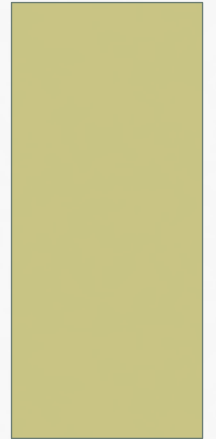


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2021 SUMMER MEETING
TILE PERMITTING



GO BISON!





- **Tile Permitting Modifications - 2021 Legislation**
 - Leadership of Rep. Cynthia Schreiber-Beck
 - Months of pre-session work by working group
 - Rep. Schreiber-Beck, Ellingson Drainage (Levi Otis, Roger Ellingson, Derrik Ellingson), Richland County WRD (Monica Zentgraf and Justin Johnson), and SMF



- **Goals:**

- Develop a more efficient permitting process
 - Eliminate unnecessary and potentially expensive delays (for applicants and downstream parties)
- Negotiate a process that is fair to applicants, provides reasonable protections for downstream parties, and ensures a consistent permitting process statewide
- Eliminate in-session disputes
- Engage various interests



- **HB 1437**

- Included an emergency clause
- Signed by Governor Burgum April 30, filed with the Secretary of State on May 3, 2021



- The new law of the land
- Discuss Significant Changes
- Ensure WRDs across the state follow a similar process



- **Permitting Threshold**

- 80 acres is still permitting threshold
- Clarification in 1437:
 - This section applies only to subsurface water management systems that drain, in whole or in part, platted or unplatted lands used for raising agricultural crops or grazing farm animals.



- **Permitting Threshold (cont.)**

- Surface Inlets
 - Under 2017 law, surface inlets with drainage coefficient of $3/8$ or less were permitted under tile law
 - Larger surface inlets triggered surface permitting requirements
 - Now, tile projects that include surface inlets, regardless of coefficient, permitted exclusively under tile law
 - “Statewide or interdistrict significance” implications



- **Permitting Threshold (cont.)**

- SB 2208 proposed permitting for *all* projects, regardless of acreage
- SB 2208 (WRD [anti-]drainage bill) - Interim Study
 - No longer includes tile



- **Permitting Threshold (cont.)**

- Debate emerged regarding under-80 “notice” requirements
- Ultimately, 1437 includes an under-80 notification process



- **Under-80 Notifications**

- Any project under 80 acres requires notice to WRD, including:
 - Acreage and legal description of land tiled
 - Outlet locations & types
 - Flow direction from each outlet



- **Under-80 Notifications**

- Requirements for under-80 projects:
 - Pumps and control structure outlets must be at least 25 feet from the top of the back slope of legal assessment drains
 - Must install and maintain erosion protection at each outlet
 - Must turn off pumps and close control structures “during critical flood periods”
 - WRD may “reassess” legal drain to address benefits from under-80 project
 - WRD may order compliance
 - Under 80 information is “exempt” under ND law (more on “exempt” status in later slides)



• **Permitting Process - WRD Filing Procedures**

- WRDs have three business days (after the date of receipt) to determine if an application is complete and to notify an applicant of any missing items or application is “complete”
 - If an Application is incomplete, but the WRD fails to notify the Applicant within three business days, the Application is legally “complete” regardless of what may be missing
 - “Complete” application described in detail in later slides
 - Ensures timely decisions and eliminates



• **Permitting Process - WRD Filing Procedures**

- Application Fee
 - Permissible fee raised from \$150 to \$500
 - SMF recommended fee policy: \$500 at time of submission, with any unused dollars returned to applicant following approval of permit
 - Some legislators were concerned WRDs were making big \$



• **Permitting Process - Timeframe for Approval**

- WRDs must consider and approve all “complete” Applications within 30 days of the date of filing
- If a WRD fails to approve an Application within 30 days, the Application is automatically approved, ***without any conditions***
- Some WRDs do not meet monthly or cancel meetings during planting or harvest; ***that's trouble!***
 - Special Meetings are simple to conduct (do conference call meetings or Zoom meetings)



• **Elimination of 30-Day Notice Process**

- Under 2017 law, applications provided notice to landowners up to one mile downstream (or until project discharge into legal drain, natural watercourse, pond, lake, or slough)
- Downstream landowners could submit “technical evidence” to object to a project
 - “technical evidence”: defined as information regarding “adverse hydraulic effects, including erosion, flood duration, crop loss, and downstream water control device operation impacts”
- Required “technical evidence” submission within 30 days of the date application submitted



• **Elimination of 30-Day Notice Process (cont.)**

- Resulted in technical debates for WRDs to mediate
 - Expensive for downstream landowners
 - Expensive for WRDs to consider and process
 - Time consuming for applicants
 - Difficult decision-making
- If WRD agreed with downstream party, WRD could require consent as a condition to permit
- Hatfield / McCoy feuds perpetuated



- **Elimination of 30-Day Notice Process (cont.)**

- Parties (legislators, WRDs, tile contractors, ag groups) all agreed the 30-Day Notice process was cumbersome and did not provide protections intended
- HB 1437 eliminated the 30-Day Notice process
- What about downstream road authorities, downstream parties, etc.?



• **Permissible Condition to Protect Downstream Interests**

- HB 1437 includes the following permissible permit condition:
 - WRD may require permittees to remove silt or vegetation, or repair erosion or scour damages *directly* caused by a tile system, but only up to one mile downstream from the project outlet (or up to the discharge into a legal drain, natural watercourse, slough, or lake, if less than one mile)



• Permissible Condition to Protect Downstream Interests (cont.)

- Burden is on downstream party (downstream landowner or road authority) to present “substantial evidence” the tile system directly caused accumulation of silt or vegetation, erosion, or scouring
- A downstream landowner simply complaining is not “substantial evidence”
- Allows WRDs to attach conditions to protect downstream parties, but also protects applicants/permittees by placing the burden on downstream parties to demonstrate damages directly caused by tile system



- **What is a “Complete” Application?**

- Completed and signed State permit Application (electronic signatures acceptable)
- County tax roll evidence of ownership of the property Applicant intends to tile



• What is a “Complete” Application? (Cont.)

- Detailed project design map that includes:
 - A detailed drawing of the system “overlain on an aerial photograph of the parcel,” with the system footprint and legal description of the property
 - Main sizes and locations, and lateral sizes and locations
 - Surface inlet sizes and locations
 - Outlet sizes, locations, and types
- ***This Map is an “Exempt Record” - Do Not Provide to Any Other Party!***
 - “...all or part of a record ... that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity.”



- **What is a “Complete” Application? (Cont.)**

- Detailed downstream flow map that shows tile discharge route for one mile from *each outlet* (or up to the nearest assessment drain, natural watercourse, slough, or lake, whichever comes first)
- County tax roll evidence regarding property ownership for one mile from *each outlet* (or up to the nearest assessment drain, natural watercourse, slough, or lake, whichever comes first)



- **What is a “Complete” Application? (Cont.)**

- **Remember, WRDs have:**

- Three business days to determine if an application is “complete”
- Thirty days to approve an application from the date of submission of a complete application
- ***Do not*** “table” an application to talk to landowners or think about impacts



• **One Mile Downstream - Significance**

- HB 1437 eliminated the 30-day Notice process so why do we need downstream discharge maps and tax parcel information one mile downstream of each outlet?
- WRDs, applicants, and downstream parties must understand what “project” the WRD approved; downstream discharge is a component of each project
- Following approval of a permit, WRD must provide notice to the State Engineer’s Office and to landowners within one mile of each outlet (or up to legal drain, natural, etc.)



- **One Mile Downstream – Significance (Cont.)**

- One mile or up to the nearest assessment drain, natural watercourse, slough, or lake, whichever comes first
- “Natural Watercourse”: Under HB 1437:
 - For purposes of this section, a "natural watercourse" includes, in addition to watercourses defined in section 61-01-06, any waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map.



- **One Mile Downstream – Significance (Cont.)**

- “Natural Watercourse”: Under NDCC 61-01-06:
 - A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. The supply of water is not required to be continuous or from a perennial living source. The criteria for constituting a watercourse are satisfied if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character....



• **One Mile Downstream – Significance (Cont.)**

- Debates regarding “impacts” of tile projects – HB 1437 addresses with conditions and with permit approval notices
- Downstream parties who truly believe they will be damaged/have been damaged can still pursue their claims through separate civil action:
 - “Approval of a permit under [HB 1437] does not prohibit a downstream party unreasonably damaged by the discharge of water from a subsurface water management system from seeking damages in a civil action.”
 - Are you damaged? Prove it in court.



- **Permissible Conditions - WRDs can only attach the following conditions:**

- Outlets (including pumps) must be at least 25 feet from the top of the back slope of legal assessment drains
- Require installation and maintenance of erosion protection at any and all outlets (into legal drains, road ditches, naturals, ponds, lakes, sloughs, etc.)
- Re-establishment of any areas disturbed by installing or maintaining the system (e.g., re-seeding)



• **Permissible Conditions (Cont.)**

- Minimum distance from rural water lines:
 - Applicant will not install Applicant's tile system within 20 feet, on either side, of any rural water lines Corn Rural Water District has in the Northwest Quarter of Section 33 in Tillable Township under any blanket easements, or otherwise beyond the Water District's existing easement
- Outlet Operations:
 - Applicant must turn off any pump outlets and otherwise close all outlets during "critical flood periods," as determined by the Corn County Water Resource District
 - Applicant must install and maintain a control structure at the gravity outlet, and must close the outlet during "critical flood periods," as determined by the Corn County Water Resource District



• **Permissible Conditions (Cont.)**

- Legal Assessment Drain Benefit Modifications (Reassessments):
 - If the tile project will introduce new drainage into the watershed area of an assessment drain, and only if the tiled property is not already in the assessment district for that particular drain, a WRD may add the parcel to the assessment district without conducting a lengthy and expensive reassessment process
 - Prior to HB 1437, had to take note of a tile project and include the parcel in any future reassessment for a legal drain



- **Permissible Conditions (Cont.)**

- Future Modifications of Tile System Require Permit Amendment:
 - Applicant must apply for an amendment to SUBSURFACE WATER MANAGEMENT PERMIT NO. 2021-01 in advance of any proposed alterations to outlet locations, the addition of any outlets, or improvements or modifications to the tile system that could increase the capacity or drainage area of the tile system
- Downstream Damage Condition (addressed in previous slides)



- **Approve and Notify**

- Within 30 days, approve with permissible conditions
- Notify OSE, Applicant, and downstream parties
- No More Certified Mailings! Affidavit of Service by Regular Mail
- Notice of Decision, Permit, Downstream Flow Map, and Affidavit of Service
- ***Do Not*** Include:
 - Application or Project Design Map



- **Follow the Law!**
- **Don't be the kid that gets the whole class in trouble!**



QUESTIONS?

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GO BISON!

