

**LETTER OPINION
2012-L-01**

January 10, 2012

Mr. Neil W. Fleming
Attorney at Law
PO Box 633
Cavalier, ND 58220-0633

Dear Mr. Fleming:

Thank you for your letter requesting my opinion¹ on whether water resource boards have the authority to assess costs incurred in the course of investigating a drainage complaint and enforcing a removal order,² and whether boards can require complainants to pay investigation costs or post a bond.

It is my opinion that water boards may not assess landowners for drainage investigation costs incurred by a board prior to the issuance of a removal order under N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1. It is my further opinion that a water board may not assess compliance costs if a landowner completes the timely removal of an obstruction or noncomplying dike or dam. It is my further opinion that sections 61-16.1-51, 61-16.1-53, and 61-21-43.1 do not authorize a water board to assess a complainant for investigation costs nor do the laws authorize a board to require the posting of a bond.

ANALYSIS

You state that water boards must sometimes rely upon professional engineering or surveying services for assistance to fulfill their regulatory and water management obligations. Water boards have broad authority to manage water resources within their jurisdiction; this authority includes the power to:

¹ You requested this opinion on behalf of the Pembina County Water Resource Board, a public entity entitled to Attorney General legal opinions under N.D.C.C. § 61-16.1-58.

² Your letter inquires specifically about drainage complaints, but this opinion will also address unauthorized works, such as dikes and dams.

5. Plan, locate, relocate, construct, reconstruct, modify, maintain, repair, and control all dams and water conservation and management devices of every nature and water channels, and to control and regulate the same and all reservoirs, artificial lakes, and other water storage devices within the district.
6. Maintain and control the water levels and the flow of water in the bodies of water and streams involved in water conservation and flood control projects within the district and regulate streams, channels, or watercourses and the flow of water therein by changing, widening, deepening, or straightening the same, or otherwise improving the use and capacity thereof.
7. Regulate and control water for the prevention of floods and flood damages by deepening, widening, straightening, or diking the channels or floodplains of any stream or watercourse within the district, and construct reservoirs or other structures to impound and regulate such waters.
-
9. Do all things reasonably necessary and proper to preserve the benefits to be derived from the conservation, control, and regulation of the water resources of this state.³

Water boards have more specific regulatory obligations within N.D.C.C. chs. 61-16.1 and 61-21, which require boards to determine or investigate whether drainage obstructions have been negligently constructed and whether dams or dikes comply with the law. These laws also allow a water board to assess a responsible landowner for the costs of removal if the landowner does not comply with a board's removal order. Since the investigation costs associated with this work can be unpredictable and expensive,⁴ you question whether a water board may also assess investigation costs to a responsible landowner or complainant.

³ N.D.C.C. § 61-16.1-09.

⁴ The annual funding for water boards is generated by a tax levy of up to four mills approved by county commissions under N.D.C.C. § 61-16.1-06. See also N.D.C.C. § 57-15-26.6. Water boards may also use special assessments to fund projects. See N.D.C.C. §§ 61-16.1-17, 61-16.1-18, 61-16.1-21, 61-16.1-22, and 61-16.1-24.

Water boards are political subdivisions created by statute.⁵ “A political subdivision’s ‘rights and powers are determined and defined by law.’”⁶ “[D]rainage boards are creatures of statute, and they have no powers, except such as are expressly granted by the statute or reasonably implied from the powers granted.”⁷ “In defining a [political subdivision’s] powers the rule of strict construction applies and any doubt as to the existence or extent of the powers must be resolved against the [political subdivision].”⁸ After it has been determined that a political subdivision has the particular power, the rule of strict construction no longer applies, and the manner and means of exercising those powers, where not limited or specified by the Legislature, are left to the discretion of the political subdivision.⁹

Your letter specifically references three statutes within these chapters: N.D.C.C. §§ 61-16.1-51 (Removal of obstructions to drain), 61-16.1-53 (Removal of a noncomplying dike or dam),¹⁰ and 61-21-43.1 (Removal of obstructions to drain). Sections 61-16.1-51 and 61-21-43.1, N.D.C.C., which are nearly identical, provide that if a water board determines an obstruction to a drain has been caused by the negligent act or omission of a landowner (or tenant), the board shall provide a notice to the landowner:

[specifying] the nature and extent of the obstruction, the opinion of the board as to its cause, and must state that if the obstruction is not removed within such period as the board determines, but not less than fifteen days, the board shall procure removal of the obstruction and assess the cost of the removal, or the portion the board determines appropriate,¹¹ against the property of the landowner responsible.¹²

Neither section 61-16.1-51 nor 61-21-43.1 provides the authority to assess costs for an investigation, a formal complaint or investigation process, or the authority to assess “any” or “all” costs.

Section 61-16.1-53, N.D.C.C., provides a more structured complaint and investigation process. Under this law, a water board “shall promptly ‘investigate’ and make a

⁵ N.D.C.C. ch. 61-16.1; see also Anderson v. Richland Cnty. Water Res. Bd., 506 N.W.2d 362, 366 (N.D. 1993); N.D.A.G. 99-F-17; N.D. Const. art. VII, § 2.

⁶ Burlington N. & Santa Fe Ry. Co. v. Benson Cnty. Water Res. Dist., 618 N.W.2d 155, 157 (N.D. 2000) (quoting Eikevik v. Lee, 13 N.W.2d 94, 97 (1944)).

⁷ Freeman v. Trimble, 129 N.W. 83, 87 (1910).

⁸ Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980).

⁹ See Haugland v. City of Bismarck, 429 N.W.2d 449, 453 (N.D. 1988).

¹⁰ See also N.D.C.C. § 61-16.1-53.1 (Appeal of board decisions).

¹¹ The word “appropriate” is not included in N.D.C.C. § 61-21-43.1.

¹² N.D.C.C. § 61-16.1-51.

determination [upon receipt of a complaint of unauthorized construction of a dike, dam, or other device]”¹³ If a water board orders the removal of the noncomplying dike or dam and the responsible landowner does not comply, “the board shall cause the removal of the dike, dam, or other device and assess the cost of the removal, or the portion the board determines, against the property of the landowner responsible.”¹⁴ The law is silent regarding whether a water board may seek costs for an investigation.

Since the specific laws discussed above do not provide express authority for water boards to assess investigation costs, you question whether investigation costs may be assessed to landowners as a cost of removing an obstruction or noncomplying dike or dam.¹⁵

As explained above, the Legislature has only provided a water board with the express authority to assess a landowner for the costs of removing an obstruction or noncomplying dike or dam. This language is not ambiguous¹⁶ and it is apparent that the Legislature has concluded investigations are distinct regulatory tasks for water boards rather than a general or generic function that may be cast as another regulatory function.¹⁷

¹³ N.D.C.C. § 61-16.1-53.

¹⁴ N.D.C.C. § 61-16.1-53.

¹⁵ Your question assumes that a responsible landowner has not complied with a board’s removal order.

¹⁶ See N.D.C.C. § 1-02-02 (words in a statute are understood in their ordinary sense unless a contrary intention plainly appears).

¹⁷ Authority for water boards or a water authority to specifically conduct investigations is provided in a number of locations throughout N.D.C.C. title 61, including: N.D.C.C. § 61-01-23 (Investigation or removal of obstructions in channel); N.D.C.C. § 61-16.1-12 (Scope of water resource board’s extraterritorial contractual authority – Board may acquire property in adjoining states and provinces); N.D.C.C. § 61-16.1-53.1 (Appeal of board decisions – State engineer review – Closing of noncomplying dams, dikes, or other devices for water conservation, flood control, regulation, and watershed improvement); N.D.C.C. § 61-21-02 (Watercourses, ditches, and drains may be constructed, maintained, repaired, improved, or extended); N.D.C.C. §§ 61-24.5-10 and 61-24.5-11 (Southwest Water Authority, District budget – Tax levy and Determination of amount to be levied – Adoption of levy – Limitation); N.D.C.C. § 61-32-03.1 (Permit to drain subsurface waters required – Permit form – Penalty); N.D.C.C. § 61-32-07 (Closing a noncomplying drain – Notice and hearing – Appeal – Injunction – Frivolous complaints); N.D.C.C. § 61-32-08 (Appeal of board decisions – State engineer review – Closing of noncomplying drains); N.D.C.C. § 61-39-05 (Authority of the Lake Agassiz water authority); N.D.C.C. § 61-40-05 (Authority of the western area water supply authority).

For example, under N.D.C.C. § 61-32-03, a drainage permit “may not be granted until an investigation discloses that the quantity of water which will be drained . . . will not flood or adversely affect downstream lands.” In addition, the law further provides that if “the [subsurface drain permit] investigation shows that the proposed drainage will flood or adversely affect lands of downstream landowners . . . [a]n owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required [flowage easement] investigation.”

By comparison, N.D.C.C. § 61-32-03.1, which was passed by the 2011 Legislature,¹⁸ provides that “[i]f an investigation by a water resource district or a downstream landowner within one mile [1.61 kilometers] . . . shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers] . . . the water resource district may require flowage easements . . .” There is no requirement in section 61-32-03.1 for an owner of land to pay for an investigation. Thus, it is logical to conclude that the mention of investigation costs under section 61-32-03 implies that such a directive would not be authorized under section 61-32-03.1 if it is not expressly stated.¹⁹

The “investigation” distinction is further supported by N.D.C.C. §§ 61-16.1-53 and 61-32-07, which both require a board to conduct an investigation upon receipt of a complaint.²⁰ The laws require that if a board determines a dike, dam, or drain does not comply with the law, a water board’s removal or closure notice must state that the landowner may be assessed for the cost of removal or closure. There is no authority within these laws for water boards to assess investigation costs. Similarly, there is no authority for a water board to expand the field of costs assessed to a landowner when the statutory notice only requires a board to inform a landowner he or she may be assessed for removal costs.

Finally, the statutes you reference, N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1, do not uniformly use the word “investigate” nor do the laws require that a water board hire or designate an engineer or surveyor.²¹ The addition of “investigation costs” to “the cost of removal” would be an extension of existing law based only upon a

¹⁸ 2011 N.D. Sess. Laws ch. 498, § 2; 2011 N.D. Sess. Laws ch. 499, § 2.

¹⁹ See generally *Juhl v. Well*, 116 N.W.2d 625, 628 (N.D. 1962) (generally, the mention of one thing in a statute implies the exclusion of another, except if there is some special reason for mentioning one thing and not the other).

²⁰ See also N.D.C.C. § 61-16.1-53.1 (requiring the State Engineer to complete an independent investigation) and N.D.C.C. § 28-32-26 (authorizing a state agency to assess the costs of an investigation to a person found to be in violation of a statute or rule as a result of an adjudicative proceeding or informal disposition).

²¹ Compare N.D.C.C. § 61-16.1-17 (providing a water board with specific authority to designate an engineer for special assessment projects).

presumption that the Legislature intended a water board to assess additional costs. Such an extension ignores the Legislature's express directive for landowners to pay investigation costs in N.D.C.C. § 61-32-03, and the rule of strict construction. Although the Legislature has provided water boards with broad authority to regulate water resources and levy assessments, the authority to assess costs is limited. It is my opinion, therefore, that water boards may not assess responsible landowners for investigation costs incurred prior to the issuance of a removal order under N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1.²²

Your next question is whether a water board may assess costs if a board incurs costs in the course of determining whether a responsible landowner has fully complied with a removal order.

A plain reading and strict construction of N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1 suggest that a water board may only assess removal costs if an obstruction or noncomplying dike or dam is not removed. Consistent with the prior discussion and according to the rule of strict construction, it is my opinion that a water board may not assess compliance costs, such as post-removal survey or engineering costs, if a landowner completes the timely removal of an obstruction or noncomplying dike or dam.

Finally, you question whether a water board may require a complainant to post a bond²³ or whether a water board may assess investigation costs to a complainant if a board determines no obstruction to drainage exists. In practical terms, you are asking whether a water board may require a complainant, whose land might be flooded from a downstream drainage obstruction, to pay a water board's costs to investigate the source of the flooding.

In my review of the drainage laws, it appears that a water board is only authorized to assess costs against a complainant under N.D.C.C. § 61-32-07. The law provides that "[i]f, after the first complaint, in the opinion of the board, the complaint is frivolous, the board may assess the costs of the frivolous complaint against the complainant."²⁴ The remaining laws discussed above²⁵ do not authorize a water board to require a bond or to assess costs against a complainant.

²² Although the laws do not require an investigation per se, water board decisions must still be supported by substantial evidence, and board decisions cannot be arbitrary, capricious, or unreasonable. See Gowan v. Ward Cnty. Comm'n, 764 N.W.2d 425, 427 (N.D. 2009); Klindt v. Pembina Cnty. Water Res. Bd., 697 N.W.2d 339, 344 (N.D. 2005).

²³ See, e.g., N.D.C.C. § 61-16.1-39.1 (requiring petitioners for maintenance of a project to supply a surety bond for payment of costs if a water board finds the petition was improvidently made).

²⁴ N.D.C.C. § 61-32-07.

²⁵ N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1.

LETTER OPINION 2012-L-01
January 10, 2012
Page 7

Based upon the rule of strict construction and the Legislature's plain and unambiguous wording with respect to the assessment of costs, it is my opinion that N.D.C.C. §§ 61-16.1-51, 61-16.1-53, and 61-21-43.1 do not authorize a water board to require a complainant to post a bond or assess investigation costs against a complainant.

Sincerely,

Wayne Stenehjem
Attorney General

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.²⁶

²⁶ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).