

**LETTER OPINION  
2008-L-14**

October 1, 2008

Mr. Dale Frink  
State Engineer  
Office of State Engineer  
900 E Boulevard Ave  
Bismarck, ND 58505-0850

Dear Mr. Frink:

Thank you for your July 28, 2008, letter asking whether tile drainage systems require a drain permit under N.D.C.C. ch. 61-32. For the reasons outlined below, it is my opinion that tile drainage systems are subject to the permitting requirements of N.D.C.C. § 61-32-03.

**ANALYSIS**

Your letter indicates that the Office of the State Engineer has concluded tile drainage<sup>1</sup> requires a permit under N.D.C.C. § 61-32-03 because tile drains have the capability of draining the waters listed in N.D.C.C. § 61-32-03;<sup>2</sup> the drainage occurs underground rather than through conventional surface drainage structures such as ditches, canals, dikes, levees and watercourses.

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<sup>1</sup> Tile drainage systems are a “subsurface” or “underground” method of artificial drainage, which consists of a series of perforated plastic pipes installed below the surface of an agricultural field. The perforated pipes used in tile drainage generally allow water to flow by gravity or be drawn out of saturated soil and a field through use of pumps. See generally Hans Kandel, Managing Subsurface Water in the Field Can Pay Off, NDSU Agriculture Communication News, August 30, 2007, <http://www.ag.ndsu.edu/news/newsreleases/2007/aug-30-2007/managing-subsurface-water-in-the-field-can-pay-off>; David Franzen, Managing Saline Soils in North Dakota, NDSU Extension Service, March 2007.

<sup>2</sup> The waters listed in N.D.C.C. § 61-32-03 are ponds, sloughs, lakes, or sheetwater, or any series thereof.

Section 61-32-03, N.D.C.C., requires that a person secure a drain permit before draining a pond, slough, lake, or sheetwater,<sup>3</sup> or any series thereof, which has a watershed area comprising eighty acres or more. The word “draining” is not defined in N.D.C.C. ch. 61-32. Under the general rules of statutory construction, “[i]f no definition to a word contained in a certain section is given, the word is to be understood in its ordinary sense, construed according to the context in which it lies, and interpreted to give a reasonable result.”<sup>4</sup> If the language of the statute is ambiguous or adherence to the strict letter would lead to an absurd result, a court may use extrinsic aids to interpret the statute.<sup>5</sup>

The word “draining” is unambiguous, and the usual and accepted meaning of “draining,” is “to draw off (a liquid) by a gradual process.”<sup>6</sup> Section 61-32-03, N.D.C.C., does not differentiate between methods of draining nor does it mention the type of drain or drainage systems that may be regulated by the State Engineer. In addition, the penalty provision of section 61-32-03 contemplates a broad applicability of the law:

Any person draining, or causing to be drained, a pond, slough, lake or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more, without first securing a permit to do so, as provided by this section, is liable for all damage sustained by any person caused by the draining, and is guilty of an infraction.

The inclusion of the words “causing to be drained” indicates that the actions of the drainer and drainage system need not act directly upon surface water, but may include any method of removal of surface water.

Section 61-32-03, N.D.C.C., also prohibits the granting of a permit to drain water until an investigation discloses that the quantity of water which will be drained from the pond, slough, lake, or sheetwater will not flood or adversely affect downstream lands. It would contravene the plain language and purpose of this statute if it was determined that it applied only to surface drainage techniques, and subsurface drainage techniques were allowed to be used without consideration of potential adverse affects to downstream

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<sup>3</sup> As used in N.D.C.C. § 61-32-03, sheetwater means shallow water that floods land not normally subject to standing water.

<sup>4</sup> Ames v. Rose Twp. Bd. of Twp. Supervisors, 502 N.W.2d 845, 850 (N.D. 1993); see N.D.C.C. §§ 1-02-02 and 1-02-03.

<sup>5</sup> State v. Fasteen, 740 N.W.2d 60, 63 (N.D. 2007); see N.D.C.C. § 1-02-39 (extrinsic aids include the object sought to be obtained, legislative history and administrative construction); N.D.A.G. 2004-L-12 (reasonable construction of statute by administrative agency charged with its execution entitled to deference by the courts, unless it contradicts clear and unambiguous statutory language).

<sup>6</sup> The American Heritage Dictionary, 423 (2d coll. ed. 1991).

property as required by this statute. Such a result was likely not the Legislature's intent in enacting drainage laws.<sup>7</sup>

Finally, although the word "draining" is not defined in the law, there is a definition of "drain" in the administrative rules that is applicable for these purposes. A "drain" includes both natural watercourses and "any artificial drains of any nature or description" constructed for the purpose of drainage.<sup>8</sup> Therefore, an artificial drain is not limited only to artificial drains that resemble a natural watercourse; rather, the definition applies to all drains including subsurface drains such as tile drainage.

Thus, it is my opinion that under N.D.C.C. § 61-32-03, the State Engineer may require a drain permit for a tile drain or tile drainage system.

Sincerely,

Wayne Stenehjem  
Attorney General

cwg/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.<sup>9</sup>

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<sup>7</sup> Edinger v. Governing Auth. of Stutsman County Corr. Ctr. & Law Enforcement Ctr., 695 N.W.2d 447, 453 (N.D. 2005) (statutes are construed to avoid absurd results).

<sup>8</sup> N.D.A.C. § 89-02-01-02(4).

<sup>9</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).