



State of North Dakota

Office of the State Engineer

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August 4, 2014

John Walstad
Code Revisor
North Dakota Legislative Council
State Capitol
600 East Boulevard, 2nd Floor
Bismarck, ND 58505

Dear Mr. Walstad:

The Notice of Intent to Adopt, Amend or Repeal Administrative Rules and a copy of the proposed rules are enclosed as required by N.D.C.C. § 28-32-10(1).

Sincerely,

Todd Sando, P.E.
State Engineer

Enclosures

**NOTICE OF INTENT TO
ADOPT, AMEND, OR REPEAL ADMINISTRATIVE RULES**

TAKE NOTICE that the North Dakota State Engineer and North Dakota State Water Commission will hold a public hearing to address proposed amendments to North Dakota Administrative Code Articles 89-02 (Drainage of Water), 89-03 (Water Appropriations), 89-04 (Water Management Plans for Surface Coal Mining Operations), 89-08 (Dams, Dikes, and Other Devices), 89-12 (Municipal, Rural, and Industrial Water Supply Program), and 89-14 (Stream Crossings) at **9:00 A.M., Tuesday, September 9, 2014**, in the basement conference room at the State Office Building, 900 East Boulevard Ave., Bismarck, ND. The proposed rules changes are not expected to have an impact on the regulated community in excess of \$50,000.

The purpose and an explanation of the proposed rules changes are outlined on the attached chart.

The proposed rules may be reviewed at the North Dakota State Water Commission's office, 900 East Boulevard Ave., Bismarck, ND 58505 or on the Commission's website at www.swc.nd.gov. A copy of the proposed rules may be requested by writing the above address, calling 701-328-4941, or e-mailing rpedersen@nd.gov. Written or oral comments on the proposed rules sent to the above mailing or e-mail address, or telephone number and received by **September 19, 2014**, will be fully considered.

If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the State Water Commission at the above address or phone number at least seven days before the public hearing.

Dated August 4, 2014.



Todd Sando, P.E.
State Engineer

Section	Housekeeping	Substantive	Comments
Article 89-02 – Drainage of Water			
<i>Chapter 89-02-01 – Drainage of Ponds, Sloughs, Lakes, of Sheetwater, or Any Series Thereof, and of Meandered Lakes</i>			
Chapter Title	Updating title to reflect legislative changes		
TOC	Updating titles to reflect changes		
89-02-01-01		Repealed	This intent language is unnecessary.
89-02-01-02	Language clarifications	Moved definition for “emergency.” Deleted “meandered lake” definition. Deleted “person” definition. Deleted “state engineer” definition.	“Emergency” previously defined in N.D.A.C. § 89-02-05.1-04. Moved here so all definitions for article in one location at the beginning. Referenced many definitions back to N.D.C.C. rather than double-defining terms. Meandered lake language (N.D.C.C. § 61-15-08) was repealed in 2013 legislative session. “Person” defined by N.D.C.C. § 1-01-49. “State engineer” defined by N.D.C.C. § 61-03-01.
89-02-01-03	Language clarifications		Eliminates portions that are repetitive of N.D.C.C.
89-02-01-05	Language clarifications		
89-02-01-06	Language clarifications		
89-02-01-07	Language clarifications		
89-02-01-08	Language clarifications		
89-02-01-09	Language clarifications		
89-02-01-09.1	Language clarifications	Added NRCS as a party to be given notice of statewide or interdistrict significance drainage applications.	
89-02-01-09.2	Language clarifications		
89-02-01-09.3	Language clarifications	Extended the time for board action from 60 days to 120 days.	

Section	Housekeeping	Substantive	Comments
89-02-01-09.3 cont'd		Added language that applications are considered void if the board does not act or request an extension within the 120 days.	
89-02-01-09.4	Language clarifications		
89-02-01-09.5	Language clarifications	Removed language restricting when copies of notice may be requested.	
89-02-01-09.6	Language clarifications		
89-02-01-09.7	Language clarifications		
89-02-01-09.8	Language clarifications and corrected reference.		
89-02-01-09.9	Language clarifications		
89-02-01-09.10	Language clarifications		
89-02-01-09.11	Language clarifications	Added language that a permit does not absolve applicants from liability.	Moved language about time extensions to § 89-02-01-09.12. Moved from § 89-02-01-09.12 language that time period to complete construction does not begin until any appeals are completed.
89-02-01-09.12	Language clarifications	Added language that only two one-year extensions may be granted.	See above comment. Added extension limitation to minimize the potential for changes to conditions between when the permit is approved and when the project is constructed.
89-02-01-28	Language clarifications		
<i>Chapter 89-02-04 – Drainage Complaint Appeals</i>			
89-02-04-01	Language clarifications		Removed date because N.D.C.C. modified during 2013 session so that all drainage appeals handled the same regardless of date constructed. Substantive changes to this Chapter will be considered in a future revision.

Section	Housekeeping	Substantive	Comments
89-02-04-02	Language clarifications		See above comment.
89-02-04-03	Language clarifications		
89-02-04-04	Language clarifications		
89-02-04-05	Language clarifications		
89-02-04-06	Language clarifications		
89-02-04-07	Language clarifications		
89-02-04-08	Language clarifications		
89-02-04-09	Language clarifications		
89-02-04-10	Language clarifications		
89-02-04-13	Language clarifications		
89-02-04-14	Language clarifications		
89-02-04-16	Language clarifications		
89-02-04-17	Language clarifications		
89-02-04-18	Language clarifications		
89-02-04-19	Language clarifications		
89-02-04-20	Language clarifications		
89-02-04-21	Language clarifications		
89-02-04-23	Language clarifications		
<i>Chapter 89-02-05.1 – Licenses for Emergency Drainage</i>			
Chapter Title	Language clarifications		
TOC	Updating titles to reflect changes		
89-02-05.1-01		Repealed	Restating the scope of the chapter is redundant.
89-02-05.1-02		Repealed	“Application” does not need a definition. “Board” and “drain” are both already defined in N.D.A.C. § 89-02-01-02 which references back to N.D.C.C. definitions.
89-02-05.1-03	Language clarifications		
89-02-05.1-04		Repealed	Moved definition to N.D.A.C. § 89-02-01-02.
89-02-05.1-05	Language clarifications		
89-02-05.1-06	Language clarifications		
89-02-05.1-07	Language clarifications		Moved language from N.D.A.C. § 89-02-05.1-10 regarding liability.
89-02-05.1-08	Language clarifications	Added language that emergency drain permits for drains that are intended to become permanent can be extended by the state engineer under this section while the permanent drain license	Clarified the intent to provide a mechanism to permanently permit an existing emergency drain.

Section	Housekeeping	Substantive	Comments
89-02-05.1-08 cont'd		is being processed if the permanent drain has the same alignment as the emergency drain.	
89-02-05.1-09	Language clarifications	Added language that the applicant must notify the board and the state engineer when an emergency drain has been completely closed.	
89-02-05.1-09.1		Added this section to discuss extensions of emergency permits and limit the extension to six months.	
89-02-05.1-10		Repealed	Moved language to N.D.A.C. § 89-02-05.1-07.
Article 89-03 – Water Appropriations			
<i>Chapter 89-03-01 – Water Permits</i>			
89-03-01-01.3	Language clarifications		Revised wording at suggestion of Sen. Triplett from previous hearing.
Article 89-04 – Water Management Plans for Surface Coal Mining Operations			
<p>Repeal of Article. The intent of the water management plan was a separate permitting process that satisfied the construction and drainage permitting requirements of the state engineer. Specifically, a water management plan approved by the state engineer was to serve as an approval of permit requirements under N.D.C.C. §§ 61-15-08, 61-16.1-38, and 61-16.1-41. However, §§ 61-15-08 and 61-16.1-41 have both been repealed. Further, the permitting requirements addressed by N.D.A.C. art. 89-04 are already addressed by N.D.A.C. arts. 89-02 and 89-08. Lastly, PSC administrative code (art. 69-05.2) duplicates the majority of art. 89-04, but is frequently updated to comply with changing federal regulations.</p>			
Article 89-08 – Dams, Dikes, and Other Devices			
TOC	Updating titles to reflect changes		
<i>Chapter 89-08-01 – Definitions</i>			
89-08-01-01	Language clarifications	<p>Clarified language for “dam” to include the entire structure.</p> <p>Clarified that “dikes” divert surface waters.</p> <p>Clarified definition of “height.”</p>	<p>Many regulatory issues with the difference between dikes, dams, diversions, and embankments. Subject of litigation.</p> <p>Issues in oil producing areas regarding what types of “ponds” are regulated by state engineer.</p>

Section	Housekeeping	Substantive	Comments
89-08-01-01 cont'd		Added definitions for "diversion," "embankment," "holding pond, lagoon, or dugout," and "top of dam."	Moved definition for "unsafe dam, dike, or other device" from N.D.A.C. § 89-08-01-02.
89-08-01-02		Repealed	See above comment.
<i>Chapter 89-08-02 – Construction Permits</i>			
TOC	Updating titles to reflect changes		
89-08-02-01	Language clarifications		
89-08-02-02	Language clarifications		Confusion regarding current language of "evidence recognized in a court of law sufficient to establish a prima facie case of a property right."
89-08-02-03	Language clarifications		
89-08-02-03.1		New section establishing a two year period within which construction must be completed.	This would also be consistent with the time period established in Article 89-02 for drainage.
89-08-02-03.2		New section regarding extensions of time for construction completion.	This would also be consistent with the extension period established in Article 89-02 for drainage.
89-08-02-04	Language clarifications		Makes language consistent with Article 89-02 for drainage.
89-08-02-05		New section regarding extension of emergency construction permits.	Makes language consistent with Article 89-02 for drainage.
89-08-02-06		New section requiring the removal of emergency structures.	
89-08-02-07	Language clarifications		Moved from N.D.A.C. § 89-08-03-06.
<i>Chapter 89-08-03 - Inspections</i>			
TOC	Updating titles to reflect changes		
89-08-03-01	Language clarifications		
89-08-03-03	Language clarifications		
89-08-03-04	Language clarifications	Removed language that state engineer will continue to make	State engineer has typically not collected costs. Further, this is considered part of the

Section	Housekeeping	Substantive	Comments
89-08-03-04 cont'd		unjustified inspections at the cost of the complainant. Added language that construction activities must cease until the state engineer completes the inspection. Removed sections regarding payment.	state engineer's regulatory duties.
89-08-03-05		Removed language tying inspections to construction permits.	Not all dams require a construction permit, but they still all should be subject to inspection.
89-08-03-06		Repealed	Moved to N.D.A.C. § 89-08-02-07.
89-08-03-07		Added section to clarify procedure for entering land to inspect a dam. State engineer must request landowner permission (except in emergencies), and after five days may request a court order.	
<i>Chapter 89-08-04 – Operating Plan</i>			
Title	Updating Title		
89-08-04-01	Language clarifications	Deleted language regarding maintenance and emergency procedures.	Deleted language has been broken out in further detail in newly created N.D.A.C. §§ 89-08-04-02 and -03.
89-08-04-02		Created new section regarding maintenance plans.	Broke out requirements from N.D.A.C. § 89-08-04-01 into separate sections so there is a specific section regarding operating plans, maintenance plans, and emergency action plans.
89-08-04-03		Created new section regarding emergency action plans.	See above comment.
Article 89-12 – Municipal, Rural, and Industrial Water Supply Program			
<i>Chapter 89-12-01 - Municipal, Rural, and Industrial Water Supply Program</i>			
Chapter Title	Fix spelling error		

Section	Housekeeping	Substantive	Comments
TOC	Updating titles to reflect changes		
89-12-01-01	Language clarifications	Deleted definitions for "applicant," "bureau," "C-district," "city," "proposal," and "state engineer." Added definition for "Garrison Diversion." Modified definition of "program funds."	Modified definition of program funds to recognize that the Garrison Diversion Reformulation Act of 1986 has been amended by the Water Resources Development Act of 2000.
89-12-01-02	Language clarifications		
89-12-01-03	Language clarifications	Added language that the SWC's chief engineer in consultation with Garrison Diversion may decide eligibility. Added language that the chief engineer may prepare a report for recommendations regarding funding.	Added eligibility language here and repealed N.D.A.C. § 89-12-01-04. Language regarding preparation of report reflects current practice where chief engineer makes a funding recommendation to SWC.
89-12-01-04		Repealed	See above comment.
89-12-01-05		Repealed	
89-12-01-06	Language clarifications	Removes specific requirements for feasibility studies. Added language regarding consultation with Garrison Diversion.	
89-12-01-07		Repealed	Any specific design and construction requirements will be addressed in the cost share agreement developed with the project sponsor.
89-12-01-08	Language clarifications		
89-12-01-09		Repealed	Any reporting requirements will be addressed in the cost share agreement developed with the project sponsor.
89-12-01-10		Repealed	Any contracting requirements will be addressed in the cost share agreement developed with the project sponsor.

Section	Housekeeping	Substantive	Comments
Article 89-14 – Stream Crossings			
Article Title	Language clarifications		Clarify that the stream crossing rules only apply to public highways.
Chapter 89-14-01 – Stream Crossing Design			
89-14-01-01	Language clarifications	Added a comma between individual and firm.	<p>Inconsistencies exist between various N.D.C.C. and N.D.A.C. provisions. N.D.C.C. § 24-03-06 and N.D.A.C. § 89-14-01-01 do not contain the comma; N.D.A.C. § 89-14-01-06 does contain the comma.</p> <p>Without the comma, the statutes/regulations would seem to apply to individual “firms, corporations, or LLCs,” but not to a collection of “firms, corporations, or LLCs.” With the comma, the statutes/regulations would apply to individuals AND “firms, corporations, or LLCs.” After consultation with DOT staff and attorneys and the Attorney General’s office and a review of legislative history, consensus has been reached that a comma was intended. This error will also need to be corrected in N.D.C.C. § 24-03-06 during upcoming session.</p>
89-14-01-02	Language clarifications	Added definition for “stream crossing.”	
89-14-01-03	Language clarifications		
89-14-01-04	Language clarifications		
89-14-01-05	Moved language from N.D.A.C. § 89-14-01-06.		
89-14-01-06	Language clarifications		Deleted language was moved to N.D.A.C. § 89-14-01-05.