NORTH Dakota | Water Resources
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Testimony Neutral of
HB 1544
House Agriculture
January 31, 2025

TESTIMONY OF
Matt Lindsay, Engineering & Permitting Section Manager, Regulatory Division

Chairman Beltz, and members of the House Agriculture Committee, I am Matt Lindsay the Engineering & Permitting Section Manager of the Department of Water Resources. I'm here today to provide neutral testimony on House Bill 1544.

House Bill 1544, at least the portion related to Department actions in Section 1 of the bill, will require surface drainage permits be obtained by those draining less than 80 acres when the drainage is discharged on to neighboring landowners without first securing permission to do so.

This bill will result in a regulatory expansion of surface drainage law North Dakota Century Code § 61-32-03.

If this bill were to pass as proposed, there would likely be a notable increase of drainage permit applications to both the Department and the county water resource board where drainage is proposed.

Since this bill will result in an increase in regulatory responsibilities for the Department, the Department believes a fiscal note to account for the expected costs to address the new regulatory expansion is necessary, which would include at least one (1) additional FTE to account for an increase in surface drain permit applications.

If it helps provide context to this committee, the Department developed policies REG-2020-3 and REG_02.2024 to both provide more transparency for permitting review considerations as well as address jurisdictional questions regarding surface drain permitting. Those policies are on the Department's Drainage and Water Management webpage here and are also included in my testimony online.

Thank you for the opportunity to testify, and I'm happy to answer any questions.

DRAINAGE PERMITTING CONSIDERATIONS

POLICY | REG_02.2024

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Effective Date 04/01/2024

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1 POLICY STATEMENT

In an effort to clarify definitions of “drain” and what constitutes “drainage” or “draining” requiring a permit under North Dakota Century Code (N.D.C.C.) § 61-32-03 and North Dakota Administrative Code (N.D.A.C.) ch. 89-02-01, the North Dakota Department of Water Resources (Department) has developed the following definitions and parameters. This Policy aims to provide transparency to the drainage permitting jurisdictional limits.

1.1 POLICY AUTHORITY OR IMPLEMENTATION

This policy garners authority from N.D.C.C. § 61-32-03 and N.D.A.C. ch. 89-02-01 and will be implemented through drainage permit application and permit requirements.

1.2 ACCEPTANCE OR ENFORCEMENT

The Department reserves the right to change this Policy as necessary to ensure the Department fulfills its statutory duties.

The Department reserves the right to return any application submitted under this Policy to the applicant for correction if, in determination, it does not comply with the Policy’s intent or is insufficient for the Department to make an informed decision.

The Department reserves the right to enforce this policy as per the process outlined in N.D.C.C. § 61-32-03 and N.D.A.C. ch. 89-02-01.

1.3 APPEALS

Decisions may be appealed as per the process outlined in N.D.C.C. § 61-03-22.

1.4 POLICY DEVIATIONS

The Department reserves the right to deviate from policy as deemed appropriate and within requirements outlined in N.D.C.C. or N.D.A.C.

Policy deviation requests from applicants may be considered by the Department if the applicant can justify why requirements of this policy are not necessary or applicable. Such a deviation will not be granted without significant justification. Additionally, a deviation request does not guarantee that a deviation will be granted, and any work performed to pursue such a deviation request will be solely at the applicant’s expense.

1.5 DEPARTMENT CONTACT

Please contact the Department’s Engineering and Permitting Section at (701) 328-4956 or dwrregpermit@nd.gov for questions regarding this Policy or other water drainage questions.

2 PRE-APPLICATION CONSULTATION

The Department strongly encourages pre-application consultation prior to a drainage permit application submittal. Early consultation between the applicant, the applicant's representative(s), and the Department will support early understanding and compliance with this policy to limit unexpected project costs or delays.

3 GENERAL POLICY CONSIDERATIONS

N.D.C.C. ch. 61-32 and N.D.A.C. art. 89-02 require permits for “drainage of a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty areas or more.” In interpreting codified statutes, rules, and definitions, the Department will use the parameters laid out within this Policy.

The definitions used within this Policy are used by the Department only when reviewing drainage permits and appeals.

3.1 DRAIN

"Drain" is defined in N.D.C.C. § 61-16.1-02 as, “any natural watercourse opened, or proposed to be opened, and improved for drainage, and any artificial channel constructed for drainage. The term includes dikes and appurtenant works and may include more than one watercourse or artificial channel when the watercourses or channels drain land within a practical drainage area.”

In practice, “drain” means a physical feature, such as a ditch, pipe, or pump, constructed or used to accomplish drainage or draining of a pond, slough, lake, or sheetwater, or any series thereof, including appurtenant works.

Other common terms that may be associated with a drain include legal drain, assessment drain, lateral drain, ditch, canal, channel, pipe, or diversion.

3.1.1 ACCEPTED AS ‘DRAINS’:

The Department considers the following items to be “drains”:

a. A ditch or pipe constructed, installed, or operated to drain by gravity a pond, slough, lake, or sheetwater, or any series thereof.

b. A mechanical pump or siphon constructed, installed, or operated to drain a pond, slough, lake, or sheetwater, or any series thereof.

c. Placement of fill, as defined in this policy.

d. Modifications to a watercourse for the purpose of enhancing, opening, or improving the watercourse, including slope modifications or improvements, deepening, widening, straightening, rerouting, or diverting of watercourses.

e. Modifications to an existing drain or its appurtenant works for the purpose of modifying how the original drain operates or accomplishes drainage or draining, including slope modifications or improvements, deepening, widening, enlarging, rerouting, or extending existing drains, as well as changes to a drain’s previously authorized or permitted control(s) or operation plan(s).

f. Municipal or city stormwater management activities that occur within the jurisdictional limits of a municipality or city for the purposes of draining a watercourse, pond, slough, or lake, or any series thereof or constructing or modifying an assessment drain.

3.1.2 UNACCEPTED AS ‘DRAINS’:

The Department does not consider the following to be drains:

a. Maintenance of a drain or watercourse, which includes removal of silt and vegetation from a drain or watercourse including removal of obstructions or woody debris, such as the case with snagging or clearing. This is not synonymous with the “cleaning out and repairing a drain” definition in N.D.C.C. § 61-16.1-02(5).

b. Construction, installation, modification, or removal of a stream crossing that does not involve other drainage activities.

c. Municipal or city stormwater management activities that occur within the jurisdictional limits of a municipality or city and for the purposes of managing sheetwater runoff. These activities include constructing, modifying, and maintaining storm sewer and appurtenant works to alter the sheetwater flow. It is recommended that such activities be regulated under a stormwater management plan recognized by the municipal or city government, as defined in N.D.C.C. ch. 40-01.

d. Land use changes, such as the construction, modification, or maintenance of buildings, parking lots, streets, lots, or similar activities, that alter sheetwater flow.

e. Agricultural practices, such as farming, plowing, or working the soil to prepare soil for planting or seeding agricultural crops.

f. Temporary dewatering of dam or pond reservoirs or construction sites for inspection, repair, or construction.

g. Reservoir operation of dam and pond spillways.

h. Beneficial use of water, as described in N.D.C.C. ch. 61-04, including domestic, municipal, livestock, irrigation, industrial, fish, wildlife, or recreational uses. This includes replacement of baseflow in a watercourse for the purpose of water supply, as is the case under drought conditions.

i. Highway or road ditch and drainage activities, including constructing, modifying, and maintaining reasonable road ditch drainage for and by federal, state, county, and township roadways within the state. This does not include the following:

- Drainage features constructed, modified, or maintained within a highway or road right-of-way by someone other than the road authority of jurisdiction;
- Modification of a watercourse;
- Assessment drains; or
- Drainage of ponds, sloughs, lakes, or any series thereof.

j. Subsurface water management, as described and regulated under N.D.C.C. § 61-32-03.1.

k. Bank stabilization projects, such as hardening the banks of a watercourse with riprap or similar material to inhibit head cutting or bank erosion, that will not deepen or widen the channel or otherwise measurably or intentionally increase the conveyance of the watercourse.

3.2 PLACEMENT OF FILL

"Placement of fill" means material, such as earth, soil, concrete, rubble, or riprap, placed in a pond, slough, lake, or any series thereof, with the intent to accomplish drainage or draining of one of those water features by storage removal.

Placement of fill means or includes more than ten-percent reduction in a pond, slough, lake, or any series thereof as a function of fill volume (acre-feet) versus the pond's, slough's, or lake's existing surface area (acres).

3.2.1 UNACCEPTED AS 'PLACEMENT OF FILL'

Placement of fill does not mean or include:

a. Fill placed in "sheetwater."

b. Fill placed in an existing drain or watercourse, as that action would either be a modification to or an obstruction of an existing drain or watercourse.

c. Fill or earthwork to construct or modify a "dam, dike, or other device" under N.D.C.C. § 61-16.1-38 and N.D.A.C. article 89-08.

d. Fill or earthwork necessary to construct or modify a road or highway embankment otherwise subject to the road authority's jurisdiction.

e. Transmission poles, pilings, foundations, or any other infrastructure of a similar footprint.

f. Fill placed above the natural outlet elevation of a slough, pond, lake, or any series thereof, otherwise not removing available volume or storage of those water features.

3.3 ADDITIONAL DEFINITIONS

a. Appurtenant works to a drain: Drain features that are integral design and function components, including control structures, stream crossings, dikes, and spoil piles.

b. Control Structure: A pump(s), sluice gate(s), stop-log structure(s), grade or drop control structure(s), or passive weir(s).

c. Drainage/ Draining: The removal of water from a pond, slough, lake, or sheetwater, or any series thereof by the construction of a new drain or modification of an existing drain. This includes the removal of water volume or storage or the removal of water faster than occurs under existing conditions.

d. Sheetwater: Defined in N.D.C.C. § 61-32-03 as “shallow water that floods land not normally subject to standing water.” Generally, sheetwater is synonymous with the terms overland flow, runoff, surface water, excess water, and floodwater. Specifically, sheetwater includes water running or flowing over land or the surface of the earth as the result of normal precipitation, such as rainfall or snowmelt, or as the result of water beyond normal runoff or precipitation, such as the case with flooding.

4 POLICY HISTORY

Policy Adopted: 9/21/2020
Policy Version REG_02.2024 Effective: 04/01/2024

Previous Revision(s):
9/21/2020: REG-2020-2

POLICY/GUIDELINES

REG-2020-3

STATEWIDE OR INTERDISTRICT SIGNIFICANCE DETERMINATIONS

NORTH Dakota | State Engineer

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Garland Erbele, P.E., **State Engineer**

REG-2020-3

STATEWIDE OR INTERDISTRICT SIGNIFICANCE DETERMINATIONS

EFFECTIVE: 03/13/2020 POLICY VERSION 1

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1. POLICY STATEMENT

N.D. Century Code (N.D.C.C.) section 61-32-03 and N.D. Administrative Code (N.D.A.C.) chapter 89-02-01 require the State Engineer to determine whether an application for drainage meets "drainage of statewide significance," such that a more thorough permitting process, commonly referred to as the "Statewide Process," is followed for the application. While the State Engineer is guided by statewide criteria in N.D.A.C. chapter 89-02-01, there are common projects or scenarios where the application will or will not undoubtedly be determined as proposing drainage of statewide or interdistrict significance.

This policy satisfies the State Engineer's requirement to consider the criteria in N.D.A.C. section 89-02-01-09, as well as provides an initial review of the evaluation factors in N.D.A.C. section 89-02-01-09.2. Specifically, this policy identifies the applications the State Engineer deems to be drainage of statewide or interdistrict significance under N.D.C.C. section 61-32-03 and N.D.A.C. chapter 89-02-01. Additionally, this policy aims to provide an avenue for certain types of drainage applications to be determined "not drainage of statewide or interdistrict significance."

This policy harnesses the State Engineer's mission, which is "managing the water resources of the state for the benefit of its people" by following specific agency goals to "regulate and manage water resources for the future welfare and prosperity of the people of North Dakota."

1.1. POLICY AUTHORITY AND IMPLEMENTATION

This policy garners authority from N.D.C.C. section 61-32-03 and N.D.A.C. chapter 89-02-01 and will be implemented through drainage permit application and permit requirements.

1.2. STATE ENGINEER ACCEPTANCE OR ENFORCEMENT

The State Engineer reserves the right to change this policy as necessary to ensure the State Engineer fulfills its statutory duties. Additionally, the State Engineer reserves the right to return any application submittal as required or allowed under this policy to the applicant for correction if, in the State Engineer's determination, it does not comply with the policy's intent or is insufficient for the State Engineer to make an informed decision. The State Engineer reserves the right to enforce this policy as part of the drainage permit process outlined in N.D.C.C. section 61-32-03 and N.D.A.C. chapter 89-02-01.

1.3. APPEALS

Any decision of the State Engineer may be appealed under N.D.C.C. section 61-03-22.

1.4. POLICY DEVIATIONS

Policy deviations may be considered by the State Engineer if the applicant can justify why requirements of this policy are not necessary. However, such a deviation will not be granted without significant engineering or legal justification. Additionally, a deviation request does not guarantee that a deviation will be granted, and any work

performed to pursue a deviation request will be solely at the applicant's expense. Unforeseen scenarios encountered during policy implementation may require policy changes.

2. PRE-APPLICATION CONSULTATION

The State Engineer strongly encourages pre-application consultation prior to a drainage permit application submittal. Early consultation, whether conference calls, meetings, or correspondence between the applicant, the applicant's representatives, and the State Engineer, will ensure early understanding and compliance with this policy to limit any unexpected project costs, delays, or requirements.

3. GENERAL POLICY REQUIREMENTS

For the purposes of N.D.C.C. section 61-32-03 and N.D.A.C. chapter 89-02-01, the following process applies:

3.1. STATEWIDE OR INTERDISTRICT SIGNIFICANCE DETERMINATIONS. In determining whether the proposed drainage under an application is "drainage of statewide or interdistrict significance," the State Engineer must consider the criteria in N.D.A.C. section 89-02-01-09 (Criteria). Upon an initial, comprehensive review of criteria, the State Engineer must make a determination to classify an application as proposing or not proposing drainage of statewide or interdistrict significance. As a matter of practice, the State Engineer also uses the evaluation factors in N.D.A.C. section 89-02-01-09.2 (Factors) to further inform the State Engineer's statewide or interdistrict significance determination.

3.1.1. APPLICATIONS THAT WILL BE DRAINAGE OF STATEWIDE OR INTERDISTRICT SIGNIFICANCE. Based upon review of Criteria and Factors, the following applications, unless a unique or complex situation exists, WILL be considered drainage of statewide or interdistrict significance:

3.1.1.1. Drainage of a navigable watercourse or waterbody.

3.1.1.2. Drainage from a lake.

3.1.1.3. Drainage that results in an inter-basin transfer (HUC8 or larger).

3.1.1.4. Drainage that may have a substantial effect on a watercourse or lake with known flooding issues.

3.1.1.5. Drainage that will have an unmitigated effect on another district.

3.1.1.6. Drainage that has the potential to negatively affect vital public infrastructure, such as existing dikes; medium or high hazard dams; or other flood control or protection systems.

3.1.1.7. The State Engineer classifies applications for specific types of water management issues or regions of the state as drainage of statewide significance. Currently, those applications include, until further notice:

3.1.1.7.1. Drainage within the Devils Lake Basin.

3.1.2. APPLICATIONS THAT WILL NOT BE DRAINAGE OF STATEWIDE OR INTERDISTRICT SIGNFICANCE. Based upon review of Criteria and Factors and notwithstanding the requirements of section 3.1.1 or 3.1.3, the following

applications, unless a unique or complex situation exists, WILL NOT be considered drainage of statewide or interdistrict significance:

3.1.2.1. Smaller drainage projects that drain sheetwater only, including:

3.1.2.1.1. Deepening or widening of existing drains

3.1.2.1.2. Small drains that are within a square mile and are not part of a phased drainage project

3.1.3. APPLICATIONS THAT MAY BE DRAINAGE OF STATEWIDE OR INTERDISTRICT SIGNFICANCE. Based upon review of Criteria and Factors and notwithstanding the requirements of section 3.1.1 or 3.1.2, the following applications, unless a unique or complex situation exists, MAY be considered drainage of statewide or interdistrict significance:

3.1.3.1. New drainage beyond the scope of section 3.1.2.1, including assessment and private drains, that may have a negative effect on a watercourse, pond, slough, or any series thereof with known flooding issues

3.1.3.2. Drainage of a watercourse.

3.1.3.3. Drainage of a slough, pond, or any series thereof.

3.1.3.4. Drainage that results in an inter-basin transfer (HUC12 or HUC 10).

3.1.3.5. Projects with known, special considerations for other state agencies, such as:

3.1.3.5.1. Drainage with the potential of negatively affecting the water quality of the Sheyenne River.

3.1.3.5.2. Drainage with the potential to spread known aquatic nuisance species populations, as identified by the State Game and Fish Department.

3.1.3.6. Drainage that will have an effect on another district, albeit mitigated in some fashion.

3.1.3.7. Drainage affecting public infrastructure, such as roads, highways, or stream crossings.

3.1.3.8. If it is not readily apparent that an application is drainage of statewide or interdistrict significance, the State Engineer will solicit comments from the following entities to help inform the State Engineer's statewide or interdistrict significance determination:

3.1.3.8.1. Comments must be requested from the following entities unless otherwise noted:

3.1.3.8.1.1. The district(s) of jurisdiction;

3.1.3.8.1.2. The Water Development and Planning Divisions of the State Water Commission;

3.1.3.8.1.3. Any district that may be affected by the project;

3.1.3.8.1.4. The State Game and Fish Department;

3.1.3.8.1.5. The State Department of Environmental Quality;

3.1.3.8.1.6. The Department of Transportation, if applicable;

3.1.3.8.1.7. The State Historical Society, if applicable;

3.1.3.8.1.8. The State Department of Trust Lands, if applicable;

3.1.3.8.1.9. The State Parks and Recreation Department, if applicable; and

3.1.3.8.1.10. Other agencies or political subdivisions as appropriate.

3.1.3.8.2. Each entity must submit all comments in writing to the State Engineer. The State Engineer or district is not bound by any comment submitted. The State Engineer must receive comments within thirty days of the date requests for comments were sent.

3.1.3.9. Upon completion of the comment period, the State Engineer must conduct a review of the application and the comments submitted and determine if the application meets drainage of statewide or interdistrict significance.

3.1.3.10. The State Engineer must send notice and a copy of the State Engineer's statewide or interdistrict significance determination and rationale on the application to the district, the applicant, all entities listed in section 3.1.3.8.1., and anyone who has requested in writing to be notified.

3.1.3.11. As part of the State Engineer's notice, the State Engineer will attach conditions to a draft permit, as described in N.D.A.C. section 89-02-01-09.11. The State Engineer's conditions may address any comments received, which in the State Engineer's judgement, will otherwise mitigate the necessity, benefit, or purpose for classifying the application as drainage of statewide or interdistrict significance. In that scenario, upon the State Engineer's notice, the district must follow the procedure outlined in N.D.A.C. section 89-02-01-09.1(2). If the district approves the application, the district's approval must be noted on the draft permit document provided by the State Engineer and must include any draft State Engineer conditions in its approval. By signing the draft permit document, the district agrees to enforce the draft permit conditions therein.

3.1.3.12. If the application is deemed to be drainage of statewide or interdistrict significance, the district and State Engineer must follow the process in N.D.A.C. 89-02-01-09.1(1).

4. DEFINITIONS

4.1. "Drain" is defined in N.D.A.C. section 89-02-01-02(4) and otherwise in State Engineer policy.

4.2. "Lake" is defined in N.D.A.C. section 89-02-01-02(6) and otherwise in State Engineer policy.

4.3. "Pond" is defined in N.D.A.C. section 89-02-01-02(10) and otherwise in State Engineer policy.

4.4. "Slough" is defined in N.D.A.C. section 89-02-01-02(13) and otherwise in State Engineer policy.

4.5. "Watercourse" is defined in N.D.A.C. section 89-02-01-02(15) and otherwise in State Engineer policy.

5. POLICY ADDENDUMS

State Engineer Technical Memo – dated March 13, 2020

No Policy Revisions available