

# WATER DRAINAGE COMMITTEE

Pursuant to North Dakota Century Code Section 54-35-02, the Legislative Management created the Water Drainage Committee and directed the committee to:

- Study and propose amendments to Chapters 61-16.1, 61-21, and 61-32 to eliminate redundancy and conflicts and to provide for uniform assessment procedures for all water projects;
- Study and recommend procedures to appeal water resource board decisions;
- Study the structural relationship between the State Water Commission and water resource boards and identify methods for improving water resource board accountability; and
- Study methods, including the use of an independent organization, for assessing the cost of a project in relation to the benefits received and recommend a method to ensure the cost to a landowner does not exceed the benefit to the landowner.

Senate Bill No. 2208 (2021) provided for an optional study of more than 16 significant, water-related topics. The Legislative Management voted to revise the study to make it more manageable and to avoid duplication of efforts undertaken by the Water Topics Overview Committee. The revision provided for the 4 study topics listed above to be studied by the Water Drainage Committee.

The committee members include three Senators, three Representatives, and the following five citizen members:

- A member of the State Water Commission appointed by the Governor;
- A county road engineer appointed by the executive committee of the North Dakota Association of Counties;
- A county commissioner appointed by the executive committee of the North Dakota Association of Counties;
- A water resource board member appointed by the North Dakota Water Resource Districts Association; and
- A representative of agriculture producers appointed by the Agriculture Commissioner.

Committee members were Senators Larry Luick (Chairman), Kathy Hogan, and Ronald Sorvaag; Representatives Dennis Johnson, David Monson, and Marvin E. Nelson; and citizen members Jeff Frith, Clif Issendorf, Richard Johnson, Sharon Lipsh, and Randy Melvin.

## UNIFORM ASSESSMENT PROCEDURE FOR ALL WATER PROJECTS

### Background

The Legislative Assembly has enacted legislation regulating drainage, water resource boards and their predecessors, and assessment projects for many decades. In 1955, the Legislative Assembly passed Senate Bill No. 33, which authorized boards of county commissioners to appoint drain boards and levy up to one-tenth of one mill on all taxable real and personal property in the county for the operation of the drain board. Each drain board was required to report annually to its board of county commissioners but otherwise had broad authority to regulate in the county.

Provisions in Senate Bill No. 33 were codified in Chapter 61-21, which governs assessment drains. Many of the assessment drain procedures in that bill are similar to the ones in effect today. A drain board could receive petitions from landowners to construct a drain, hold a public meeting on the drain, and, if the drain was approved by the voting landowners, issue a notice of order to establish the drain. A person whose land would be assessed for an approved drain could appeal the drain board decision to a district court. The drain board also would assess properties "in accordance with the benefits received" from the drain. Public hearings were held on the proposed assessments, and a person subject to an assessment could appeal the assessment to the State Engineer.

Senate Bill No. 33 also authorized drain boards to construct bridges and culverts over or in connection to drains as the boards deemed necessary. The bill also had a provision allowing drain boards from multiple counties or states to work together on drains crossing multiple jurisdictions. Other sections of the bill addressed regulation of lateral drains, collection of taxes and assessments, responsibility for keeping drains open and in good repair, reassessment of benefits, warrants, liens, bonds, penalties for violations, and other drainage-related topics.

In 1957, House Bill No. 579 was passed to require permits for certain drains of ponds, sloughs, lakes, or a series of those water bodies which drained 80 acres or more. The authority to grant permits largely was delegated to the State Water Conservation Commission and later to the State Engineer, who was required to refer the applications to the board of commissioners of the relevant water management district with final approval.

In 1981, the Legislative Assembly passed House Bill No. 1077, creating Chapter 61-16.1, which established water resource districts. The bill arose from recommendations of the 1979-80 interim Natural Resources Committee. The legislation combined drain boards and water management districts into the new water resource districts, which were given authority over drain permitting and assessment projects. Many provisions were similar to those codified in Chapter 61-21 by earlier legislation. However, much of Chapter 61-21 regarding assessment drains was not repealed. Instead, references to water management districts in parts of Chapter 61-21 were changed to references to water resource districts.

Although some provisions in Chapter 61-16 regarding water management districts were repealed, others were amended to replace "water management district" with "water resource district." Water resource district authority and regulations were codified in Chapters 61-16, 61-16.1, and 61-21. All three chapters have been amended multiple times, including recent amendments to Chapter 61-32 regarding the process and requirements for subsurface drainage systems.

### **Testimony and Committee Discussion**

The committee reviewed information regarding conflicts and redundancies in Chapters 61-16.1 and 61-21. The committee received testimony from a representative of the State Water Commission indicating Chapter 61-16.1, 61-21, and possibly 61-32 should be combined to remove confusion and redundancy throughout those chapters. The State Water Commission recommendations were based on a review of the status of water drainage with stakeholders, including water resource boards, individual resource board members, legislators, attorneys, engineers, State Water Commission staff members, and the North Dakota Water Resource District Association.

Testimony indicated a need for clarification of the assessment process. The committee discussed several conflicts and redundancies regarding the procedures for assessment drains, posting of bonds from petitioners, publication to landowners, contents of notices, notice of public hearings, investigations of obstructions to drains, and appeals. Discussion also indicated a need for updated definitions.

The committee received testimony from representatives of the Department of Water Resources, the Attorney General's office, the North Dakota Water Resource Districts Association, and the State Water Commission outlining concerns and proposed changes.

Committee members expressed a desire to merge Chapters 61-16.1 and 61-21 regarding the authority of water resource boards and assessment projects for water drainage. The committee agreed to streamline statutory language and amend related statutes to provide clarification to landowners and water resource boards. The committee agreed water resource boards are divided in their understanding and interpretation of laws relating to water drainage assessment projects. The committee considered a bill draft that would incorporate the recommendations received by the committee and unify and clarify the procedure for assessment projects relating to water management and water resource boards throughout the state.

### **Recommendation**

The committee recommends bill draft [23.0024.03000] to address conflicts and redundancies between Chapters 61-16.1 and 61-21 by enacting new sections to Chapter 61-16.1, relating to water resource boards; amending multiple sections relating to water resource boards and procedures for assessment projects undertaken by water resource boards; and repealing Chapter 61-21, relating to water resource districts, water resource boards, assessment procedures and requirements, and drains.

## **PROCEDURES FOR APPEALS OF WATER RESOURCE BOARD DECISIONS**

### **Background**

Water drainage and assessment projects are codified under Chapters 61-16.1, 61-21, and 61-32. Each chapter contains procedures for appeals regarding the decisions of the water resource district.

### **Testimony and Committee Discussion**

The committee received testimony from a representative of the Department of Water Resources regarding appeal procedures from decisions of the water resource boards. Testimony indicated several issues regarding conflicts between procedures for appeals between district courts and the Department of Water Resources dependent on the type of issues being decided and the chapter governing the appeal.

The committee discussed the possibility of providing a uniform procedure for appeals. Currently, the Department of Water Resources has limited statutory authority to hear appeals. The Department of Water Resources will hear an appeal regarding a board's final project, assessment list, design, and location. The Department of Water Resources also will hear appeals on noncompliance drains and noncomplaint dams, dikes, or other devices. The district court may hear

appeals from any order or decision of the water resource board, as well as decisions regarding the obstruction or removal of a drain.

The committee received testimony regarding the Department of Water Resources available resources and the department's current and potential roles in drainage management. Testimony indicated the Department of Water Resources should be the last resort in the appeals process, suggesting most drainage issues should be handled at the local level.

The committee further discussed holding county commissioners and state's attorneys accountable for handling the technical aspects of appeals regarding water law.

The committee received testimony noting procedural conflicts between appeals regarding water resource board decisions and issues relating to landowner notice. The committee expressed concern regarding deadlines relating to landowner appeals to the Department of Water Resources. The committee agreed deadlines should be extended to afford water resources boards additional time to notify landowners of the final assessment list and provide landowners adequate time to file an appeal after the decision is made by the board.

The committee considered a bill draft that would provide alternatives to appeals by including mediation for landowners adversely affected by the decision of the water resource board and modifying the timelines relating to water resource board notices and landowner appeals. The bill draft would extend the deadline for a landowner to appeal a decision of the water resource board from 10 days after the meeting at which the water resource board approves the final assessment list to 20 days after the date of the meeting to provide landowners additional time to review the final assessment list.

### **Recommendation**

The committee recommends a bill draft [23.0024.03000] to provide alternatives to appeals for landowners adversely affected by water resource board decisions and to modify the timelines relating to water resource board notices and landowner appeals.

## **RELATIONSHIP BETWEEN THE STATE WATER COMMISSION AND WATER RESOURCE BOARDS**

### **Background**

Water resource districts and water resource boards were created in 1981 to conserve and protect water resources within the watersheds of North Dakota by managing projects, including assessment drains, dams and dikes, and flood control on a local level.

At the state level, the State Water Commission planned and constructed dams, made water facility projects available to the public, and developed statewide plans for future resources development. Through legislation enacted in 1983, the agency became known as the State Water Commission.

In 2021, the State Water Commission was converted into the Department of Water Resources through legislative action. The Department of Water Resources was given the authority to investigate, plan, construct, and develop water-related projects, and serves as a mechanism to financially support those efforts throughout the state. The Department of Water Resources consists of seven divisions: Administration, Atmospheric Resources, Planning and Education, Regulatory, State Engineer, Water Appropriation, and Water Development.

### **Testimony and Committee Discussion**

The committee received testimony from a representative of the Department of Water Resources, regarding the functional relationship between the State Water Commission and water resource boards. The primary relationship between the State Water Commission and water resources boards relates to state funding, whereby the State Water Commission provides funding to water resource boards through cost-share assistance.

The committee received testimony regarding the relationship between the State Engineer's office and water resource districts. The State Engineer provides oversight to water resource districts. The State Engineer reviews water-related complaints from the local level regarding drainage, dams or dikes, and obstructions. The State Engineer reviews appeals of water resource district decisions and regulates permitting for surface drainage, dams, dikes, and flood control.

The committee received testimony relating to water resource board members and local accountability. Accountability at the local level rests with the county commissioners, rather than with state agencies. The state is involved with appeals of water resource district decisions; however, the state does not have the authority to choose water resource board members.

The State Engineer's limited oversight authority provides an administrative remedy regarding water resource district decisions. The committee received testimony noting the variation in statutory provisions relating to appeals. Testimony indicated some statutes require appeals to be filed with the state as a prerequisite to filing an appeal to a district court. Other statutory provisions require decisions be appealed directly to a district court. Appeals filed with the State Engineer include assessment appeals regarding appeal of no benefit, petition to appeal assessments, and design appeals. Additionally, the State Engineer will hear complaint appeals regarding drainage, dams, and dikes. These statutes are found under Chapters 61-16.1, 61-21, and 61-32.

The committee received testimony from a representative of Griggs County relating to oversight concerns between county commissioners and water resource boards. County commissioners cannot serve on a water resource board. The committee heard testimony relating to concerns with county commissioners not involving themselves in issues relating to water management.

The committee received testimony recommending at least one county commissioner be appointed to each water resource board to improve communication between the two bodies and motivate county commissioners to take a hands-on approach to water resource board oversight.

The committee discussed reasons why county commissioners should not be allowed on water resource boards and the roles and responsibilities of the state's attorney. The committee discussed the differences between eastern and western North Dakota and policies that could apply statewide.

The committee received testimony recommending the chapters of the Century Code pertaining to water resource boards be rewritten and streamlined to minimize problems regarding oversight.

The committee discussed mandating water management education for county commissioners and holding county commissioners responsible for reviewing the decisions made by their local water resource board. Ultimately, the committee agreed not to amend the laws relating to appeals because the change would place too large of a burden on county commissioners when combined with their current responsibilities.

### **Conclusion**

The committee makes no recommendation regarding its study of the structural relationship between the State Water Commission and water resource boards and methods for improving water resource board accountability.

## **METHODS FOR ASSESSING THE COST OF A PROJECT IN RELATION TO THE BENEFITS RECEIVED**

### **Background**

In North Dakota, water resource boards are granted the general power to issue warrants to finance the construction of water conservation and flood control projects and assess benefitted property for all or part of the project's costs. Water resource boards have the authority under Chapters 61-16.1 and 61-21 to levy special assessments for the purpose of constructing, altering, and maintaining assessment drains.

A special assessment for drainage projects must be apportioned to the benefit received and cannot exceed the amount by which the property benefits from the project or improvement.

Water resource boards are required to inspect any lots and parcels of land that may be subject to assessment and determine from the inspection the particular lots and parcels of land which, in the opinion of the board, will be especially benefited by the construction of the work for which the assessment is made. Water resource boards are required to assess the proportion of the total cost of the project in accordance with benefits received.

### **Testimony and Committee Discussion**

The committee received testimony from a representative of the State Water Commission regarding the methods for assessing project costs for assessment projects relating to water management.

The committee received testimony regarding the tool maintained and used by the State Water Commission for estimating land benefit and assessment costs for projects submitted to the Department of Water Resources. Testimony indicated benefits are categorized as public or private as well as direct and indirect.

When determining public benefits, the Department of Water Resources takes into consideration impacts on roads and bridges and other infrastructure used by the public. However, private benefits take into consideration factors such as property value, production of land, and avoided damage caused by flooding. Direct benefits include avoided damages to crop loss, structures, and other physical assets while indirect benefits include the benefits to parks, bridges, and roads.

The committee received testimony emphasizing the need to ensure assessments are proportioned to the benefits received. The committee was informed if the project costs increase, documentation must show how and why one assessment is higher than another. If there is no calculation for benefits, the calculation is based solely on project costs and distribution and is not dependent on benefit received. Law dictates the cost of an assessment cannot outweigh the benefits received. Additionally, a cost-benefit ratio is required on a parcel-by-parcel level and project level. Each assessed parcel and each project must have a cost-benefit ratio equal to or greater than 1.

The committee received testimony summarizing the two benefit models used. The first is a dollar-per-acre assignment, in which each parcel is billed in an amount equal to the project cost divided by the total number of acres. The dollar-per-acre model is based entirely on the properties within the assessment district and does not address any factors pertaining to indirect beneficiaries.

The second model is a percentage model which is a semi-arbitrary calculation of cost based on the parcel's distance from the drain, with special consideration for some parcels.

The committee was informed of several issues regarding the current models, including a general problem that not all lands within the assessment district are assessed and not all indirect beneficiaries are included in the assessment district. The models consider direct beneficiaries within the assessment district without considering the watershed as a whole. Additionally, percentages of assessments often are negotiated rather than measured by the benefits to the parcel. None of the current models calculate or are based on the benefits received as required by law. As a result, every project always will return a cost-benefit ratio equal to or greater than 1 because the original calculation was based on cost and not the benefits received.

Testimony indicated a need to calculate benefits to both the properties within the assessment district and the properties benefiting within the watershed of the proposed drain at a rate independent from the cost of the project. The committee received testimony indicating the tool used by the Department of Water Resources provides the information and calculations needed to analyze benefit-cost calculations for assessment projects.

The tool used by the Department of Water Resources calculates the benefit of the project by analyzing several factors, including damage functions from the Federal Emergency Management Agency for a 5-year or 10-year flood event, insurance claims, rain events, and other economic probabilities. The tool calculates the benefits to the project and divides the calculation into benefits to the parcels.

The committee received a tutorial on using the economic analysis tool and received testimony indicating the tool can be used to estimate assessments on property ranging from an agricultural field to an entire city.

The committee discussed the need to address the concerns of landowners who believe the costs of their assessments are disproportioned to the benefits they will receive from the project. The committee agreed the law does not provide enough clarification as to why some landowners are paying higher assessment costs. The committee agreed the cost-benefit analysis tool would address this issue; however, the committee was divided on mandating every project conduct a cost-benefit analysis because requiring an analysis on each project could increase project costs. Taking into account landowner concerns relating to transparency in their assessments and concerns relating to additional administration costs, the committee reviewed a bill draft that would represent a compromise between the competing interests by requiring the use of the economic tool used by the Department of Water Resource to calculate a cost-benefit analysis for projects costing \$1 million or more.

### **Recommendation**

The committee recommends a bill draft [23.0025.03000] to require the use of a tool to calculate a cost-benefit analysis for assessment projects costing \$1 million or more.