

**North Dakota State Water Commission Testimony
Relative to Engrossed House Bill 1437**

**Presented to The Senate Agricultural Committee
Senator Luick, Chair
March 11, 2021**

Good morning Chairman Luick, and members of the Senate Agriculture Committee, I am Patrick Fridgen, Director of the Planning and Education Division with the State Water Commission. I am here today to offer testimony in support of House Bill 1437 as it relates to impacts to the Commission's cost-share policy eligibility requirements, and subsurface water management system information sharing with the Office of the State Engineer.

To provide some brief context relating to cost-share program eligibility impacts, in September 2020, North Dakota's Attorney General released Letter Opinion 2020-L-04. In that Opinion, it was determined that deepening and widening of existing agricultural drains is considered "maintenance." Also of note, NDCC 61-02-01.4 (3) says the Commission "Must consider all project costs potentially eligible for reimbursement, except the commission shall exclude operations expense, regular maintenance, and removal of vegetative materials and sediment, for assessment drains..." Because the Letter Opinion used the broad term "maintenance," and because NDCC 61-02-01.4 (3) prohibits the agency from funding "regular maintenance," the Commission was advised to defer cost-share requests for drainage projects that involve deepening and widening of existing channels to avoid a conflict with Century Code.

Engrossed House bill 1437 currently includes language to mitigate this potential conflict. Section 1, lines 13 and 14 say "...deepening and widening of existing drains are eligible for reimbursement." We support this amendment as it clarifies the agency's ability to continue cost-sharing on drainage deepening and widening projects – as the Commission has done for decades before the September 2020 Letter Opinion.

With regard to regulation of subsurface water management systems, currently the State Engineer's responsibility and role is developing the permit application for these types of projects, as well as collecting and maintaining a database of approved system permits. This database is publicly accessible through the agency's map services.

While the State Engineer supports this legislation, we suggest the addition of an amendment to require water resource districts to continue forwarding approved subsurface water management permits, and proposed under 80 acre notifications to the State Engineer.

Mr. Chairman, members of the committee, this concludes my testimony, and I will be happy to answer questions that you might have.

**LETTER OPINION
2020-L-04**

September 1, 2020

The Honorable Rich Wardner
State Senator, District 37
1042 12th Ave W
Dickinson, ND 58601-3654

Dear Senator Wardner:

Thank you for your letter asking for clarifications regarding how N.D.C.C. chapters 61-16.1 and 61-21 interact with regard to water resource districts' authority and special assessment projects.

I.

You first asked whether a water board may convert an "assessment drain" under N.D.C.C. ch. 61.21 to a "project" under N.D.C.C. ch. 61-10.1 or vice versa. It is my opinion that a water board may not convert an "assessment drain" under N.D.C.C. ch. 61-21 to a "project" under N.D.C.C. ch. 61-16.1 or vice versa without following the statutory process required under N.D.C.C. ch. 61-16.1 to start a new project.

II.

You next ask whether the term "maintenance," as defined by N.D.C.C. § 61-16.1-45, includes deepening and widening an existing drain and, if so, whether there is a limit to how much the drain may be deepened and widened. **It is my opinion that maintenance under N.D.C.C. § 61-16.1-45 means "cleaning and repairing of [a] drain," which includes deepening and widening the existing drain, and there is no statutory limit on how much an existing drain can be deepened or widened under N.D.C.C. § 16-16.1-45.** Whether there is a point at which deepening and widening an existing drain goes beyond "maintenance" is a factual determination. This office does not make factual determinations in legal opinions.¹

¹ N.D.A.G. 2002-L-17.

CHAPTER 61-02 WATER COMMISSION

61-02-01. Water conservation, flood control, management, and development declared a public purpose.

It is hereby declared that the general welfare and the protection of the lives, health, property, and the rights of all the people of this state require that the conservation, management, development, and control of waters in this state, public or private, navigable or non-navigable, surface or subsurface, the control of floods, and the management of the atmospheric resources, involve and necessitate the exercise of the sovereign powers of this state and are affected with and concern a public purpose. It is declared further that any and all exercise of sovereign powers of this state in investigating, constructing, maintaining, regulating, supervising, and controlling any system of works involving such subject matter embraces and concerns a single object, and that the state water commission in the exercise of its powers, and in the performance of all its official duties, shall be considered and construed to be performing a governmental function for the benefit, welfare, and prosperity of all the people of this state.

61-02-01.1. Statewide water development program.

The legislative assembly finds that there is a critical need to develop a comprehensive statewide water development program. The state water commission shall develop and implement a comprehensive statewide water development program. The commission shall design the program to serve the long-term water resource needs of the state and its people and to protect the state's current usage of, and the state's claim to, its proper share of Missouri River water.

61-02-01.2. State water commission - Policies for water retention projects.

The state water commission shall develop policies, including cost-sharing guidelines, which further the development of water retention projects for flood control. The commission shall provide a report regarding the policies to the sixty-second legislative assembly.

61-02-01.3. Comprehensive water development plan.

Biennially, the commission shall develop and maintain a comprehensive water development plan organized on a river basin perspective, including an inventory of future water projects for budgeting and planning purposes. As part of the commission's planning process, to facilitate local project sponsor participation and project prioritization and to assist in education regarding life cycle analyses for municipal water supply projects, and economic analyses for flood control and water conveyance projects expected to cost more than one million dollars, the commission shall develop a policy that outlines procedures for commissioner-hosted meetings within the upper Red River, lower Red River, James River, Mouse River, upper Missouri River, lower Missouri River, and Devils Lake drainage basins.

61-02-01.4. State water commission cost-share policy.

The state water commission shall review, gather stakeholder input on, and rewrite as necessary the commission's "Cost-share Policy, Procedure and General Requirements" and "Project Prioritization Guidance" documents. The commission's cost-share policy:

1. Must provide a water supply project is eligible for a cost-share up to seventy-five percent of the total eligible project costs.
2. May not determine program eligibility of water supply projects based on a population growth factor. However, a population growth factor may be used in prioritizing projects for that purpose.
3. Must consider all project costs potentially eligible for reimbursement, except the commission shall exclude operations expense, regular maintenance, and removal of vegetative materials and sediment, for assessment drains, and may exclude operations expense and regular maintenance for other projects. Snagging and clearing of watercourses are not regular maintenance. The commission shall require a water