

**LETTER OPINION  
2015-L-01**

January 8, 2015

Mr. Todd Sando  
State Engineer  
State Water Commission  
900 E Boulevard Ave  
Bismarck, ND 58506-0850

Dear Mr. Sando:

Thank you for your letter asking whether subsurface drainage projects are “drains” subject to processing under N.D.C.C. §§ 61-32-07 and 61-32-08. For the reasons outlined below, it is my opinion that the enforcement provisions of N.D.C.C. § 61-32-07 and the appeals process provided by N.D.C.C. § 61-32-08 apply to subsurface drainage projects just as they would apply to other types of drains.

**ANALYSIS**

Chapter 61-32, N.D.C.C., governs permitting, enforcement, and appeals for drainage of wetlands. In order to drain a “pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more” a permit must be secured.<sup>1</sup> A person is liable for resulting damages and is guilty of an infraction if the required permit is not obtained.<sup>2</sup>

In 2011 the Legislature added a separate permitting process for subsurface drainage.<sup>3</sup> The additional section requires a permit for “[i]nstallation of an artificial subsurface drainage system” and charges the state engineer with developing an application form “for a permit for subsurface drainage of water.”<sup>4</sup> Although the Legislature added a separate

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<sup>1</sup> N.D.C.C. § 61-32-03.

<sup>2</sup> Id.

<sup>3</sup> See N.D.C.C. § 61-32-03.1.

<sup>4</sup> Id.

permitting process for subsurface drainage, it did not provide a complaint, enforcement, and appeal process specific only to subsurface drainage.

Your question is whether the complaint process found in N.D.C.C. §§ 61-32-07 and 61-32-08 apply to subsurface drains as well as surface drains because, although these sections refer to “drains” they do not specifically refer to “subsurface drains.”<sup>5</sup>

In 2008 this office issued an opinion concerning whether (subsurface) tile drainage systems required a drain permit under N.D.C.C. § 61-32-03.<sup>6</sup> The opinion reasoned that “[s]ection 61-32-03, N.D.C.C., does not differentiate between methods of draining”, and concluded subsurface drainage was included in the chapter’s broad application of the term “drain.”<sup>7</sup> The opinion stated:

[T]here 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.<sup>9</sup>

The opinion concluded that the term “drains” in ch. 61-32 includes drains of both a surface<sup>10</sup> and subsurface<sup>11</sup> nature. Thus, when the Legislature added a separate permitting process for subsurface drains it did not have to duplicate the enforcement provision and appeals process already found in ch. 61-32 because the term “drain” includes subsurface drains.

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<sup>5</sup> See N.D.C.C. § 61-32-07 and N.D.C.C. § 61-32-08 (a water board may determine that a “drain, lateral drain, or ditch” has been established “contrary to this title or any rules adopted by the board”).

<sup>6</sup> N.D.A.G. 2008-L-14.

<sup>7</sup> *Id.*

<sup>8</sup> N.D.A.C. § 89-02-01-02.

<sup>9</sup> N.D.A.G. 2008-L-14.

<sup>10</sup> N.D.C.C. § 61-32-03.

<sup>11</sup> N.D.C.C. § 61-32-03.1

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It is my opinion that the enforcement provisions of N.D.C.C. § 61-32-07 and the appeals process provided by N.D.C.C. § 61-32-08 apply to subsurface drainage projects just as they would apply to other types of drains.

Sincerely,

Wayne Stenehjem  
Attorney General

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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>12</sup>

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<sup>12</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).