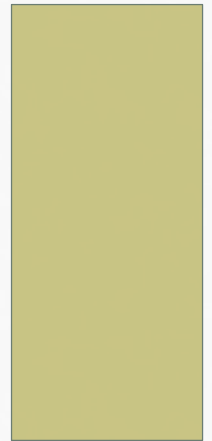


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RED RIVER BASIN DRAINAGE CONFERENCE
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DRAINAGE RULES AND REGULATIONS IN NORTH DAKOTA





WATER RESOURCE DISTRICTS

- In 1895, the North Dakota Legislature created “drain boards.”
 - Appointed by county commissions solely for management of drainage.
 - Existed until 1981.
- In 1935, the North Dakota Legislature also created “water conservation districts.”
 - Created by the North Dakota State Water Conservation Commission (precursor to the North Dakota State Water Commission).
 - Required a petition from a county, city, township, or at least 50% of the landowners within a district.
- In 1957, the Legislature created “water conservation and flood control districts” in place of water conservation districts.
 - Also created via petition.



WATER RESOURCE DISTRICTS

- In 1973, the Legislature created “water management districts” to replace water conservation and flood control districts.
 - All land in North Dakota included within water management districts.
- In 1981, the Legislature conducted a large scale overhaul of water management law, eliminated drain boards and water management districts, and created water resource districts.
 - Water resource districts still operate under the statutory regime created in 1981, with several amendments since then.



WATERSHED v. POLITICAL BOUNDARIES

- This debate continues today.
- There are advantages and disadvantages to both systems.
- To account for watershed issues and the need to cooperate, the Legislature permits the creation of joint water resource districts along watershed boundaries.
- The Legislature also mandates that water resource districts “within a common river basin” must meet at least twice a year “for the purpose of reviewing and coordinating efforts for the maximum benefit of the entire river basin.”



STATEWIDE DRAINAGE REQUIREMENTS

- All land in North Dakota is within a water resource district.
- The legislature granted water resource districts the ability to “[M]ake rules and regulations concerning the management, control, regulation, and conservation of waters and prevent the pollution, contamination, or other misuse of the water resources, streams, or bodies of water included within the district.” N.D. Cent. Code § 61-16.1-09(8).



STATEWIDE DRAINAGE REQUIREMENTS

- The North Dakota Attorney General has opined that water resource districts may *not* adopt rules that modify drainage permitting requirements. N.D.A.G. 85-5.
- The AG also opined that water resource districts may adopt rules that require permitting for drainage activities that normally would not require a permit under North Dakota law. N.D.A.G. 85-5.
- However, the enforcement statutes regarding drainage permitting, N.D. Cent. Code §§ 61-32-07 and 61-32-08, do not permit water resource districts to enforce their own rules by closing or filling drainage that does not meet their internal drainage permitting rules.



STATEWIDE DRAINAGE REQUIREMENTS

- In 2015, the North Dakota Attorney General indicated the drainage permitting enforcement statutes govern “drains” that are subject to permitting requirements. N.D.A.G. 2015-L-01.
- Conclusion:
 - While water resource districts have authority to implement rules, without enforcement capabilities, those rules lack effect. As a result, the surface and tile permitting statutes govern all water resource districts, all drains, and all land in North Dakota.



SURFACE DRAINAGE PERMITTING

- N.D. Cent. Code § 61-32-03 governs surface drainage permitting requirements.
- Surface improvements that drain a watershed area of 80 acres or more require surface permits.
- “Any person, before draining a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more, shall first secure a permit to do so.”



SURFACE DRAINAGE PERMITTING

- The definitions for those terms are in Chapter 89-02-01 of the North Dakota Administrative Code.
 - "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.
 - "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 2 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.



SURFACE DRAINAGE PERMITTING

- (Continued) The definitions for those terms are in Chapter 89-02-01 of the North Dakota Administrative Code.
 - "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.
 - "Sheetwater" means shallow water that floods land not normally subject to standing water. North Dakota Century Code section 61-32-03.

SURFACE DRAINAGE PERMITTING

- (Continued) The definitions for those terms are in Chapter 89-02-01 of the North Dakota Administrative Code.
 - "Pond, slough, lake, sheetwater, or any series thereof" means ponds, sloughs, lakes, or sheetwater that are hydrologically linked.
 - "Watershed" means the area that drains into a pond, slough, lake, or any series thereof.



SURFACE DRAINAGE PERMITTING

- Maintenance of an existing drain does not require a permit.
- The Administrative Code defines “maintenance” as follows:
 - "Maintenance" means removal of silt and vegetation from a drain. Maintenance does not include deepening or widening a drain.
- The North Dakota Attorney General, when faced with an inquiry regarding permitting requirements related to Devils Lake, indicated “The State Engineer determined permissible maintenance, for which a drain permit is not required, to be ‘the siltation that has occurred since statehood.’” N.D.A.G. 2004-L-12.
 - “According to the State Engineer’s office, tilling of land increased erosion and siltation, which resulted in changes to naturally occurring drainage and waterflow.”
 - The State Engineer concluded that statehood is when “large-scale agriculture began to take place in the State.”

SURFACE DRAINAGE PERMITTING

- From a more practical perspective, what activity requires a permit?
 - Construction of new drainage.
 - Construction of improvements to existing drains or natural channels (i.e., deepening or widening).
 - Pumping.
 - Placement of fill.
- Beware of “cleanout” assurances.
 - Parties frequently claim they are merely conducting a cleanout of a road ditch, but their project ultimately includes some type of slope improvements; that type of activity does require a permit if the watershed area is large enough.



SURFACE DRAINAGE PERMITTING

- Surface permitting requirements triggered by the watershed area impacted, and not by the footprint of the project constructed.
- The Administrative Code provides the following regarding watershed area determinations:
 - **89-02-01-06. Determination of watershed area.** The determination of the watershed area must be made using the best available maps or surveys. LiDAR information or a survey conducted under the supervision of a registered land surveyor are preferred. Published seven and one-half minute topographic maps may also be utilized. This information may be supplemented by aerial photographs of the watershed or by an onsite investigation requested by the applicant or board or if the state engineer determines it is necessary.



SURFACE PERMITTING PROCESS

- Applicant must submit a completed Surface Drainage Application to the North Dakota State Engineer's office.
- If the project is not "of statewide or interdistrict significance," the State Engineer will attach any conditions and forward to the relevant water resource district.
- The water resource district has 120 days to consider, process, and render a decision regarding a surface permit application.



SURFACE PERMITTING PROCESS

- The Legislature mandated a process for water resource districts to determine impacts to downstream properties in the permitting statute, § 61-32-03:
 - “A permit may not be granted until an investigation discloses that the quantity of water which will be drained from the pond, slough, lake, or sheetwater, or any series thereof, will not flood or adversely affect downstream lands. If the investigation shows that the proposed drainage will flood or adversely affect lands of downstream landowners, the water resource board may not issue a permit until flowage easements are obtained. The flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. An owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required investigation.”



SURFACE PERMITTING PROCESS

- Typically, flowage easement issues are not as problematic for surface drains since impacts are often more obvious (e.g., construction of actual drainage improvements on a downstream landowner's property).
- These can become contentious issues between landowners.



STATEWIDE OR INTERDISTRICT SIGNIFICANCE PERMITS

- When an applicant submits a surface drainage permit to the State Engineer's office, they must first determine whether or not the project triggers "statewide or interdistrict significance" criteria.
- OSE must consider the following:
 - **89-02-01-09. Criteria for determining whether drainage is of statewide or interdistrict significance.** In determining whether the proposed drainage is of statewide or interdistrict significance, the state engineer must consider:
 1. Drainage affecting property owned by the state or its political subdivisions.
 2. Drainage of sloughs, ponds, or lakes having recognized fish and wildlife values.
 3. Drainage having a substantial effect on another district.
 4. Drainage converting previously noncontributing areas (based on the National Oceanic and Atmospheric Administration Atlas 14 twenty-five year event - four percent chance) into permanently contributing areas.
 5. For good cause, the state engineer may classify or refuse to classify any proposed drainage as having statewide or interdistrict significance.



STATEWIDE OR INTERDISTRICT SIGNIFICANCE PERMITS

- If OSE concludes the project triggers one or more “statewide or interdistrict significance” criteria, OSE forwards its determination to the water resource district, and the WRD must follow the “statewide or interdistrict significance” hearing process.
- The WRD must conduct considerable amount of review to determine downstream landowners (deed searches), potential adverse impacts, and compile hearing and notice lists.
- Must create a record, file the record with OSE and County Auditor(s), and provide hearing notices to potentially impacted landowners, downstream riparian landowners, Game and Fish, Department of Health, all road authorities (NDDOT, county, townships), NRCS, and others.



STATEWIDE OR INTERDISTRICT SIGNIFICANCE PERMITS

- At the hearing, the applicant must present the project, and the WRD must allow written and oral questions, comments, and evidence.
- If the WRD denies the permit, the denial is the final determination.
- If the WRD approves the permit, the WRD must then forward its approval to OSE; OSE makes the final decision on permit approval or denial.



STATEWIDE OR INTERDISTRICT SIGNIFICANCE PERMITS

- WRD must provide a written notice to OSE, and all parties of record, and must supply a copy of the hearing transcript and all other documents to OSE.
- OSE will consider the record, including any comments by other agencies, and will issue a final decision, typically with conditions.

TILE PERMITTING

- Prior to 2011, WRDs utilized the surface permitting statute to process tile permits.
- WRDs had to determine if tile discharge resulted in adverse impacts to downstream landowners.
- Flowage easement requirements became contentious and often resulted in landowner vs. landowner disputes.
 - Neighborly feuds often dictated flowage easement decisions, and sometimes doomed tile permits and projects.
- The permitting process was the same; applicant submitted tile application to OSE, OSE conducted “statewide or interdistrict significance” review, and forwarded to WRD.

TILE PERMITTING

- Several tile permit applications sought approval to drain “sloughs, ponds, or lakes having recognized fish and wildlife values.”
- Several others also converted “previously noncontributing areas . . . into permanently contributing areas.”
- Several landowners and tile contractors objected to the “statewide or interdistrict significance” criteria application to tile permits.
- The North Dakota Attorney General issued a decision indicating that tile drainage was, in fact, subject to the same permitting requirements as surface projects.
N.D.A.G. 2008-L-14.

TILE PERMITTING

- Mayhem ensued at the Legislature.
 - WRDs, landowners, tile contractors, and commodity groups all agreed the Legislature should implement a separate permitting process unique to tile.
 - 80-acre footprint permitting threshold.
 - WRDs had the ability to attach conditions (e.g., to protect assessment drains, downstream roads, rivers and natural watercourses, etc.).
 - Pumping conditions.
 - 30-day notice requirement for landowners within one mile of the outlet.
 - Easements permitted up to one mile downstream if the project would “flood or adversely affect” the downstream landowners.

TILE PERMITTING

- (Continued) Mayhem ensued at the Legislature.
 - No easements permitted if discharges into assessment drain, natural watercourse, pond, slough, or lake.
- Landowners and tile contractors were not happy with the easement possibilities.
- Many WRDs attempted to address impacts via pumping restrictions or gates.
- The application of “statewide or interdistrict significance” criteria was not addressed in the statute.
- Trepidation regarding the “statewide or interdistrict significance” process led to additional permitting legislation in 2017.

TILE PERMITTING

- The 2017 legislative session was once again contentious.
 - The final permitting legislation left the 80-acre footprint threshold.
 - Surface intakes permitted under the tile statute if 3/8-inch coefficient or less.
 - Specifically clarified that tile is not subject to “statewide or interdistrict significance” criteria or procedures.
 - 30-day notice requirement still in place to downstream landowners, but triggered upon the date of filing of a complete application.
 - Elimination of flowage easement requirements.
 - WRDs can require “notarized letters of approval” from downstream landowners in very limited situations.

TILE PERMITTING

- (Continued) The 2017 legislative session was once again contentious.
 - Downstream landowner must submit “technical evidence” that the project would “flood or unreasonably harm” their property, and must address “adverse hydraulic effects, including erosion, flood duration, crop loss, and downstream water control device operation impacts.”
 - 30-day turnaround for downstream landowners is arduous and expensive.
 - WRDs lack the authority to attach conditions, with the exception of projects that discharge *directly* into assessment drains or road ditches.

TILE PERMITTING

- (Continued) The 2017 legislative session was once again contentious.
 - In that case, “reasonable conditions,” limited to conditions that address outlet location, erosion control, and reseeding of disturbed areas.
 - Road authorities are not pleased with tile permitting process.
 - WRDs have expertise regarding tile drainage yet limited in terms of their ability to consider impacts of tile drainage.
- The 2019 legislative session saw competing tile permitting bills defeated.



THE FUTURE OF PERMITTING

- WRDs agree downstream easements are not the answer.
- The 80-acre threshold is arbitrary.
- WRDs support tile and agree the process should be the same statewide.
- Landowners and tile contractors want an expedited permitting process with limited oversight.
- To be continued.