




# 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 11, 2009

#### **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 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.*

An abbreviated notice of hearing was published once in each official county newspaper in North Dakota and a full notice of hearing was filed with the Legislative Council. A public hearing was held on November 20, 2008, in Bismarck. The comment period was open until December 1, 2008. The rules were submitted to the Attorney General for a legal opinion on January 7, 2009 and the Attorney General approved the rules on February 2, 2009.

The proposed rules were provided to anyone who requested them; they were also mailed to a number of citizens and public 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 comments received at the hearing were general about sovereign lands; however, the comments did not address any of the rule changes. The written 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 \$1,374.44.

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, Authority** was amended to replace "the islands and beds of navigable waters" with "sovereign lands" for consistency throughout the chapter.

**Section 89-10-01-02, Prohibition on Permanent Relinquishment** was amended to provide that all structures permitted or otherwise allowed for private use are subordinate to public use and values on sovereign lands.

**Section 89-10-01-03, Definitions** was amended to add definitions for "boardwalk" and "structure" and to amend the definition of "project" by replacing "below the ordinary high watermark of navigable waters" with "on sovereign lands" for consistency throughout the chapter.

**Section 89-10-04-04, Authorization** was amended to delete reference to specific sections of this chapter and replace the reference with as "otherwise provided by these rules."

**Section 89-10-01-10, Projects Not Requiring a Permit** was amended to clarify that permits are not required if all of the listed criteria are met.

**Subdivisions d and e of subsection 1 of section 89-10-01-10** were amended to clarify placement and length of a dock or boardwalk that does not require a permit.

**Subdivision d of subsection 4 of section 89-10-01-10** was amended to replace "an island or any portion of the bed of a navigable stream or water" with "sovereign lands" for consistency throughout the chapter.

**Section 89-10-01-10.1, Boat Docks, Boat Ramps, and Water Intakes** was created to clarify that a permit from the state engineer is required if these structures do not meet the criteria in 89-10-01-10 and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$250 fee.

**Section 89-10-01-11, Structures** was amended to provide that, except as otherwise provided, construction or moorage of a structure on sovereign lands is prohibited and established the process by which the state engineer may remove the structure.

**Section 89-10-01-12, Public Recreational Use** was amended to replace "the islands and all land and water below the ordinary high watermark of navigable waters" with "sovereign lands" for consistency throughout the chapter, the term "nondestructive" was removed, and to provide that the state engineer may post signage prohibiting public recreational use. Several editing revisions are also made.

**Section 89-10-01-13, Vehicular Access** was amended to replace "land below the ordinary high watermark of navigable water bodies" and "sovereign land" with "sovereign lands" for consistency throughout the chapter, and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$100 fee. Several editing revisions were also made.

**Section 89-10-04-14, Cancellation by the State Engineer** was amended to delete reference to specific sections of this chapter.

**Section 89-10-01-17, Inspections** was amended to replace "which lie below the ordinary high watermark" with "on sovereign lands" for consistency throughout the chapter.

**Section 89-10-01-21, Organized Group Activities** was amended to add "on sovereign lands" for consistency throughout the chapter and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$250 fee.

**Section 89-10-01-22, Pets** was amended to delete the specific reference to the Missouri River corridor and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$50 fee. Several editing revisions were also made.

**Section 89-10-01-23, Camping** was amended for editing revisions for consistency throughout the chapter, to provide that camping for longer than 10 consecutive days within a 30-day period is prohibited, and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$100 fee.

**Section 89-10-01-24, Hunting, Fishing, and Trapping** was amended for several editing revisions for consistency throughout the chapter and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$100 fee.

**Section 89-10-01-25, Unattended Watercraft** was amended to replace "land" with "lands" for consistency throughout the chapter and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$50 fee.

**Section 89-10-01-26, Removal of Public Property** was amended for several editing revisions for consistency throughout the chapter and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$250 fee.

**Section 89-10-01-27, Cultural or Historical Resources** was amended to replace "land" with "lands" for consistency throughout the chapter and to require a permit from the state engineer before disturbing or destroying cultural or historical resources.

**Section 89-10-01-28, Disposal of Waste** was amended to add "on sovereign lands" and to replace "land" with "lands" for consistency throughout the chapter and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$250 fee. The provisions for abandonment of vehicles or other personal property and glass containers were deleted from this section and added to new sections.

**Section 89-10-01-29, Glass Containers** was created to prohibit glass containers on sovereign lands and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$100 fee.

**Section 89-10-01-30, Abandoned Property** was created to prohibit abandoned vehicles or other personal property on sovereign lands.

**Section 89-10-01-31, Firearms** was created to prohibit reckless and indiscriminate use of firearms on sovereign lands and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$100 fee.

**Section 89-10-01-32, Tree Stands** was created to regulate the construction of tree stands on sovereign lands and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$100 fee.

**Section 89-10-01-33, Baiting** was created to regulate baiting of wildlife on sovereign lands and to provide that any person who violates this section is guilty of a noncriminal offense and shall pay a \$100 fee.

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.*

Regulatory analysis and economic impact statements on small entities were issued and are 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 AMENDMENTS**

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

**1. N.D. Admin. Code article 89-10**

**Wayne Papke and Raleigh Messmer, landowners in the Christmas Tree Island area, and Virgil Horst, a landowner on the Mandan side of the river (provided comments at the public hearing):**

Their comments were general in nature, expressing concerns about management of sovereign lands.

**State Engineer's Response:**

Mr. Papke, Mr. Messmer, and Mr. Horst made only general comments and did not address any of the proposed administrative rule amendments.



2. **N.D. Admin. Code § 89-10-01-10**

**Doug Prchal, North Dakota Parks and Recreation Dept. (written comments):**

Mr. Prchal questioned whether this section permits private groups, i.e. FALF [Fort Abraham Lincoln Foundation] and the Riverboat to secure a permit.

**State Engineer's Response:**

N.D. Admin. Code § 89-10-01-10 describes the conditions that must be met by the riparian landowner or the riparian landowners lessee before constructing a dock on sovereign lands. If the conditions are not satisfied, the dock owner must apply for and receive a sovereign lands permit from the state engineer before construction.

**Harley Swenson (written comments):**

I continue my objection to some of the proposed rules. The most onerous is the prohibition of docks over 50 feet in length in lakes. Anyone who has been to some Minnesota lakes has seen docks at least twice that long being used to get beyond the shore vegetation and bull rushes. Also, at this time, I'd like to report at least one hundred docks at Lake Isabel that next summer will exceed the 50 foot limit being proposed. You should also be aware that many docks at Lake Isabel are connected to shore by a walkway. Since the state has allowed the lake to be drained by irrigators, we all have about one hundred feet of beach, and of course, 100 foot boardwalks, four times more than is allowed.

The biggest hazard on the lake occurs when riparian owners leave their boat lifts 300 feet from shore to get to water deep enough to use a boat lift! They then wade out to the lift.

Prior to excessive irrigation withdrawals, a fifty foot dock and 25 foot boardwalk would have been acceptable but not now!

In my opinion, if nobody is harmed, we should not create rules that cause problems for people, or cause them to be lawbreakers. Has anyone who uses the lake complained about the above issues? That is a [sic] not a rhetorical question. I hope for an answer. I also hope that you will explain who will be enforcing these rules and how they can be appealed.

**State Engineer's Response:**

N.D. Admin. Code § 89-10-01-10 describes the conditions for constructing a dock on sovereign lands without a permit from the state engineer. The riparian landowner or the riparian landowner's lessee may construct a longer dock or boardwalk, but must first apply for and receive a permit.

In reviewing a permit application, the state engineer first determines whether sovereign lands are involved. If so, the state engineer would consider conditions such as those you describe. (Please note that the state engineer does not agree with your statement that, "the state has allowed [Lake Isabel] to be drained by irrigators.") The state engineer would also consider any complaints raised by dock owners in the area.

Finally, these rules will be enforced by the state engineer through existing authorities and an agreement being developed with the North Dakota Game and Fish Department.

#### **North Dakota Game and Fish Department (written comments):**

##### Boat Docks:

Certain waterways in our state (e.g. Missouri River near Bismarck and Lake Metigoshe) are becoming overly congested with boats and other watercraft. This situation is compounded when riparian owners are allowed to place a private dock in the waterway further reducing the amount of space available to boaters. In order to effectively and responsibly deal with the congestion issue on these waterways, there is a need to track the number and locations of all docks that are placed in the water. The need for this is especially critical when the dock is located in a river, because the location and size of the navigable channel changes. This could be accomplished by having any individual that places a dock on sovereign land register it with the State Engineers Office. While different from the process of permitting, registration would require the individual who owns the dock to register it by notifying the State Engineers office in writing of his intent to place the dock, its physical location and that he has satisfied all of the required conditions. Docks not meeting the required conditions would need to be permitted. We suggest the following wording for boat docks:

**89-10-01-10. Projects not requiring a permit.** The following projects do not require a permit:

1. Boat docks provided the individual who owns the dock registers it by notifying the State Engineers Office in writing of his intent to place the dock, its physical location and that he has satisfied all of the following conditions:
  - a. They are constructed, operated, and maintained by the riparian owner or the riparian owner's lessee for the riparian owner's or lessees personal use;
  - b. The dock is used only for embarkation, debarkation, moorage of boats, water intakes or recreation;
  - c. Only clean, nonpolluting materials are used;
  - d. The dock does not extend more than twenty-five feet [7.6 meters] in length from the edge of the water on a river and fifty feet [15.24



meters] in length from the edge of the water on a lake, and there is no unreasonable interference with navigation or access to adjacent riparian owner's property;

- e. The dock is connected to a point above the ordinary high watermark by a boardwalk that does not exceed twenty-five feet [7.6 meters] in length, and is removed from below the ordinary high watermark each fall;
- ~~f. There is no excavation or filling below the ordinary high watermark in excess of that authorized in subsection 4; and~~
- f. Upon abandonment, the grantee restores the bank as closely as practicable to its pre project original condition.

#### Water intakes:

A large number of the water intakes that are placed across sovereign land are for lawn and garden use. These intakes are usually small, do not require excavation and are commonly attached to a dock. As such, they would have little if any impact on fish and wildlife resources and should not require a permit provided they meet certain conditions. Larger intakes that require bank excavation or are not attached to a dock have the potential to cause bank or shoreline erosion if not done properly and should therefore require a permit. We suggest the following wording for water intakes.

#### 2. Water intakes provided they are attached to a boat dock and meet the following conditions:

- a. They are constructed, operated, and maintained by the riparian owner or the riparian owner's lessee for ~~riparian owner's or lessee's~~ their personal use;
- ~~b. Excavation of the bank is limited to the minimum width necessary to install and maintain the water intake;~~
- ~~c. Materials excavated from the bank are removed to a location above the ordinary high watermark;~~
- b. The intake is entirely removed each fall. ; and
- ~~e. Upon abandonment, the grantee restores the bank as closely as practicable to its original condition.~~

#### Boat ramps:

As presently worded, the rules allow some boat ramps to be constructed without a permit provided they meet several conditions. The conditions require the individual to make several rather subjective decisions. For example, conditions b

and d essentially state that excavation and riprap must be limited to the minimum necessary for placement and stabilization of the ramp. Without a more defined standard we believe those individuals will be inclined to excavate and stabilize larger areas than what is needed. This could lead to unintended bank erosion, improper stabilization techniques and stream deflections/diversions. We believe that all boat ramp projects on sovereign land should require some level of oversight and review by the State Engineers and a permit.

Dredging or filling:

Similar to boat ramps, the current rules allow for some dredging/filling to occur without a permit provided the project meets several conditions. Again the conditions require the individual to make several subjective decisions. Condition c states that the project cannot cause a stream diversion. Based on our experience most members of the general public are not qualified to make this determination and when left to their own devices will say their project is not causing a diversion. Due to the serious consequences of flow diversions (intended or otherwise) we believe that all dredging/filling projects should be reviewed by the State Engineers Office and be allowed by permit only.

**State Engineer's Response:**

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

3. **N.D. Admin. Code § 89-10-01-23**

**Doug Prchal, North Dakota Parks and Recreation Dept. (written comments):**

Mr. Prchal suggested that this section be amended to be similar to Parks and Recreation rule - ten consecutive days within a 30-day period.

**State Engineer's Response:**

This section will be changed to read:

Camping for longer than ten consecutive days within a thirty-day period in the same vicinity or leaving a campsite unattended for more than twenty-four hours is prohibited on ~~any state sovereign land area~~ lands. Any person who violates this section is guilty of a noncriminal offense and shall pay a one hundred dollar fee.

4. N.D. Admin. Code § 89-10-01-27

Paul R. Picha, Chief/State Archaeologist, Archaeology and Historic Preservation Division, State Historical Society of North Dakota (written comments):

Mr. Picha strongly recommended deleting the proposed addition of: "Any person who violates this section is guilty of a noncriminal offense and shall pay a two hundred fifty dollar fee." Mr. Picha stated that "the current wording would parallel that found in 89-10-01.30 [sic] Abandoned Property and the situation would revert to chapters of North Dakota Century Code (NDCC) and accompanying administrative rules (North Dakota Administrative Code, NDAC) pertaining to existing penalties with respect to cultural resources."

State Engineer's Response:

We agree that the addition of: "Any person who violates this section is guilty of a noncriminal offense and shall pay a two hundred dollar fee" is not necessary and may conflict with N.D.C.C. § 55-03-07 which states: "Any person violating any provision of this chapter is guilty of a class A misdemeanor and shall forfeit to the state all archaeological or historic articles and materials discovered by the violator." Therefore, this section will be changed to read:

Artifacts, or any other cultural or historical resources, occurring on sovereign ~~land~~ lands may not be disturbed or destroyed without formal written approval from the state historical society and a permit from the state engineer.

5. **N.D. Admin. Code § 89-10-01-30**

Michael Gunsch, district engineer for the Burleigh County Water Resource District and employee of Houston Engineering, provided comments at the public hearing. Mr. Gunsch expressed concern that there appeared to be no fee provided for removal and disposal of abandoned property on sovereign lands. Mr. Gunsch was informed that abandoned property on sovereign lands is a class B misdemeanor provided for under N.D.C.C. chapter 61-33. Mr. Gunsch stated that he had no other concerns.

**State Engineer's Response:**

Mr. Gunsch's concern was addressed at the hearing.



N.D. ADMIN. CODE ARTICLE 89-10  
SOVEREIGN LANDS

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.