

Testimony
House Bill 1340 – Office of the State Engineer
House Judiciary Committee
Representative Klemin, Chairman
February 15, 2021

Chairman Klemin and members of the House Judiciary Committee, my name is Aaron Carranza, Regulatory Division Director of the State Water Commission.

House Bill 1340 proposes to place limitations on private land access by “law enforcement officers” unless specific criteria are met. According to the attorney general’s office, under both the 4th Amendment of the United States Constitution and Article 1, Section 8 of the North Dakota Constitution, unreasonable searches and seizures are already prohibited.

While not intuitive, the regulatory staff of my office fit the legal definition of a law enforcement officer as North Dakota Century Code (N.D.C.C) § 12.1-01-04 defines the term to mean “a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigations or prosecutions for violations of law.”

The state engineer has the regulatory authority to enforce the water laws of the state. Hundreds of water permits are inspected each year, as well as numerous other site investigations, under authorization from numerous sections of N.D.C.C, which include 61-03-21.1, 61-04-09, 61-04-11, and 61-04-23.

The state engineer’s standard operating procedure prior to entering on to private land is to notify the landowner ahead of the intended site visit. While this is an agency chosen method, there are scenarios where notification may be either not possible or not practical. As such, this bill could have a profound effect on the sound management of state’s water resources by limiting the process of entry onto private property.

My office conducts site visits for the purposes of making determinations at the request of local water resource districts and road authorities, investigation of construction and drainage permitting complaints, field verification of water appropriation permits, and alleged violations of water appropriation law.

In addition, agency staff measures over 4,000 groundwater and surface water sites multiple times per year, and takes approximately 1,800 water quality samples from various observation wells and surface water sites. These wells are commonly located in or adjacent to section line rights of way. The information obtained from these observation wells are used in the regulatory decisions of the agency.

For these reasons, we oppose the proposed blanket limitations on entry to private property by law enforcement officers. However, we welcome a conversation to discuss the specific concerns the bill intends to address so a workable solution that does not contradict existing regulatory responsibilities of my office can be developed.

I will stand for any questions.

Attachment

Below are some of the sections in North Dakota Century Code (N.D.C.C.) relating to the responsibilities for access on to private property by Office of the State Engineer staff:

N.D.C.C. § 61-01-23. Investigation or removal of obstructions in channel.

In order to investigate or remove obstructions from the channel or bed of any watercourse and thus prevent ice from gorging therein and to prevent flooding or pollution of such watercourse, the state water commission, any water resource district, any municipality, any board of county commissioners, and any federal agency authorized to construct works for prevention of damage by floods or for abatement of stream pollution, may enter upon lands lying adjacent to such watercourse to investigate or remove, or cause to be removed from the bed, channel, or banks of such watercourse obstructions which prevent or hinder the free flow of water or passage of ice therein. However, such entry upon adjacent lands must be by the most accessible route and the entering agency is responsible to the landowner for any damage.

N.D.C.C. § 61-02-41. Surveys for the diversion of waters.

For the purpose of regulating the diversion of the natural flow of waters, the state engineer may enter upon the means and place of use of all appropriators for the purpose of making surveys of respective rights and seasonal needs.

N.D.C.C. § 61-03-21.1. Inspection by state engineer.

Whenever the state engineer is authorized or mandated by law to inspect or investigate an alleged violation of a statute under this title, the state engineer shall have the authority to enter upon land for the purposes of conducting such an inspection or investigation. Except in emergency situations as determined by the state engineer, the state engineer shall request written permission from the landowner to enter the property. If the landowner refuses to give written permission,

or fails to respond within five days of the request, the state engineer may request the district court of the district containing the property for an order authorizing the state engineer to enter the property to inspect or investigate the alleged violation.

N.D.C.C. § 61-04-09. Application to beneficial use - Inspection - Perfected water permit.

After the permit's beneficial use date, or upon notice from the permit holder that water has been applied to a beneficial use, the state engineer shall notify the conditional water permit holder and inspect the works. The inspection must determine the safety, efficiency, and actual capacity of the works. If the works are not properly and safely constructed, the state engineer may require the necessary changes to be made within a reasonable time. Failure to make the changes within the time prescribed by the state engineer shall cause postponement of the permit's priority date to the date the changes are made to the satisfaction of the state engineer. Any intervening application submitted before the date the changes are made will have the benefit of the postponement of priority. When the works are properly and safely constructed and inspected, the state engineer shall issue the perfected water permit, setting forth the actual capacity of the works and the limitations or conditions upon the water permit as stated in the conditional water permit authorized by section 61-04-06.2. All conditions attached to any permit issued before July 1, 1975, are binding upon the permit holder.

N.D.C.C. § 61-04-11. Inspection of works.

If the state engineer, in the course of the state engineer's duties, finds any works used for the storage, diversion, or carriage of water are unsafe and a menace to life or property, the state engineer shall notify the owner or the owner's agent, specifying the changes necessary and allowing a reasonable time for putting the works in safe condition. Upon the request of any party, accompanied by the estimated cost of inspection, the state engineer shall inspect any alleged unsafe works. If they shall be found unsafe by the state engineer, the money deposited by the party must be

refunded, and the fees for inspection must be paid by the owner of such works. If the fees are not paid by the owner of the works within thirty days after the decision of the state engineer, they must be a lien against any property of the owner and must be recovered by a suit instituted by the state's attorney of the county at the request of the state engineer. The state engineer, when in the state engineer's opinion it is necessary, may inspect any works under construction for the storage, diversion, or carriage of water and may require any changes necessary to secure their safety. The fees for the inspection must be a lien on any property of the owner and must be subject to collection as provided in this chapter but neither the United States nor the state of North Dakota nor any government agency may be required to pay such fees.

N.D.C.C. § 61-04-23. Cancellation of water rights - Inspection of works.

Any appropriation of water must be for a beneficial use, and when the appropriator fails to apply it to the beneficial use cited in the permit or ceases to use it for the beneficial use cited in the permit for three successive years, unless the failure or cessation of use has been due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause, the state engineer may cancel the water permit or right. For purposes of this chapter, an incorporated municipality or rural water system has good and sufficient cause excusing the failure to use a water permit, if the water permit reasonably may be necessary for the future water requirements of the municipality or the rural water system. The state engineer, as often as necessary, shall examine the condition of all works constructed or partially constructed within the state and compile information concerning the condition of every water permit or right and all ditches and other works constructed or partially constructed under the permit or right.

N.D.C.C. § 61-16.1-53.1(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.

1. The board shall make the decision required by section 61-16.1-53 within a reasonable time, not exceeding one hundred twenty days, after receiving the

complaint. The board shall notify all parties of its decision by certified mail. Any aggrieved party may appeal the board's decision to the state engineer. The appeal to the state engineer must be made within thirty days from the date notice of the board's decision has been received. The appeal must be made by submitting a written notice to the state engineer, which must specifically set forth the reason why the board's decision is erroneous. The appealing party shall also submit copies of the written appeal notice to the board and to all nonappealing parties. Upon receipt of this notice the board, if it has ordered removal of a dam, dike, or other device, is relieved of its obligation to procure the removal of the dam, dike, or other device. The state engineer shall handle the appeal by conducting an independent investigation and making an independent determination of the matter. The state engineer may enter property affected by the complaint to investigate the complaint.

N.D.C.C. § 61-16.2-11. Authority to enter and investigate lands or waters.

The state engineer or any community must notify all landowners prior to making any entry upon any lands and waters in the state for the purpose of making an investigation, survey, removal, or repair contemplated by this chapter. An investigation of a nonconforming use or existing construction or structure shall be made by the state engineer either on the state engineer's own initiative, on the written request of an owner of land abutting the watercourse involved, or on the written request of a community.

N.D.C.C. § 61-32-08. Appeal of board decisions - State engineer review - Closing of noncomplying drains.

1. The board shall make the decision required by section 61-32-07 within a reasonable time, but not to exceed one hundred twenty days, after receiving the complaint. The board shall notify all parties of its decision by certified mail. Any aggrieved party may appeal the board's decision to the state engineer. The appeal to the state engineer must be made within thirty days from the date notice of the board's decision has been received. The appeal must be made by submitting a written notice to the state engineer, which must

specifically set forth the reason why the board's decision is erroneous. The appealing party shall also submit copies of the written appeal notice to the board and to all nonappealing parties. Upon receipt of this notice the board, if it has ordered closure of a drain, lateral drain, or ditch, is relieved of its obligation to procure the closing or filling of the drain, lateral drain, or ditch. The state engineer shall handle the appeal by conducting an independent investigation and making an independent determination of the matter. The state engineer may enter property affected by the complaint to investigate the complaint.