extending time to complete construction of structure.

If the completion period expires before construction is complete, the permit recipient may make a written request to the department for a one-year extension. Only two extensions may be granted. All requests for extensions must be made at least sixty days before the permit expiration date and must specifically state why construction has not been completed.

History: Effective January 1, 2015; amended effective January 1, 2023.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-04. Emergency construction permits.

A completed application for an emergency construction permit must be submitted to the department along with any additional information required by the department. If the director determines an emergency exists, the director may issue an emergency construction permit to construct a dam, dike, or other device capable of impounding, obstructing, or diverting more than fifty acre-feet [61674 cubic meters] of water. An emergency construction permit will expire in twelve months unless extended by the director under section 89-08-02-05.

History: Effective April 1, 2004; amended effective January 1, 2015; January 1, 2023; July 1, 2024.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-05. Extension of emergency construction permits.

The applicant must submit a written request for an extension at least thirty days before the expiration of the emergency construction permit. If it is determined that an emergency still exists, the director 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 section 89-08-02-04 for a new emergency construction permit.

History: Effective January 1, 2015; amended effective January 1, 2023.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-06. Removal of emergency structures.

Once the emergency has ended or upon permit expiration, whichever occurs first, all structures constructed under section 89-08-02-04 must be removed in their entirety and the disturbed area restored to preproject conditions. The applicant must notify the department in writing when the emergency structure has been completely removed.

History: Effective January 1, 2015; amended effective January 1, 2023.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-07. As built plans.

As a condition on all construction permits, the owner of the dam, dike, or other device will provide the department with "as built" plans within six months after the dam, dike, or other device has been

constructed to provide details of the modifications that occurred during construction.

History: Effective January 1, 2015; amended effective January 1, 2023.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-08. Operation and maintenance manual.

A medium-hazard or high-hazard dam owner must submit an operation and maintenance manual for the dam and the appurtenant works to the department. The manual must be maintained and updated on a regular basis, and copies of all updates must be submitted to the department. Dam owners must maintain their structures in an adequate manner.

History: Effective _____.

General Authority: NDCC 61-03-13

Law Implemented: NDCC 61-03-21.2

CHAPTER 89-08-04 OPERATION AND MAINTENANCE

[Repealed effective _____]

Section

~~89-08-04-01 — Operation and Maintenance Manual~~

~~89-08-04-02 — Maintenance Plan [Repealed]~~

~~89-08-04-03 — Emergency Action Plan~~

~~89-08-04-01. Operation and maintenance manual.~~

~~A medium-hazard or high-hazard dam owner must submit an operation and maintenance manual for the dam and the appurtenant works to the department. The manual must be maintained and updated on a regular basis, and copies of all updates must be submitted to the department. Dam owners must maintain their structures in an adequate manner.~~

~~**History:** Effective November 1, 1989; amended effective January 1, 2015; January 1, 2023; July 1, 2024.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-03-21~~

~~89-08-04-02. Maintenance plan.~~

~~Repealed effective July 1, 2024.~~

~~89-08-04-03. Emergency action plan.~~

~~A high-hazard dam owner must submit an emergency action plan for the dam to the department. The plan must be approved by the director. The plan must be maintained and updated on a regular basis, and copies of all updates must be submitted to the department.~~

~~**History:** Effective January 1, 2015; amended effective January 1, 2023; July 1, 2024.~~

~~**General Authority:** NDCC 61-03-13~~

~~**Law Implemented:** NDCC 61-03-21~~