



State of North Dakota

Office of the State Engineer

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MEMORANDUM

TO: Legislative Council Administrative Rules Committee

FROM: Dale L. Frink, State Engineer

RE: Rules Published in the April 2008 Supplement to the North Dakota Administrative Code

DATE: March 12, 2008

Title 89 - Water Commission.

A brief description of the amendments that have been made by the State Engineer and an explanation regarding the matters of concern to the committee are as follows:

1. *Whether the rules resulted from statutory changes made by the Legislative Assembly.*

The amendments to N.D. Admin. Code §§ 89-11-01-04 and 89-11-01-05 resulted from statutory changes to N.D.C.C. § 61-34-04. The remainder of the rules did not result from statutory changes.

2. *Whether the rules are related to any federal statute or regulation.*

No.

3. *A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.*

The State Engineer published the abbreviated public hearing notice for the proposed rules once in each official county newspaper in North Dakota. The State Engineer filed a full notice of hearing with the Legislative Council and held a public hearing on November 20, 2007, in Bismarck. The comment period was open until December 3, 2007. The rules were submitted to the Attorney General for a legal opinion on January 22, 2008, and the Attorney General approved the rules on February 14, 2008.

The proposed rules were given, mailed, or faxed to anyone who requested them; they were also mailed to a number of federal and state agencies. The abbreviated notice stated that the rules were available on the State Engineer's web page.

4. *Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.*

Oral and written comments were received at the hearing and during the comment period. The comments and the State Engineer's consideration of the comments are attached.

5. *The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.*

The cost for publication of the public hearing notices was \$1,797.00.

6. *An explanation of the subject matter of the rules and the reasons for adopting those rules.*

N.D. Admin. Code Article 89-10 regulates islands and beds of navigable waters. The following sections were either amended or created:

Section 89-10-01-01 amends the phrase "navigable streams and waters" to "navigable waters."

Subsection 3 of Section 89-10-01-03 amends the definition of "navigable waters" and adds Painted Woods Lake and Sweetwater Lake as navigable.

Subsection 4 of Section 89-10-01-03 amends the definition of "ordinary high watermark."

Subsection 5 of Section 89-10-01-03 amends the definition of "project."

Subsection 6 of Section 89-10-01-03 amends the definition of "riparian owner."

Section 89-10-01-04 requires that any project on state sovereign land requires authorization by the state engineer prior to construction or operation, except as otherwise provided in this chapter.

Subdivision b of subsection 1 of section 89-10-01-06 is amended to correct the title of the state department of health.

Section 89-10-01-08 is amended to include the requirement that the state engineer consider potential effects on cultural and historical resources when acting on a permit application for a project on state sovereign land.

Section 89-10-01-11 prohibits the construction or moorage of any residential structure or structure designed for human occupancy except as otherwise provided in this chapter.

Section 89-10-01-12 amends the phrase “navigable streams and waters” to “navigable waters” and replaces “beds” with “all land and water below the ordinary high watermark.”

Section 89-10-01-13 regulates the use of motor vehicles on state sovereign land.

Section 89-10-01-14 provides that the state engineer may cancel any project authorized under these rules.

Section 89-10-01-21 is created to require a permit from the state engineer for organized group activities that are publicly advertised or are attended by more than 25 people on state sovereign land.

Section 89-10-01-22 is created to address control of pets on state sovereign land in and around the Missouri River between the railroad bridge near the south border of Fort Lincoln state park (approximately river mile marker 1,310) and the Interstate 94 bridge (approximately river mile marker 1,315.4).

Section 89-10-01-23 is created to prohibit camping for more than 10 days or leaving a campsite unattended for more than 24 hours on state sovereign land.

Section 89-10-01-24 is created to provide that hunting, fishing, and trapping are open on state sovereign land, except as provided in other rules, regulations, or laws; and prohibits posting sovereign land with signage by anyone other than the state engineer.

Section 89-10-01-25 is created to prohibit leaving watercraft unattended or moored on state sovereign land for more than 24 hours.

Section 89-10-01-26 is created to prohibit unpermitted activities that remove or destroy natural resources on state sovereign land.

Section 89-10-01-27 is created to prohibit disturbance or destruction of cultural or historical resources on state sovereign land.

Section 89-10-01-28 is created to prohibit littering, abandonment of property, dumping of holding tanks of campers or boats, and possession of glass containers on state sovereign land.

N.D. Admin. Code Article 89-11 regulates the drought disaster livestock water supply project assistance program. The following sections were amended:

Subsection 2 of Section 89-11-01-01 amends the definition of “water supply project.”

Section 89-11-01-02 is amended to provide that the state water commission will determine a beginning and end date of the program.

Subsection 2 of Section 89-11-01-03 updates the name of the farm service agency.

Subsection 2 of Section 89-11-01-04 removes the requirement that cost share assistance is available only for long-term immediate solutions.

Subsection 4 of Section 89-11-01-04 is amended to provide the following items are eligible for assistance - new water wells, rural water system connections, pipeline extensions, pasture taps, pumps, generators, electrical and solar hook-ups, stock water tanks; and labor, materials, and equipment rentals for work completed by the producer as items eligible for assistance.

Subsection 5 of Section 89-11-01-04 is amended to limit an applicant to three projects.

Subsection 2 of Section 89-11-01-05 is amended to provide that projects outside of North Dakota are not eligible for the program.

Subsection 6 of Section 89-11-01-05 is amended to provide that repairs due to damage to an existing water source are not eligible for the program.

Subdivision a of subsection 1 of Section 89-11-01-06 updates the name of the farm service agency.

Subsection 2 of Section 89-11-01-06 is amended to require the state engineer to acknowledge receipt of an application.

Subdivision a of subsection 2 of Section 89-11-01-06 is amended to provide that the state engineer may grant an extension of time to complete a project if a written request is submitted and just cause for an extension is provided.

Subsection 3 of section 89-11-01-06 adds the state water commission’s website address.

7. *Whether a regulatory analysis was required by North Dakota Century Code (N.D.C.C.) § 28-32-08 and whether a regulatory analysis was issued.*

A regulatory analysis was not required.

8. *Whether a regulatory analysis or economic impact statement of impact on small entities was required by N.D.C.C. § 28-32-08.1 and whether that regulatory analysis or impact statement was issued.*

A regulatory analysis and economic impact statement on small entities was issued and is attached.

9. *Whether a constitutional takings assessment was prepared as required by N.D.C.C. § 28-32-09.*

A constitutional takings assessment was not required.

10. *If these rules were adopted as emergency (interim final) rules under N.D.C.C. § 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.*

These rules were not adopted as emergency rules.

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Attachments

**STATE ENGINEER'S CONSIDERATION OF COMMENTS ON
NORTH DAKOTA STATE ENGINEER'S
PROPOSED ADMINISTRATIVE RULE CHANGES**

**Article 89-10
Islands and Beds of Navigable Waters**

1. N.D. Admin. Code Article 89-10

Darrell McQuay (comments provided at the hearing):

I'm not sure exactly what I'm going to, what your meeting is, if it involves our land out there or not. We live out there, there's three, four of us out here from the area of Crestwood Drive, Westwood on the river, it's called. And we petitioned the Corps of Engineers for permission to dredge the stream area that comes by ours, it once upon a time was part of the original mainstream. And now it's, through the raising and lowering of the water we don't get any water on it and we have about two, three miles of people living on there who pump out of the river with permission from the Corps for lawns. Its, they have their boats and the whole shootin match and so anyhow we approached the Corps of Engineers and the State Water Commission was at our meeting, were you there, anyhow we requested permission to dredge. The Corps was, and the guy that worked with me is an engineer, Bill Simon, and he could not make it today. He has another meeting this morning, and, but, our petition with the Corps was approved, but we, the Water Commission hadn't approved it, but they sent out some things that we have to prepare for them which Bill has done, like I say, he's an engineer and he has, we have sent them back in and then we got another letter of a few other things we have to do. And we have not been down to the river since then, or down to survey all of this to see exactly what markings we're gonna have put up on it. I don't know if this particular hearing involves that particular land or project or not. But I heard about it and thought I'd better get in here and check.

State Engineer's Response:

This testimony refers to a sovereign lands permit application, not the proposed changes to the North Dakota Administrative Code.

Jeff Underhill (comments provided at the hearing):

I have concerns about the off-road vehicles on the sovereign land down in that area of the island. And I was just hoping that there'd be some way we could get someone out there to patrol it, or, have some rules on that, not have just free reign down there for people just to use it however they want to. You know there's boaters down there and people that walk down there in the summertime

and with no, with no sheriff patrolling or anything down there the people that drive the off-road vehicles think that that's, that that's their land and they're the only ones that can use it. So I just hope that that would be addressed. I don't see with all the development going on to the north of the town that it's just going to get worse. It's a pretty small island, I think there should be somewhere else they can go other than that. Thank you.

State Engineer's Response:

The proposed changes to N.D. Admin Code § 89-10-01-13 address these concerns.

North Dakota Game and Fish Department:

The regulations proposed by the State Engineer no longer make any references to enforcement penalties. In lieu of this the State Engineer is relying upon the provisions enacted into law in the last legislative session via SB 2096. As the penalty section of SB 2096 states "a person who violates this chapter or any rule implementing this chapter is guilty of a class B misdemeanor unless a lesser penalty is indicted." The State Engineer's office needs to specifically indicate in Article 89-10 which proviso would be noncriminal offenses or subject to lesser penalties. If the State Engineer's office chooses not to do it here in the proposed regulations, the question would be where and when would these lesser penalties be specified. The lack of lesser penalties may affect enforceability.

State Engineer's Response:

The fine structure has yet to be decided, but will be developed with input from both the Attorney General's office and the Game and Fish Department.

2. **N.D. Admin. Code § 89-10-01-03(4)**

North Dakota Game and Fish Department:

The proposed definition for "ordinary high watermark" is not consistent with best available hydrologic science or commonly used definitions and thus is in need of modification. The specific problem emanates from the use of the terms "bank" and "bed" in the proposed sentence "Land above the high watermark typically is referred to as the 'bank' of navigable waters; land below the high watermark typically is referred to as the 'bed' of navigable waters." It appears this sentence has been added to the proposed regulations to help people visualize where the ordinary high watermark is. However, we believe it will have the opposite effect and lead to confusion in terms of public understanding and in future ordinary high watermark delineations. In standard vernacular a river "bank" is the sloping ground that confines the water in the natural channel when the water level, of flow is normal. A river "bed" is commonly thought of as the flat-lying channel situated between the two river banks or the channel area actually covered by water. Thus the river bed often contains the "low" or "ordinary low" watermark. In terms of elevation however, the ordinary high watermark is generally found on the banks of a river or near the top of the bank. The proposed wording is confusing and flawed. Accordingly we recommend that this sentence be deleted. For more information on banks, bankfull stage, the relationship of frequent highwater events and the floodplains and bankfull stage we refer you to *Water in Environmental Planning* by Dunne and Leopold (1978) and the earlier seminal work of Leopold and Wolman (1957) and Leopold, Wolman and Miller (1964).

Harley Swenson:

Defines the "bed" of navigable waters as everything below the high watermark. Yet in #7, it defines the area between the high watermark and the low watermark as "the shore zone". It is well known that the state and adjacent landowner both have rights in the "shore zone". As you've defined it, you are then granting the adjacent landowner rights to the "bed" of the navigable water. Is this what you want to do?

State Engineer's Response:

The proposed sentence relating to the "bank" and "bed" found under the definition of ordinary high watermark will be removed.

3. N.D. Admin. Code § 89-10-01-03(6)

North Dakota Game and Fish Department:

Given the problems cited above, we believe the proposed definition for "riparian owner" should be amended to read "6. 'Riparian owner' means a person who owns land adjacent to navigable waters."

State Engineer's Response:

The definition will be changed to read:

6. "Riparian owner" means a person who owns land adjacent to navigable waters or the person's authorized agent.

4. N.D. Admin. Code § 89-10-01-03(7)

North Dakota Game and Fish Department:

The ordinary low watermark is not defined and a protocol has not been developed for determining where it may be located. Because of this we recommend the definition of "shore zone" be reworded.

State Engineer's Response:

The definition of "shore zone" will be removed and all subsequent occurrences of "shore zone" (§ 89-10-01-13(10), § 89-10-01-25(2) and (3), and § 89-10-01-26) will be replaced with "land below the ordinary high watermark."

5. N.D. Admin. Code § 89-10-01-10

Harley Swenson (comments provided at the hearing):

I believe you restrict the length of docks and I know that if you were, you'd better send somebody out to Lake, to a lot of the small lakes because in many cases the docks at the length that you have the water would be 18 inches deep. So, I don't believe that you should restrict, I don't believe you should put a number on the length. I think you should accomplish what you want to accomplish by requiring that it not interfere with navigation nor should it interfere with the pre-right of access to adjacent properties. And that's what you're trying to accomplish so why just not say that instead of artificially putting in lengths that have really not, only muddy the water.

Harley Swenson (provided written comments):

- 1(d) Prohibits boat docks longer than 25 feet on a river and longer than 50 feet on a lake. In some lakes in the state (and in Minnesota and other states as well), 50 feet will not get you to knee deep water. On the other hand, a 25 foot dock near the entrance to a marina or boat ramp could be a serious impediment to navigation and marine access to adjacent properties. What should be said, and I've pointed this out to your staff repeatedly, is: Docks that unreasonably interfere with navigation or reasonable marine access to adjacent riparian owner's property are prohibited. Length of dock should not be a factor. We should not create a rule that makes many of the state's docks on lakes unlawful!

North Dakota Game and Fish Department:

For permitted docks we believe that the anchoring devices for the dock and walkway should be installed above the ordinary high watermark. Similarly we believe that walkways should be attached to the shore above the ordinary high watermark.

North Dakota Game and Fish Department:

Projects not requiring a permit

- §1. Boat docks. In order to facilitate tracking we believe all boat docks should require a permit.
- §2. Boat ramps. Again in order to facilitate tracking we believe all boat ramps should require a permit.
- §3. Water intakes.
- We believe provision e. should be amended and reworded as follows: "e. Upon abandonment, the riparian owner or lessee should remove the intake and restore the bank to its original condition."
 - We believe another provision should be added to this subsection that reads as follows: "f. Intake screens with a mesh opening of ¼ inch or less shall be installed, inspected annually, and maintained."
- §5. Boats that are temporarily moored. See 89-10-01-25.

State Engineer's Response:

This section was not included in the public notice; therefore, it will not be changed at this time.

6. N.D. Admin. Code § 89-10-01-12

North Dakota Game and Fish Department:

Public recreational use. We believe the proposed regulation should be reworded as follows: "The public's right to use the islands and all land and water below the ordinary high watermark of navigable waters for nondestructive, recreational purposes is allowed except as otherwise provided for by these rules."

State Engineer's Response:

The section will be changed to read:

The public's right to use the islands and all land and water below the ordinary high watermark of navigable waters for nondestructive, recreational purposes is allowed except as otherwise provided by these rules.

7. N.D. Admin. Code § 89-10-01-13(1)

North Dakota Game and Fish Department:

Provision 1 should be deleted or changed to SWC "designated trails and signed."

State Engineer's Response:

This subsection will be changed to read:

1. *When on government-established trails that have been permitted by the state engineer;*

8. N.D. Admin. Code § 89-10-01-13(2)

Michael Gunsch, Houston Engineering, also representing the Burleigh County Water Resource District (comments provided at the hearing):

One of the issues that came up that we noted was the reference to Kimball Bottoms being in the administrative rules and that is the only reference to any particular site throughout the whole state. And I guess it was kind of our impression that should other sites be listed and/or should the reference to Kimball Bottoms be taken out and the administrative rules written around so that Kimball Bottoms is actually addressed by specific elements rather than by name. So it's kind of a straight forward, I think we understand what Kimball Bottoms is for and what has been defined for use as by the Corps under their authorization

as well. But we just didn't see any name or any reason to recognize a specific name when there are no other sites recognized.

North Dakota Game and Fish Department:

Provision 2 of the proposed regulations will allow motor vehicle use in the sovereign land areas adjacent to the Kimball Bottoms off-road riding area. We do not support this provision for a variety of reason including:

- Such use can be authorized under Provision 3.
- The Game and Fish Department is responsible for managing land adjoining the Kimball Bottoms OHV area. Given the sandbars in this area shift it can be reasonably anticipated that trespassing OHVs on Game and Fish managed lands will be an issue.
- The existing motor vehicle use in the Kimball Bottoms OHV area is already having a negative impact on the vegetation in the riparian area including the trees lining the river banks. Erosion around some trees is severe and many trees have had their roots exposed by vehicles going up and down the banks at will. To reduce this ongoing damage if OHV use is authorized in the area, specific access routes to the shore zone need to be identified. The ability to undertake this measure can be done under provision 3 and under 89-10-01-20, however Provision 2 would undermine the prospective of this happening.

Harley Swenson:

This section prohibits ATV recreational use of sandbars and other shore zones except by the adjacent riparian owner or in the Kimball Bottoms (which is a very poor, ill defined description). I am curious as to where the boundaries of the Kimball Bottoms are--and I've lived here all my life. Does this mean the State game management area, which extends for many miles? Or the entire Kimball bottoms? I feel that we are creating a rule that will be difficult or impossible to enforce.

State Engineer's Response:

This subsection will be changed to read:

2. *When on sovereign land areas immediately adjacent to the Kimball Bottoms off-road riding area located in the south half of sections 23 and 24 and the north half of sections 25 and 26, all in township 137 north, range 80 west, Burleigh County;*

9. N.D. Admin. Code § 89-10-01-13(3)

North Dakota Game and Fish Department:

Provision 3 should be reworded, to read as follows: "When in state-designed off-road use areas, provided the area is managed and supervised by a government entity, the government entity has developed a management plan to minimize impacts, the management plan is approved by the Office of the State Engineer and sovereign lands advisory panel, and the government entity has obtained a sovereign land permit for off-road-use in the designated area."

State Engineer's Response:

As provided in N.D.C.C. § 61-33-08, the sovereign lands advisory board "has no authority to require the state engineer or the board of university and school lands to implement or otherwise accept the board's recommendations." Therefore no change will be made to the proposed language.

10. N.D. Admin. Code § 89-10-01-13(4)

North Dakota Game and Fish Department:

Provision 4 should be reworded, to read as follows: "To cross a stream by use of a ford, bridge, culvert, or similar structure on a designated road or trail provided the crossing is in the most direct manner possible."

State Engineer's Response:

Limiting crossings to only designated roads or trails is not practical, especially in remote, rural areas where crossings may be few and far between.

11. N.D. Admin. Code § 89-10-01-13(5)

North Dakota Game and Fish Department:

Provision 5 should be deleted.

State Engineer's Response:

Restricting the launching or loading of a boat to a designated boat landing may be overly restrictive or even impossible in some situations.

12. N.D. Admin. Code § 89-10-01-13(6)

North Dakota Game and Fish Department:

Provision 6 should be reworded to read as follows: "... to operate on the frozen surfaces of any navigable water, provided the crossing of sovereign land is in the most direct manner possible."

State Engineer's Response:

The likely practical result of the proposed change is to eliminate the entire subsection, which may be overly restrictive. Therefore, no changes will be made.

13. N.D. Admin. Code § 89-10-01-13(8)

North Dakota Game and Fish Department:

Provision 8 should be deleted.

State Engineer's Response:

We feel the impact from allowing this to occur will be minimal compared to the benefits derived by individuals who might otherwise have limited hunting and fishing opportunities.

14. N.D. Admin. Code § 89-10-01-13(9)

North Dakota Game and Fish Department:

Provision 9 should be reworded to read as follows: "When operation is authorized as part of a permitted activity or project."

State Engineer's Response:

The language proposed appears to offer no substantial change; therefore, no changes will be made.

15. N.D. Admin. Code § 89-10-01-13(10)

North Dakota Game and Fish Department:

Provision 10 should be reworded to read as follows: "By the riparian owner or the riparian owner's lessee in the shore zone adjacent to the riparian owner's property provided it does not negatively affect public use and/or value."

State Engineer's Response:

This subsection will be changed to read:

10. *By the riparian owner or the riparian owner's lessee on land below the ordinary high watermark that is adjacent to the riparian owner's property provided it does not negatively affect public use or value; and*

16. N.D. Admin. Code § 89-10-01-13

North Dakota Game and Fish Department:

A provision must be added that specifically authorizes the use of vehicles by official personnel in the performance of their duties.

State Engineer's Response:

Subsection 11 will be added as follows:

11. *When being used by government personnel in the performance of their duties.*

17. N.D. Admin. Code § 89-10-01-17

North Dakota Game and Fish Department:

Inspections. We believe this section should be reworded as follows: "The state engineer or his designee may inspect all projects which lie below the ordinary high watermark and enter upon a grantee's land during normal working hours to carry out the inspection."

State Engineer's Response:

This section was not included in the public notice; therefore, it will not be changed at this time.

18. **N.D. Admin. Code § 89-10-01-22**

North Dakota Game and Fish Department:

Pets. The Department suggests the following change to this section. "Pets may not be permitted to run unattended on sovereign land. Additionally, in and around the Missouri River between the railroad bridge near the south border of Fort Lincoln state park (approximately river mile marker 1,310) and the Interstate 94 bridge (approximately river mile marker 1,315.4). Pets in this corridor of the Missouri River must be leashed by a restraint of no more than ten feet. A pet's solid waste must be disposed of properly."

Harley Swenson:

Prohibits pets not on a leash in areas around Bismarck. Apparently it's O.K. to let them run on sovereign lands in the rest of the state. Again, I'm concerned about who will enforce the law for this terrible crime. If it is the riparian owner's pet, is it O.K.?

State Engineer's Response:

This section will be changed to read:

Pets may not be permitted to run unattended on sovereign land in and around the Missouri River between the railroad bridge near the south border of Fort Lincoln state park (approximately river mile marker 1,310) and the Interstate 94 bridge (approximately river mile marker 1,315.4). Pets in this corridor of the Missouri River must be in the immediate control of their owner. A pet's solid waste must be disposed of properly.

19. N.D. Admin. Code § 89-10-01-23

North Dakota Game and Fish Department:

Camping. The proposed language no longer includes a prohibition on trailers, campers, motor homes or pick-up campers. As use of such modes of camping appear inconsistent with the provisos established for vehicular access in 89-10-01-13 this section merits further consideration and clarification. Our experience is that motorized forms of camping result in the development of a network of volunteer trails. We believe that such use will result in negative impacts to sovereign lands. This merits further consideration and clarification.

State Engineer's Response:

This section will be changed to read:

Camping for longer than ten consecutive days in the same vicinity or leaving a campsite unattended for more than twenty-four hours is prohibited on any state sovereign land area.

20. N.D. Admin. Code § 89-10-01-24

North Dakota Game and Fish Department:

Hunting, fishing, and trapping. The proposed language does not prohibit commercial guiding or outfitting on sovereign lands. The Department has suggested that a proviso be added that prohibits guiding and outfitting on sovereign lands in the past and we strongly urge that it be added now. We also believe this section should include the proviso "Posting sovereign land with signage by anyone other than the state engineer is prohibited."

State Engineer's Response:

The issue regarding commercial guiding or outfitting is already addressed in N.D.C.C. § 20.1-03-42, which, among other things, prohibits a person from acting as a hunting guide or hunting outfitter on land owned by the state unless permitted by the appropriate state agency.

The issue of making it illegal to post sovereign lands by someone other than the state engineer is already addressed in the proposed language.

**STATE ENGINEER'S CONSIDERATION OF COMMENTS ON
NORTH DAKOTA STATE ENGINEER'S
PROPOSED ADMINISTRATIVE RULE CHANGES**

**Article 89-11
Drought Disaster Livestock Water Supply Project
Assistance Program**

1. N.D. Admin. Code § 89-11-01-01

North Dakota Department of Agriculture:

I believe all changes being proposed will help make the program more effective and follow the intent of the law. However, I would like to suggest that the definition of "Livestock Producer" be reflected more accurately in the application process.

The rule in part states that an eligible producer is one "... who normally (emphasis added) receives not less than fifty percent of the individual's annual gross income from farming or ranching." The application asks, "Do you get more than 50% of your income from farming and ranching?" Unfortunately, at least one beginning farmer felt he would not qualify after seeing that question and did not submit an application. I suspect that there may have been many more.

Young farmers often depend on non-farm income during the start-up years to make ends meet. Lenders who finance these new producers generally require more than one cash flow projection. The first is used to create a picture of the start-up period while the other, called a "typical year" plan, will predict what the operation will produce once it reaches full capacity.

My recommendations are to:

1. Remove the question asking about the farm producing 50% of the family's gross income from the application.
2. Add the following question to the application: "Does a typical year cash flow projection (*The operation has reached full production, and the projection is based on average income and expenses.*) show that at least 50% of your gross income comes from farming?" Yes or No.
3. Add this warning below the new question: (*Note: If Yes, you may be asked to verify your answer by submitting a copy of your cash flow plan.*)

Changing the application as described above should allow all farmers, including beginning farmers in their start up years, to qualify for the Livestock Disaster Program when it is activated and provide a simple method of verification.

State Engineer's Response:

We agree with the recommendations concerning the application for assistance and will incorporate them in the application form. No changes are necessary to the administrative rules.

2. N.D. Admin. Code § 89-11-01-05

Senator Tom Fischer (phone call):

N.D.C.C. § 61-34-04 was amended to provide that a water supply project commenced after application for funding is made but without prior approval of the state engineer is eligible for funding from the program. To be consistent with statute, the requirement that a water supply project be approved before application for funding is made should be removed from the rules as a noneligible item.

State Engineer's Response:

Subsection 4 of N.D. Admin. Code § 89-11-01-05 will be deleted.

**N.D. ADMIN. CODE CHAPTER 89-10-01
ISLANDS AND BEDS OF NAVIGABLE WATERS**

SMALL ENTITY REGULATORY ANALYSIS

1. Establishing less stringent compliance or reporting requirements.
No impact.
2. Establishing less stringent schedules or deadlines for compliance or reporting requirements.
No impact.
3. Consolidation or simplification of compliance or reporting requirements.
N/A.
4. Establishing performance standards that replace design or operational standards required in the proposed rule.
N/A.
5. Exempting small entities from all or any part of the requirements.
No impact.

SMALL ENTITY ECONOMIC IMPACT STATEMENT

1. Small entities that may be subject to the proposed rule.
Private persons or groups/organizations are subject to the proposed rules.
2. The administrative or other costs required for small entities to comply with the proposed rule.
No cost to comply with the proposed rules.
3. The probable cost and benefit to private persons and consumers who may be affected by the proposed rule.
The cost is simply the cost of doing business for the Office of State Engineer, but the benefits will be preserving sovereign lands for the people of North Dakota.
4. The probable effect of the proposed rule on state revenues.
There would be no effect on state revenues.
5. Whether there are any less intrusive or less costly methods of achieving the proposed rule's purpose.
No.

**N.D. ADMIN. CODE CHAPTER 89-11-01 – DROUGHT DISASTER
LIVESTOCK WATER SUPPLY PROJECT ASSISTANCE PROGRAM**

SMALL ENTITY REGULATORY ANALYSIS

1. Establishing less stringent compliance or reporting requirements.

The proposed rules make applying for and receiving assistance easier.

2. Establishing less stringent schedules or deadlines for compliance or reporting requirements.

Prior approval of the State Engineer is no longer needed before construction begins.

3. Consolidation or simplification of compliance or reporting requirements.

The rules have been simplified because estimates no longer need to be written. Also, more items are now eligible for funding from the program.

4. Establishing performance standards that replace design or operational standards required in the proposed rule.

No impact.

5. Exempting small entities from all or any part of the requirements.

No impact.

SMALL ENTITY ECONOMIC IMPACT STATEMENT

1. Small entities that may be subject to the proposed rule.

Private contractor well drillers and livestock producers are subject to the proposed rules.

2. The administrative or other costs required for small entities to comply with the proposed rule.

No cost to comply with the proposed rules.

3. The probable cost and benefit to private persons and consumers who may be affected by the proposed rule.

The proposed rules make applying for assistance easier.

4. The probable effect of the proposed rule on state revenues.

There would be no effect on state revenues.

5. Whether there are any less intrusive or less costly methods of achieving the proposed rule's purpose.

The proposed rules make applying for assistance easier.