

Article 89-02 is amended as follows:

ARTICLE 89-02

DRAINAGE OF WATER

Chapter

- 89-02-01 Drainage of Ponds, Sloughs, Lakes, or Sheetwater, or Any Series
Thereof, ~~and of Meandered Lakes~~
- 89-02-02 Drainage of Wetlands [Repealed]
- 89-02-03 Wetlands Bank [Repealed]
- 89-02-04 Drainage Complaint Appeals
- 89-02-05 Licenses for Emergency Drainage [Repealed]
- 89-02-05.1 ~~Licenses for Emergency Drainage~~ Drain Permits

CHAPTER 89-02-01

DRAINAGE OF PONDS, SLOUGHS, LAKES, OR SHEETWATER, OR ANY SERIES THEREOF, ~~AND OF MEANDERED LAKES~~

Section

- 89-02-01-01 Intent [Repealed]
- 89-02-02-02 Definitions
- 89-02-01-03 Permit Required
- 89-02-01-04 Permits for Assessment Drains [Repealed]
- 89-02-01-05 Exceptions to the Need for a Permit ~~Required~~
- 89-02-01-06 Determination of Watershed Area
- 89-02-01-07 Filing Application
- 89-02-01-08 Referral of Applications to Appropriate District
- 89-02-01-09 Criteria for Determining Whether Drainage Is of Statewide or
Interdistrict Significance
- 89-02-01-09.1 Board Procedure for Processing Applications to Drain
- 89-02-01-09.2 Evaluation of Applications - Factors Considered
- 89-02-01-09.3 Time for Determination by Board
- 89-02-01-09.4 Evaluation of Applications by the State Engineer of Statewide or
Interdistrict Significance - Information to Be Used
- 89-02-01-09.5 Procedure, Availability, and Contents of Notice of State Engineer's
Decision to Grant or Deny Application of Statewide or Interdistrict
Significance
- 89-02-01-09.6 Request for State Engineer's Hearing
- 89-02-01-09.7 Notice of State Engineer's Hearing
- 89-02-01-09.8 Evidence at the State Engineer's Hearing
- 89-02-01-09.9 Time for Determination by the State Engineer - Copies of Decision
- 89-02-01-09.10 Consideration of Evidence Not Contained in the State Engineer's
Record
- 89-02-01-09.11 Conditions to Permits ~~- Extending Time to Complete Project~~
- 89-02-01-09.12 Extending Time ~~Within Which~~ to Complete Construction of
Drain

89-02-01-10	District Hearing on Applications of Statewide or Interdistrict Significance [Repealed]
89-02-01-11	Emergency Drainage [Repealed]
89-02-01-12	Notice of District Hearings [Repealed]
89-02-01-13	Content of Notice of Hearing [Repealed]
89-02-01-14	Affidavit of Mailing and Affidavit of Notice [Repealed]
89-02-01-15	Time for Determination by Board of Managers [Repealed]
89-02-01-16	Consideration by the State Engineer and Districts [Repealed]
89-02-01-17	Approval of Drainage Permit Applications by District [Repealed]
89-02-01-18	Denial of Application by the District [Repealed]
89-02-01-18.1	Notice by State Engineer of Public Hearing on Application of Statewide or Interdistrict Significance [Repealed]
89-02-01-18.2	Evidence Presented at the State Engineer's Public Hearing [Repealed]
89-02-01-19	Consideration by State Engineer of Applications of Statewide or Interdistrict Significance [Repealed]
89-02-01-20	Criteria to Determine Whether Drainage Will Adversely Affect Lands of Lower Landowners [Repealed]
89-02-01-20.1	Time for Determination by the State Engineer [Repealed]
89-02-01-20.2	Consideration of Evidence Not Contained in the Record [Repealed]
89-02-01-21	Conditions to Permits [Repealed]
89-02-01-22	Requirements for a Valid Permit to Drain [Repealed]
89-02-01-23	Procedure Upon Complaint of Violation [Repealed]
89-02-01-24	Enforcement Action Without Receipt of Complaint [Repealed]
89-02-01-25	Criminal Complaint [Repealed]
89-02-01-26	Ditches or Drains Existing for Ten Years or More [Repealed]
89-02-01-27	Notice of Drainage Application Denies to Commissioner of Agriculture [Repealed]
89-02-01-28	Landowner Assessment Appeal to State Engineer

89-02-01-01. Intent. ~~This chapter establishes rules for processing applications for permits to drain certain ponds, sloughs, lakes, or sheetwater, or any series thereof, and meandered lakes, as required by North Dakota Century Code sections 61-15-08 and 61-32-03. Repealed effective January 1, 2015.~~

History: ~~Amended effective December 1, 1979; August 1, 1994; February 1, 1997; June 1, 1998.~~

General Authority: ~~NDCC 28-32-02, 61-03-13~~

Law Implemented: ~~NDCC 61-15-08, 61-32-03~~

89-02-01-02. Definitions. Unless the context otherwise requires, the following definitions apply to this article:

1. "Assessment drain" ~~means a drain constructed pursuant to~~ is defined in North Dakota Century Code chapter 61-16.1 or 61-21 section 61-16.1-02.

2. "Board" means the board of managers of a water resource district is defined in North Dakota Century Code section 61-21-01.
3. "District" means water resource district.
4. ~~"Drain" includes any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains of any nature or description constructed for such purpose, including dikes and other appurtenant works. This definition may include more than one watercourse or artificial channel constructed for the aforementioned purpose when the watercourses or channels drain land within a practical drainage area is defined in North Dakota Century Code section 61-21-01.~~
5. "Emergency" means a situation that will cause significant damage to people or property if not addressed immediately and that would not occur under normal circumstances. An emergency may exist because of an extremely wet hydrologic cycle. Damages caused by deliberate acts may not constitute an emergency.
5. 6. "Lake" means a well-defined basin which that characteristically holds water throughout the year. Lakes go dry only after successive years of below normal runoff and precipitation.
6. 7. "Lateral drain" for the purpose of regulating the drainage of water means a drain constructed after the establishment and construction of the original drain or drainage system and which flows into such original drain or drainage system from outside the limits of the original drain is defined in North Dakota Century Code section 61-21-01.
7. 8. "Maintenance" means removal of silt and vegetation from a drain. Maintenance does not include deepening or widening a drain.
8. ~~"Meandered lake" means any pond, slough, or lake which has had its boundaries established by metes and bounds in the survey of public lands by the government of the United States.~~
9. "Party Parties of record" means each person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.
10. ~~"Person" means a person, firm, partnership, association, corporation, or any other type of private legal relationship, and any governmental organization, which includes any agency of the United States, a state agency, and any political subdivision of the state.~~

- ~~11.10.~~ "Pond" means a well-defined land depression or basin that holds water in normal years throughout the summer. Ponds generally go dry only in years of below normal runoff and precipitation.
- ~~12.11.~~ ~~"Series of ponds, sloughs, lakes~~ Pond, slough, lake, or sheetwater, or any series thereof" means ~~two or more~~ ponds, sloughs, lakes, or sheetwater that are hydrologically linked ~~naturally or artificially~~.
- ~~13.12.~~ "Sheetwater" is defined ~~by~~ in North Dakota Century Code section 61-32-03, ~~which provides that sheetwater means shallow water that floods land not normally subject to standing water.~~
- ~~14.13.~~ "Slough" includes two types:
- a. Seasonal slough: a depression ~~which~~ that holds water in normal years from spring runoff until approximately mid-July. In years of normal runoff and precipitation, a seasonal slough is usually not tilled, but can be used for hayland or pasture. In low runoff, dry years, these areas generally are tilled for crop production, but commonly ~~reflood~~ re-flood with frequent or heavy summer or fall rains.
 - b. Temporary slough: a shallow ~~depressional area~~ depression that holds water ~~or is waterlogged~~ from spring runoff until approximately early June. In years of normal runoff and precipitation, a temporary slough is usually tilled for crop production. In years of high runoff or heavy spring rain, a temporary slough may not dry out until mid-July and generally would not be tilled, but may be used for hayland or pasture. A temporary slough frequently ~~refloods~~ re-floods during heavy summer ~~and~~ or fall rains.
- ~~15.14.~~ ~~"State engineer" means the state engineer, appointed pursuant to under North Dakota Century Code section 61-03-01, or the state engineer's designee.~~
- ~~16.15.~~ "Supplemental ~~public~~ hearing" means a hearing held to review evidence not contained in the record of the state engineer's public hearing.
- ~~17.16.~~ "Watercourse" is defined ~~by~~ in North Dakota Century Code section 61-01-06. ~~That section provides: "A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character."~~ Watercourse, for the purposes of this chapter, also means an outlet

~~channel utilized to carry drained water from the outlet of the drain to a watercourse, as defined by section 61-01-06.~~

- ~~18-17.~~ "Watershed" means the area ~~which~~ that drains into a pond, slough, lake, or sheetwater, or any series thereof.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC ~~61-15-08~~, 61-32-03

89-02-01-03. Permit required.

- ~~1. A permit is required before any person may construct a drain for the purpose of draining waters from a pond, slough, lake, or sheetwater, or any series thereof, having a watershed of eighty acres [32.37 hectares] or more.~~
- ~~2. A permit is required before any person may drain by pumping a pond, slough, lake, or sheetwater, or any series thereof, having a watershed of eighty acres [32.37 hectares] or more.~~
- ~~3. A permit is required before any person may drain, cause to be drained, or attempt to drain any meandered lake.~~
- ~~4. A permit is required for an assessment drain constructed pursuant to North Dakota Century Code chapter 61-16.1 or 61-21.~~
- ~~5. A permit is required for the construction of any lateral drain.~~
- ~~6. A permit is required before any person may modify the drainage authorized in the original permit. Modification of drainage includes deepening and widening of a drain, or the extension of any drain.~~
- ~~7. A permit is required before any person may fill a pond, slough, lake, or sheetwater which has a watershed of eighty acres [32.37 hectares] or more, for the purpose of causing the pond, slough, lake, or sheetwater to be drained by elimination of all or a portion of the existing storage.~~

In addition to North Dakota Century Code section 61-32-03, a permit is required for:

1. An assessment drain.
2. Construction of a lateral drain.

3. Modification of a previous permit, which includes deepening, widening, or extending a drain.
4. Pumping, gravity, or placement of fill.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC ~~61-15-08~~, 61-32-03

89-02-01-04. Permits for assessment drains. Repealed effective February 1, 1997.

89-02-01-05. Exceptions to the need for a permit required.

1. A drainage permit under section 89-02-01-03 is not required for maintenance of a drain.
2. The provisions of section 89-02-01-03, ~~except subsection 3,~~ do not apply to any drain constructed under the direct and comprehensive supervision of the following federal or state agencies ~~specified in this section.~~ ~~The agencies deemed capable of providing supervision and analyzing downstream impacts are:~~
 - a. The state water commission;
 - b. The army corps of engineers;
 - c. The natural resources ~~and~~ conservation service, for projects constructed ~~pursuant to~~ under the Watershed Protection and Flood Prevention Act [Pub. L. 83-566; 16 U.S.C. 1001];
 - d. The bureau of reclamation, for projects that are part of the originally (1965) authorized Garrison diversion unit ~~authorized in 1965;~~
 - e. The state department of transportation, for federal aid projects; and
 - f. The public service commission for surface mining projects.

However, these agencies ~~shall~~ must notify the state engineer of any proposed drainage projects under their direct supervision during the planning stages.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; April 1, 2004; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC ~~61-15-08~~, 61-32-03

89-02-01-06. Determination of watershed area. The determination of the watershed area must be made using ~~accurate or reliable~~ the best available maps or surveys. Published seven and one-half minute topographic maps LiDAR information or a survey conducted under the supervision of a registered land surveyor are preferred. Published seven and one-half minute topographic maps may also be utilized. This information may be supplemented by aerial photographs of the watershed or by an onsite investigation if requested by the applicant or ~~the local water resource board~~; or if the state engineer determines it is necessary.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC ~~61-15-08~~, 61-32-03

89-02-01-07. Filing application. Any person desiring a drainage permit ~~shall~~ must file an application with the state engineer on a form provided by the state engineer. ~~The applicant, if~~ If requested by the state engineer or the board, ~~shall the applicant must~~ provide an engineering analysis showing the downstream impacts of the proposed drainage. The analysis, ~~at the discretion of the state engineer or the board may need to~~ include a determination of the ~~capacity of the drain and the drain's and receiving watercourse watercourse's capacities~~ and a ~~comparison of volume and timing comparison of pre-drainage pre-drainage and post-drainage post-drainage~~ flows. If the application is incomplete, or if the information ~~contained therein~~ is insufficient to enable the state engineer or ~~the appropriate district board~~ to make an informed decision on the application, ~~the application must~~ it will be returned to the applicant for correction.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC ~~61-15-08~~, 61-32-03

89-02-01-08. Referral of applications to appropriate district. Upon receipt of a properly completed application, the state engineer ~~shall~~ must determine whether the application involves drainage of statewide or interdistrict significance ~~using the factors set out in~~ under section 89-02-01-09. The state engineer ~~shall~~ must attach to the application any comments, recommendations, and engineering data that may assist the ~~appropriate~~ district in making a determination on the application. The application must then be referred to the ~~appropriate~~ district within which ~~is found~~ a majority of the watershed ~~or drainage area~~ of the pond, slough, lake, ~~or~~ sheetwater, or any series thereof is found.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC ~~61-15-08~~, 61-32-03

89-02-01-09. Criteria for determining whether drainage is of statewide or interdistrict significance. In determining whether the proposed drainage is of statewide or interdistrict significance, the state engineer ~~shall be guided by the following criteria~~ must consider:

1. Drainage ~~which would affect~~ affecting property owned by the state or its political subdivisions.
2. Drainage of sloughs, ponds, or lakes having recognized fish and wildlife values.
- ~~3. Drainage or partial drainage of a meandered lake.~~
4. ~~3.~~ Drainage ~~which would have~~ having a substantial effect on another district.
5. ~~4.~~ Drainage ~~which would convert~~ converting previously noncontributing areas (based on the National Oceanic and Atmospheric Administration Atlas 14 twenty-five year event - four percent chance) into permanently contributing areas.
6. ~~5.~~ For good cause, the state engineer may classify or refuse to classify any proposed drainage as having statewide or interdistrict significance, ~~or the state engineer may determine that certain proposed drainage is not of statewide or interdistrict significance.~~

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC ~~61-15-08~~ 61-32-03

89-02-01-09.1. Board procedure for processing applications to drain.

1. The board ~~shall~~ must use the following procedure ~~in this subsection when it processes to process~~ a drainage permit application ~~that the state engineer has determined is~~ of statewide or interdistrict significance:
 - a. Upon receipt of an application to drain ~~from the state engineer~~, the board ~~shall~~ must set the date, time, and place for a meeting at which it will receive ~~information concerning the merits of, as well as any testimony or information~~ pertinent to the application. At the applicant's expense, the board ~~shall also~~ must give notice by mail

~~not less than~~ at least twenty days from before the date set for consideration of the drainage application meeting to:

- (1) The applicant.
 - (2) All record title owners ~~of real estate~~ and holders of a contract for deed whose property ~~would be crossed by~~ the proposed drain would cross.
 - (3) All downstream riparian landowners ~~on the watercourse into which water will be drained~~ who are the board determines have the potential to be adversely impacted ~~as determined by the board~~.
 - (4) Any board ~~that~~ whose district would be substantially affected ~~by the water to be drained~~.
 - (5) The state game and fish department.
 - (6) The state department of health.
 - (7) The state ~~highway~~ commissioner department of transportation, county commissioners, ~~and~~ or board of township supervisors if the proposed ~~drainage drain~~ will affect or cross the ~~right-of-way~~ right-of-way of any public highway, street, or road within their ~~jurisdiction~~ jurisdictions.
 - (8) The state engineer.
 - (9) The natural resources conservation service.
 - (9) (10) Any person who has made a written request for notification of ~~that~~ the project and has advanced the cost of providing that notification. ~~Such advance may not exceed ten dollars.~~
- b. Notice must ~~also~~ be published in a newspaper of general circulation in the area of the proposed drainage once a week for two consecutive weeks. Final notice must be published ~~not more than~~ between five and fifteen days ~~nor less than five days from~~ before the date set for the meeting.
- c. The notice must give the essential facts of the proposed drain, including ~~name~~:
- (1) Name and address of applicant; ~~legal~~

- (2) Legal description of the area to be drained;
- (3) Drain purpose of the drainage; watercourse
- (4) Watercourse into which the water will be drained; legal
- (5) Legal description of the drain's confluence ~~of the drain and with the watercourse~~ into which the water will be drained; the
- (6) The time, date, and place of the ~~board's consideration of the application~~ meeting; and the
- (7) The location and date of availability of information regarding the project.

- d. At least fourteen days ~~prior to~~ before the date set by the board for its meeting ~~to receive information on the application~~, the applicant ~~shall~~ must submit to the board all documentary information the applicant intends to present at the ~~board's~~ meeting. The board ~~shall~~ must immediately place ~~such~~ the information in the board's office if the office is open for public access at least twenty hours each week, ~~or if~~. If the board's office is not open to the public at least twenty hours each week, ~~in custody of the information~~ must be immediately placed with the county auditor of the county in which the majority of the watershed of the drain is to will be built. The information must be available for public review. The board ~~shall~~ must notify the applicant of this requirement upon its receipt of an application to drain. If the information is placed in the auditor's office, the auditor ~~shall~~ must return the information to the board one working day ~~prior to~~ before the board's meeting.
- e. The board ~~shall~~ must allow submission of all relevant oral or written evidence.
- f. In evaluating applications, the board ~~shall~~ must consider the factors in section 89-02-01-09.2.
- g. ~~The meeting at which the board must stenographically or electronically record the meeting at which it receives information concerning the application must be recorded either stenographically or electronically.~~ If the board approves the permit application, the record and all documentary information the board received by the board must be transferred to the state engineer. ~~Upon request of the state engineer, the~~ The board shall must provide a meeting transcript of the meeting at the request of the state engineer. The cost of providing a transcript must be borne by the applicant.

- h. At the ~~meeting's conclusion of the meeting at which the board receives information about the proposed drain,~~ the board shall must announce that:
- (1) The board's permit ~~denial of a permit~~ constitutes final denial ~~of the permit~~. Appeals ~~of a denial~~ must be taken to the district court within thirty days.
 - (2) A board-approved application will be forwarded to the state engineer.
 - (3) Those who wish to be notified of the board's decision shall ~~so notify the board and shall~~ must provide their names and addresses in writing to the board at the end of the meeting.
 - (4) The board shall must send notice ~~of the board's decision along with~~ and a copy of the board's determination and rationale to all parties of record, ~~to~~ anyone who has requested in writing to be notified, and ~~to~~ the state engineer.
- i. If the board denies the application, it shall must return the application to the applicant, along with a copy of the board's determination and rationale. A copy of the board's ~~denial~~ determination and rationale must also be sent to all parties of record, ~~to~~ anyone who has requested in writing to be notified, and ~~to~~ the state engineer.
- j. If the board approves the application, the ~~board's~~ approval must be noted on the application and a copy of the determination and rationale sent to the applicant. The board shall must send notice ~~of the board's decision along with~~ and a copy of the board's determination and rationale to all parties of record and ~~to~~ anyone who has requested in writing to be notified. The application, a copy of the determination and rationale, and all information reviewed by the board in considering the application must be forwarded to the state engineer for review within twenty days of the determination. The board's decision approving the application must contain a determination of the location and surface acre size, ~~in surface acres,~~ of ponds, sloughs, and lakes to be drained by the proposed drain. ~~A seven and one-half minute topographic map indicating the location and size of the ponds, sloughs, and lakes approved for drainage must be attached to the determination.~~

- k. The board's notice to an applicant must state that the ~~board's application approval of the application~~ is not a permit to drain until the state engineer ~~has also approved~~ approves the application.
2. The board ~~shall~~ must use the following procedure ~~when it processes in this subsection to process~~ a drainage permit application that ~~the state engineer has determined~~ is not of statewide or interdistrict significance:
 - a. The board ~~shall~~ must review the permit application and any supporting documentation and determine whether ~~protection of~~ public and private interests would be better served by a specific public meeting to consider the project.
 - b. ~~If it is determined~~ a specific public meeting is necessary ~~to protect public and private interests~~, the board ~~shall~~ must process the permit application ~~in accordance with~~ under procedures established by the board.
 - ~~b.~~ c. ~~If the board determines~~ a specific public meeting is unnecessary, the board ~~shall~~ must consider the project ~~pursuant to~~ under the criteria ~~set forth~~ in section 89-02-01-09.2 and ~~shall~~ must deny or grant the application ~~with or without~~ and any modifications or conditions based upon those criteria. Written notice of the board's decision must be provided to all parties of record, ~~to~~ anyone ~~requesting who has requested~~ in writing ~~notice of the decision to be notified~~, and ~~to~~ the state engineer.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.2. Evaluation of applications - Factors considered. ~~The state engineer, for applications of statewide or interdistrict significance, and the board, for all~~ All applications to drain, ~~shall~~ must consider the following factors:

1. The water volume ~~of water~~ proposed to be drained and ~~the~~ its impact ~~of the flow or quantity of this water~~ upon the watercourse into which the water it will be drained.
2. Adverse effects that may occur to ~~the lands of lower proprietors downstream landowners~~. This factor is limited to the project's hydrologic effects, such as erosion, flood duration ~~of floods~~, impact of sustained flows impacts, and impact on the operation of downstream water control devices device operation impacts.
3. The engineering design and other physical aspects of the drain.

4. The project's impact on flooding problems in the project watershed.
5. The project's impact on ponds, sloughs, streams, or lakes having recognized fish and wildlife values.
6. The project's impact on agricultural lands.
7. Whether easements are required.
8. Other factors unique to the project.

History: Effective February 1, 1997; amended effective April 1, 2000; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-01-26, 61-16.1-10, 61-32-03

89-02-01-09.3. Time for determination by board. ~~Within sixty days after receipt from the state engineer of an application to drain, the~~ The board shall must make a determination on the application within one hundred twenty days of receipt. This time limit may be extended only with the written consent of the state engineer. A request for ~~an a time extension of time under this section~~ must be in writing to the state engineer and must set forth the reason for requesting the time extension request. If no determination has been made and no extension has been requested, unless the state engineer determines that a unique or complex situation exists, the application is void.

~~In~~ For applications involving assessment drains, the ~~sixty-day~~ one hundred twenty-day time period does not ~~commence~~ begin until the date the assessments are ~~finally~~ established by the board and ~~are no longer subject to appeal to a court of law or the state engineer.~~

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.4. Evaluation of applications by the state engineer of statewide or interdistrict significance - Information to be used. In the state engineer's evaluation ~~of an application~~ of statewide or interdistrict significance applications, the state engineer shall must use all relevant documentary information submitted and oral testimony given for the board's consideration at its meeting. The state engineer may ~~also~~ use any information in the files and records retained by the state engineer's office or engineering information developed or obtained through investigation of the project area by the state engineer's staff. ~~The information used must be relevant and is part of the record.~~

The state engineer may also request information ~~and~~ or comment from independent sources. ~~However, the state engineer, but~~ is not required to delay the

~~state engineer's decision on an application for more than thirty days from the date of request while waiting for comment from these sources. All information used must be relevant and is part of the record.~~

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-06, 61-32-03

89-02-01-09.5. Procedure, availability, and contents of notice of state engineer's decision to grant or deny application of statewide or interdistrict significance.

1. ~~If the state engineer determines an application of statewide or interdistrict significance should be denied, the~~ The state engineer ~~shall~~ must provide a copy of the determination to the parties of record. ~~If the state engineer determines an application should be granted, with or without conditions, the state engineer shall provide a copy of the determination to all parties of record.~~ Other members of the public may view the record at the Office of the State Engineer, 900 East Boulevard, Bismarck, during normal business hours.
2. ~~One~~ Upon written request, ~~one~~ copy of the determination to grant or deny a permit may be provided to ~~persons~~ any person not provided copies pursuant to a copy under subsection 1 ~~upon written request. Additional copies will be provided upon payment for necessary copying, handling, and postage.~~
3. ~~Copies of the notice of the state engineer's determination must be provided to persons who made a written request for notice of that project not more than two months, or later than one day, prior to the date of the state engineer's decision.~~
4. ~~3.~~ The notice of decision must include the:
 - (a) The name of the drain; ~~the~~
 - (b) The applicant's name; ~~whether~~
 - (c) Whether the application was granted or denied ~~and the~~;
 - (d) The date of the decision; ~~the~~
 - (e) The availability of the full text of the decision; ~~and the fact that within thirty days of the date of the state engineer's decision~~
 - (f) That a hearing may be requested on the project. ~~The notice must~~

~~also state that a valid~~ within thirty days of the date of service of the state engineer's decision; and

- (g) ~~The request for a hearing must be in writing; must~~ specifically state facts from which the person requesting the hearing is factually aggrieved by the state engineer's decision; ~~and must state~~ what material facts, or conclusions, are believed to be erroneous and why they are believed to be erroneous.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-03

89-02-01-09.6. Request for state engineer's hearing. All requests for a formal hearing on a project must be made in writing to the state engineer. ~~To be valid, a request must be made~~ within thirty days of the date of service of the state engineer's decision. The request ~~must be in writing and must~~ specifically state facts from which it is evident the person requesting the hearing is factually aggrieved by the state engineer's decision; and must state which material facts or conclusions are believed to be erroneous and why they are believed to be erroneous.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.7. Notice of state engineer's hearing. If the state engineer determines that a request for a hearing on an application of statewide or interdistrict significance is valid and well-founded, the state engineer ~~shall~~ must set a date for a hearing and publish notice in the official newspaper of the county ~~within which~~ where a majority of the drainage basin is located. Publication must be once a week for two consecutive weeks. One of the publications must be published ~~no less than~~ at least twenty days before the hearing ~~date~~. The person requesting the hearing ~~shall~~ must give notice by certified mail to the state department of health, the state game and fish department, the state department of transportation, and all parties of record to the board's hearing at least twenty-one days before the ~~date of the~~ hearing. If such notice is not provided, the hearing ~~may~~ will not be held. The notice must give essential information about the proposed drainage application, including the date, time, and location of the hearing. All hearings will be held in Bismarck.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-05

89-02-01-09.8. Evidence at the state engineer's hearing. Evidence at the state engineer's hearing may be confined to the matters ~~put in issue~~ raised by any valid request of hearing described in section ~~89-02-01-09.7~~ 89-02-01-09.6.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-06, 61-32-03

89-02-01-09.9. Time for determination by the state engineer - Copies of decision. Unless the state engineer determines the ~~matters put in issue by the request for a hearing~~ raises complex or unique issues, the state engineer ~~shall~~ must render a decision within thirty days of the close of the ~~state engineer's~~ hearing. A copy of the decision must be ~~given to~~ served on all parties of record ~~at the state engineer's hearing~~ either personally, or by certified mail, ~~or by regular mail, or email~~ provided the. ~~The state engineer files an affidavit will retain a certificate of service by mail~~ indicating upon whom a copy of the decision was served.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 28-32-13, 61-03-13

Law Implemented: NDCC 28-32-13

89-02-01-09.10. Consideration of evidence not contained in the state engineer's record. The record of the state engineer's hearing must be closed at the conclusion of the state engineer's formal hearing. It is in the state engineer's discretion to receive testimony and evidence ~~that is not contained in the record.~~ However, ~~the state engineer, before considering any evidence not contained in the record, shall transmit the evidence~~ the state engineer must provide notice to the parties of record where the evidence may be obtained for their examination and comment. ~~The costs of reproducing and transmitting the evidence must be paid in advance by the party offering the evidence.~~ Written comment or a request for a supplemental hearing must be submitted to the state engineer within ten days after transmittal of the additional evidence. Any request for a supplemental hearing must provide sufficient information to allow the state engineer to determine if a supplemental hearing is warranted. If a supplemental hearing is warranted, ten days' notice by personal service ~~or~~ certified mail, or email must be ~~afforded~~ given to the parties of record to inform them of the date, time, place, and nature of the hearing. All supplemental hearings must be held in Bismarck.

History: Effective February 1, 1997; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-07

89-02-01-09.11. Conditions to permits –~~Extending time to complete project.~~
Unless otherwise specifically stated:

1. All permits must include the following conditions:
 - a. The project and the rights granted under the permit are subject to modification to protect the public health, safety, and welfare.

completed. ~~Upon expiration of any extension, the permit recipient may request a further extension. If the request is for an extension relating to a permit that the state engineer has determined to be of statewide or interdistrict significance, the extension must be submitted to and approved by both the state engineer and the board.~~

~~In the event the two year period passes without completion of construction, an extension of the period as provided in this section, or legal process staying construction, the permit is void.~~

History: Effective February 1, 1997; amended effective April 1, 2004; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-13, 61-32-03

89-02-01-10. District hearing on applications of statewide or interdistrict significance. Repealed effective February 1, 1997.

89-02-01-11. Emergency drainage. Repealed effective February 1, 1997.

89-02-01-12. Notice of district hearing. Repealed effective February 1, 1997.

89-02-01-13. Content of notice of hearing. Repealed effective February 1, 1997.

89-02-01-14. Affidavit of mailing and affidavit of notice. Repealed effective December 1, 1979.

89-02-01-15. Time for determination by board of managers. Repealed effective February 1, 1997.

89-02-01-16. Consideration by the state engineer and districts. Repealed effective February 1, 1997.

89-02-01-17. Approval of drainage permit applications by district. Repealed effective February 1, 1997.

89-02-01-18. Denial of application by the district. Repealed effective February 1, 1997.

89-02-01-18.1. Notice by state engineer of public hearing on application of statewide or interdistrict significance. Repealed effective February 1, 1997.

89-02-01-18.2. Evidence presented at the state engineer's public hearing. Repealed effective February 1, 1997.

89-02-01-19. Consideration by state engineer of applications of statewide or interdistrict significance. Repealed effective February 1, 1997.

89-02-01-20. Criteria to determine whether drainage will adversely affect lands of lower landowners. Repealed effective February 1, 1997.

89-02-01-20.1. Time for determination by the state engineer. Repealed effective February 1, 1997.

89-02-01-20.2. Consideration of evidence not contained in the record. Repealed effective February 1, 1997.

89-02-01-21. Conditions to permits. Repealed effective February 1, 1997.

89-02-01-22. Requirements for a valid permit to drain. Repealed effective December 1, 1979.

89-02-01-23. Procedure upon complaint of violation. Repealed effective February 1, 1997.

89-02-01-24. Enforcement action without receipt of complaint. Repealed effective October 1, 1982.

89-02-01-25. Criminal complaint. Repealed effective October 1, 1982.

89-02-01-26. Ditches or drains existing for ten years or more. Repealed effective December 1, 1979.

89-02-01-27. Notice of drainage application denials to commissioner of agriculture. Repealed effective August 1, 1994.

89-02-01-28. Landowner assessment appeal to state engineer. A landowner's appeal to the state engineer, claiming that the landowner will receive no benefit from the construction of a new drain, must be made within ten days after the assessment hearing ~~on assessments~~. The appeal must be in writing and must specifically state the facts upon which the claim is based.

History: Effective April 1, 2000; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-21-22

CHAPTER 89-02-04 DRAINAGE COMPLAINT APPEALS

Section	
89-02-04-01	Scope of Chapter
89-02-04-02	Definitions
89-02-04-03	Filing of Complaint
89-02-04-04	Complaint to State Engineer - State Engineer's Action When Board Fails to Act
89-02-04-05	Form of Appeal
89-02-04-06	State Engineer's Review of Board's Decision
89-02-04-07	Sufficiency of Information on Appeal
89-02-04-08	State Engineer's Independent Investigation
89-02-04-09	Demand for Hearing by Affected Landowner
89-02-04-10	Request for Hearing by Others than Affected Landowners
89-02-04-11	Appointment of Hearing Officer
89-02-04-12	Purpose of Hearing
89-02-04-13	Qualifications of Witnesses at State Engineer's Hearings
89-02-04-14	Notice of Hearing
89-02-04-15	Issues Limited to those Contained in Notice
89-02-04-16	Notice of Witnesses at Hearing - Time frame
89-02-04-17	Subpoena of Witnesses
89-02-04-18	Prehearing Conference
89-02-04-19	Order of Presentation at Hearing
89-02-04-20	Cross-examination
89-02-04-21	Record of Hearing - Consideration by Hearing Officer
89-02-04-22	Recommendation of Hearing Officer
89-02-04-23	Decision of State Engineer on Record of Hearing

89-02-04-01. Scope of chapter. This chapter contains the procedure for appealing the decision of a water resource board on a complaint of drainage constructed without proper approval ~~after January 1, 1987.~~

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-02. Definitions. Unless the context otherwise provides, the following definitions apply:

1. "Affected landowner" means a person with any property interest, including a lease in land ~~on which~~ where the drain complained of is located or land ~~which~~ that is affected by the drain complained of.
2. "Aggrieved party" means any individual or entity who participated in the

state engineer's or board's consideration of an appeal and who is actually damaged by the board's or state engineer's decision.

3. "Appeal" means an appeal from the decision of a board concerning a drain constructed ~~after January 1, 1987~~.
4. "Board" means the board of the water resource district in which the complaint is brought.
5. "Complaint" is a document which alleges drainage has been conducted without proper authorization. It is filed on a form supplied to the water resource board by the state engineer.
6. "Party" includes the petitioner and any respondent, the board from which the decision is appealed, and any entity or individual ~~which~~ that participated in the complaint process in front of the board. The designation as a party does not bestow standing to appeal a decision of the board to the state engineer or the decision of the state engineer to a court of law.
7. "Petitioner" means any aggrieved party who files a timely and proper appeal, or an affected landowner who files a timely and proper demand for hearing with the state engineer.
8. "Respondent" is a person who, within twenty days of notice of an appeal of a board's decision on a drainage complaint, files a notice with the state engineer of the person's intent to participate in the appeal. The person who filed the complaint, and the person against whom the complaint was filed, must be either a respondent or a petitioner. These persons and the board must be allowed to participate whether or not any notice of participation is filed with the state engineer. A person may not be a respondent to an appeal of a board's decision unless the person participated by providing information to the board for its consideration.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-03. Filing of complaint. All complaints are filed with the water resource board in the county ~~in which~~ where the drainage is located. Complaints filed with the state engineer will be forwarded to the appropriate board, unless the complaint is filed because of the board's inaction on a complaint under section 89-02-04-04.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-04. Complaint to state engineer - State engineer's action when board fails to act. If a board does not make a decision upon a drainage complaint within one hundred twenty days of its filing with the board, the person filing the complaint with the board may file a request for state engineer action with the state engineer. The request must include a copy of the complaint filed with the board and any documentation the landowner wishes the state engineer to consider. The state engineer ~~shall~~ must then determine whether to commence action against the board or conduct ~~the~~ an investigation himself.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-05. Form of appeal. If a board makes a decision on a drainage complaint, any appeal to the state engineer by an aggrieved party must be made within thirty days from the date notice of the board's decision was received in writing on the form prescribed by the state engineer, and must include:

1. The identity of all parties to the complaint.
2. Petitioner's interest in the water resource board's decision, including a statement of the impact the decision will have upon the petitioner.
3. The relief petitioner seeks.
4. A statement identifying the errors in the water resource board's decision ~~which~~ that entitle the petitioner to the relief sought.
5. All facts presented to the water resource board ~~which~~ that support the petitioner's position.
6. A legal description of the drainage area involved.
7. A map depicting the drainage area and identifying the drainage complained of.
8. A ~~certified~~ or cashier's check to cover the cost of preparing a transcript of the proceedings before the board.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-06. State engineer's review of board's decision. Upon receipt of a written appeal by an aggrieved party from a decision of a water resource district

~~pursuant to~~ under North Dakota Century Code section 61-32-07, the state engineer shall must review the board's decision. In the review the state engineer will consider only:

1. Ownership of the land on which the drain is located.
2. Topographic maps and aerial photographs of the area.
3. Any existing surveys of the area.
4. The documentation and testimony given to the board for its consideration.
5. Any pertinent rules of the appropriate board.
6. The board's decision.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-07. Sufficiency of information on appeal.

1. Once the state engineer's review under section 89-02-04-06 is complete, the state engineer will determine whether the information reviewed is sufficient to make a sound decision.
2. If the information is not sufficient, the state engineer will either conduct further investigations or return the record to the board for its further investigation.
3. If the information is sufficient, the state engineer ~~shall~~ must determine whether a drain, lateral drain, or ditch has been opened or established contrary to North Dakota Century Code title 61 or any rules adopted by the state engineer or the board. If so, the state engineer will take one of the three actions set forth in North Dakota Century Code section 61-32-08. If the drain has not been opened contrary to North Dakota Century Code title 61 or a drainage rule, the complaint ~~shall~~ will be dismissed. In either case the state engineer will notify all parties of the state engineer's decision by certified mail or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom the decision was served. The notice of decision will include the names and addresses of all parties.

History: Effective October 1, 1988; amended effective August 1, 1994; January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-13, 61-32-08

89-02-04-08. State engineer's independent investigation. After reviewing the board's decision and the items identified in section 89-02-04-06, the state engineer may conduct ~~his own~~ an investigation if the information is insufficient. The investigation may include an onsite inspection and survey of the property involved and other activities deemed appropriate by the state engineer. Any investigation the state engineer undertakes in response to a complaint filed with the state engineer because a board has not acted will be conducted ~~pursuant to~~ under this rule.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-09. Demand for hearing by affected landowner. Hearings demanded ~~pursuant to~~ under North Dakota Century Code section 61-32-08 by an affected landowner must be made by certified mail within fifteen days of notice of the state engineer's decision. The affected landowner ~~shall~~ must also notify all parties by certified mail of the state engineer's demand for hearing within fifteen days of the state engineer's decision. Hearings will be conducted as set forth in sections 89-02-04-11 through 89-02-04-23. The demand must state the issues to be addressed at the hearing.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-10. Request for hearing by others than affected landowners. Any aggrieved party may request a hearing on the state engineer's decision. A request for a hearing must specifically state the reason for the request, and a copy of the request must be sent by certified mail to the state engineer and to each party within fifteen days after notice of the state engineer's decision ~~has been mailed.~~ If granted, the hearing must be conducted as set forth in sections 89-02-04-11 through 89-02-04-23.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-11. Appointment of hearing officer. Upon receipt of an appeal or demand for a hearing, the state engineer will appoint a hearing officer to:

1. Determine if the appeal is timely and proper.

2. Preside over the hearing.
3. Administer the prehearing activities.
4. Prepare a recommended decision.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-12. Purpose of hearing. If the hearing officer determines a hearing should be held, one will be conducted to:

1. Obtain further testimony from the parties.
2. Allow the state engineer to examine other witnesses and evidence.
3. Provide the parties with an opportunity to cross-examine witnesses called by the state engineer.
4. Allow the parties to call other witnesses to present evidence.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-13. Qualifications of witnesses at state engineer's hearings. Unless agreed to by both petitioner and respondent and allowed by the hearing officer, ~~no persons~~ people who failed to participate in the water resource board's determination under North Dakota Century Code section 61-32-07 may not be called to present evidence or testimony for consideration. However, the state engineer may call witnesses on the state engineer's own motion without the agreement of any party if the state engineer feels information known by the person will assist the hearing officer in making ~~his~~ a recommended decision.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-14. Notice of hearing. When the hearing officer determines a date for a hearing, the hearing officer will notify the water resource board, the petitioner, and the respondent of the time and date of the hearing. In the case of a demand by an affected landowner ~~pursuant to~~ under section 89-02-04-09, the hearing officer ~~shall~~ must give the notice of the hearing date within fifteen days of the demand. The notice must be given by certified mail ~~not less than~~ at least forty-five days ~~prior to~~ before the date set for the hearing. All hearings will be held in Bismarck, North Dakota.

The notice must state that parties may present testimony at the hearing, petitioner and respondent may call witnesses at the hearing, and of the hearing officer's appointment as hearing officer. The notice ~~shall~~ must also state that each party ~~shall~~ must identify the position it is urging the state engineer to adopt. Those urging the state engineer's decision should be affirmed must be designated respondents. Those urging reversal or modification of the state engineer's decision must be designated petitioners.

History: Effective October 1, 1988; amended effective August 1, 1994; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-05, 61-03-22, 61-32-08

89-02-04-15. Issues limited to those contained in notice. The notice of hearing will identify the issues to be addressed and identified in the demand or the request for a hearing. Evidence and testimony at the hearing will be limited to the issues set forth in the notice of hearing.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-08, 61-03-22, 61-32-08

89-02-04-16. Notice of witnesses at hearing - Time frame. At least thirty days ~~prior to~~ before the date set for the hearing, the petitioner ~~shall~~ must notify other parties, the board, the state engineer, and the hearing officer by certified mail of all witnesses the petitioner will call and the content of their testimony. At least thirty days ~~prior to~~ before the date set for the hearing, the respondent ~~shall~~ must notify other parties, the board, the state engineer, and the hearing officer by certified mail of witnesses to be called by the respondent and the content of their testimony. Within twenty days of the date of the hearing, the petitioner ~~shall~~ must notify the parties, the board, the state engineer, and the hearing officer by certified mail of any rebuttal witnesses to be called and the content of their testimony. The state engineer ~~shall~~ must notify the parties, the board, and the hearing officer of any witnesses the state engineer intends to call in the notice of hearing. However, if testimony or evidence not provided to the board and not considered in the state engineer's determination will be presented by others, the failure of the state engineer to identify a witness should not preclude the state engineer from providing other testimony and evidence of a technical nature.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-17. Subpoena of witnesses. If any party desires the hearing officer to subpoena any witness for attendance at the hearing, the hearing officer must be notified of the intent to subpoena the witness at least seven days ~~prior to~~ before the date of the hearing. The hearing officer may not subpoena a witness unless the request for a subpoena:

1. Is written.
2. States the subject matter of the testimony to be given.
3. States the time and date ~~upon which~~ that the witness is to appear.
4. Is accompanied by a certified check for the fees allowed by law for one day for ~~such~~ the witness. The fees allowed by law include, ~~but are not limited to,~~ mileage to and from the hearing, per diem, and in the case of the state engineer's staff, the salary for that individual.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-05(13), 61-03-13

Law Implemented: NDCC 28-32-09, 61-03-05, 61-32-08

89-02-04-18. Prehearing conference. A prehearing conference to clarify issues, resolve any conflicts, and stipulate to any matter will be held at least seven days ~~prior to~~ before the date of the hearing. At the conference the parties ~~shall~~ must provide sufficient copies of exhibits to be presented to all parties, the board, the state engineer, and the hearing officer. The hearing officer may allow the prehearing conference to be held by telephone if exhibits are provided to all parties, the board, the state engineer, and the hearing officer at least three days ~~prior to~~ before the prehearing conference.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-19. Order of presentation at hearing. At the hearing the petitioner ~~shall~~ must present the petitioner's case first. The respondent then presents the respondent's case, followed by the board and the state engineer. After all participants have presented their case, a participant may present other evidence or testimony to rebut that presented by another participant.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-20. Cross-examination. Oral cross-examination of adverse witnesses ~~shall~~ will be allowed by the petitioner and the respondent. ~~Each side, petitioner~~ Petitioner and respondent, ~~shall~~ must designate one individual to cross-examine

witnesses ~~which~~ that side did not call. In addition, the state engineer and the board may cross-examine any witnesses ~~which~~ they did not call. However, if a party demonstrates to the hearing officer that the party's position is not adequately represented by any other party it may be allowed to cross-examine witnesses on the party's own.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-21. Record of hearing - Consideration by hearing officer. After the hearing is over the record will be closed. The hearing officer will consider only material contained in the record and will not accept and consider any information after the hearing unless the evidence was not provided at the hearing because of circumstances beyond the control of the party presenting the evidence. Information submitted after the hearing may be considered by the state engineer in making the state engineer's decision, but only ~~in accordance with~~ under North Dakota Century Code section ~~28-32-07~~ 28-32-25.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-07, 61-32-08

89-02-04-22. Recommendation of hearing officer. After the hearing officer completes the consideration required under section 89-02-04-20, a written recommendation must be made to the state engineer.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-08

89-02-04-23. Decision of state engineer on record of hearing. The state engineer will review the record, the hearing officer's recommendation, and any additional evidence received pursuant to under North Dakota Century Code section ~~28-32-07~~ 28-32-25, and make a final determination. If the conclusion is the drain, lateral drain, or ditch was constructed contrary to a board rule or title 61, the state engineer will take one of the actions prescribed by North Dakota Century Code section 61-32-08.

If the report concludes the drain, lateral drain, or ditch was lawfully constructed, the complaint will be dismissed.

History: Effective October 1, 1988; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-07, 61-32-08

CHAPTER 89-02-05.1
LICENSES FOR EMERGENCY DRAINAGE DRAIN PERMITS

Section	
89-02-05.1-01	Scope of Chapter [Repealed]
89-02-05.1-02	Definitions [Repealed]
89-02-05.1-03	Emergency Drain Licensure Permit to be Temporary
89-02-05.1-04	Emergency Defined [Repealed]
89-02-05.1-05	Form of Application for an Emergency Drain Form
89-02-05.1-06	Procedure for Consideration of Emergency Drain Applications Permit Application
89-02-05.1-07	Decision on Emergency License Permit Application – Conditions
89-02-05.1-08	Requirement for Permanent Drainage Permit Application
89-02-05.1-09	Closure of Temporary Drain
89-02-05.1-09.1	Extension of Permit
89-02-05.1-10	License Does Not Absolve Liability for Damages [Repealed]

89-02-05.1-01. Scope of chapter. ~~This chapter contains rules concerning temporary emergency drainage licenses. Repealed effective January 1, 2015.~~

History: ~~Effective June 1, 1998.~~

General Authority: ~~NDCC 28-32-02, 61-03-13~~

Law Implemented: ~~NDCC 61-32-03~~

89-02-05.1-02. Definitions. ~~Unless the context otherwise provides, the following definitions apply: Repealed effective January 1, 2015.~~

- ~~1. “Application” means an application for licensure for an emergency drain.~~
- ~~2. “Board” means the board of the water resource district in which the emergency drainage license is sought.~~
- ~~3. “Drain” means any structure or construction which changes the water surface area of a pond, slough, lake, or sheetwater, or any series thereof, having a watershed of eighty acres [32.37 hectares] or more.~~

History: ~~Effective June 1, 1998.~~

General Authority: ~~NDCC 28-32-02, 61-03-13~~

Law Implemented: ~~NDCC 61-32-03~~

89-02-05.1-03. Emergency drain – Licensure Permit to be temporary. A license Emergency drain permits received under this chapter ~~has a duration of not more than are only valid for six months unless extended as provided in this chapter plus any valid extensions.~~

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-04. Emergency defined. An emergency for purposes of this chapter, ~~is a situation which if not addressed immediately will cause significant damage to persons or property which would not occur under normal circumstances. An emergency may exist as a result of an extremely wet cycle. However, damages caused by deliberate acts of any individual do not constitute an emergency under this chapter unless the damage can be alleviated without harm to other persons or property.~~ Repealed effective January 1, 2015.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-05. Form of application for an emergency drain Application form. Applications for an An emergency drainage license drain permit application must be written and ~~must contain the following information include:~~

1. Landowner's name and address.
2. Legal description of land ~~on which~~ where the emergency drain will be located.
3. A map showing the drain location ~~of the drain~~.
4. An estimate of the surface acreage of the pond, slough, lake, or sheetwater, or any series thereof, and the volume of water to be drained by the emergency drain.
5. A list of all downstream adjacent landowners ~~whose land is adjacent to the course the water drained will take~~ for a distance of one mile [1.6 kilometers] downstream from the discharge point, along with the addresses and telephone numbers of these landowners.
6. Copies of any written permission received from downstream landowners.
7. A compilation of any written or oral permission and refusals from downstream landowners ~~to give permission~~.

8. A description of the emergency.
9. Written permission allowing the state engineer and board to inspect the drain.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-06. Procedure for consideration of emergency applications permit application. ~~An application for an emergency drain permit application~~ must be sent simultaneously to the board and the state engineer. The application will be reviewed for completeness by the board and the state engineer. ~~The board and state engineer shall also~~ must make a preliminary determination as to the existence of an emergency. As soon as possible, a conference call or an onsite meeting among the board, the state engineer, and other affected parties, as determined by the state engineer, must be held. The applicant or any other affected party may make a statement concerning the emergency ~~drainage~~ drain permit application during the conference call or onsite meeting. Any conference call or onsite meeting must be electronically recorded. During the call or onsite meeting, but after all parties have been given an opportunity to present their views, the board ~~shall~~ must make a recommendation to the state engineer whether ~~or not~~ the license permit should be granted.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-07. Decision on emergency license permit application - Conditions. After completion of the conference call or onsite meeting, the state engineer ~~shall~~ must consider the:

1. The written information received, ~~the;~~
2. The matters discussed during the conference call or onsite meeting, and ~~the;~~
3. The board's recommendation of the board. ~~Based upon this information, the state engineer shall decide whether; and~~
4. Whether the emergency license permit should be granted.

If the license permit is granted, the state engineer may place any condition upon it ~~which the state engineer deems necessary to protect public or private interests. A condition may include, including a requirement for a bond. The license must contain a condition limiting the duration of the license to a timeframe of not greater than six~~

months and that receipt of an emergency drain permit does not relieve an applicant from liability for damages resulting from any activity conducted under the permit.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-08. Requirement for permanent drainage permit application. If the emergency drain is to be permanent, the applicant shall must submit a drainage drain permit application to the state engineer in accordance with under chapter 89-02-01. If the application is submitted no later than at least thirty days prior to before the date the emergency license permit expires and the permanent drain has the same alignment as the emergency drain, the state engineer may extend the term of the emergency license is extended permit until final action on the drainage drain permit application has been taken unless the state engineer determines that the drain should be closed to prevent damage to public or private interests. If the watershed of the permanent drain is the same as the emergency drain, but has a different alignment, the emergency drain permit must only be extended under section 89-02-05.1-09.1.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-09. Closure of temporary drain. If an application for a permanent drainage drain permit application is not submitted thirty days prior to before the date the emergency license permit expires, the applicant shall must immediately make preparations for closure of prepare to close the drain unless the applicant has applied in writing for an extension from the state engineer and that extension has been granted under section 89-02-05.1-09.1. Preparations must include entering by other individuals, obtaining any permission necessary from other landowners, and obtaining any permission or authorizations necessary. Closure of the drain must be completed on or before by the license emergency permit expiration date. The applicant shall must keep the board and the state engineer informed of the applicant's progress in closing the drain. The applicant must notify the board and the state engineer in writing when the emergency drain has been completely closed.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-09.1. Extension of permit. The applicant must submit a written request for an extension at least thirty days before the expiration of the emergency permit. If it is determined that an emergency still exists, the state engineer may issue a one-time, six-month extension to the permit's expiration date. If an emergency continues to exist after the one-time extension, an applicant may reapply under 89-02-05.1 for a new emergency drain permit.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-10. License does not absolve liability for damages. ~~The receipt of a license for emergency drainage does not relieve an applicant from liability for damages resulting from any activity conducted pursuant to the license. Repealed January 1, 2015.~~

History: ~~Effective June 1, 1998.~~

General Authority: ~~NDCC 28-32-02, 61-03-13~~

Law Implemented: ~~NDCC 61-32-03~~

Section 89-03-01-01.3 is amended as follows:

89-03-01-01.3. When a water permit for stored water must be obtained. A water permit ~~for stored water must be obtained when the stored water will be put to a beneficial use.~~ A water permit may also authorize the storage of water for flood control or other reasons deemed necessary by the state engineer. However, authorization to store water for flood control or other reasons does not create a water right. If stored water will be put to beneficial use, a water permit must be obtained.

History: Effective November 1, 1989; amended effective August 1, 1994; July 1, 2014; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-04-01.1, 61-04-01.2, 61-04-02

Article 89-04 is repealed effective January 1, 2015.

ARTICLE 89-04

~~WATER MANAGEMENT PLANS FOR SURFACE COAL MINING OPERATIONS~~

Chapter

- ~~89-04-01 — General Provisions~~
- ~~89-04-02 — Procedure for Submission and Approval of Water Management Plans~~
- ~~89-04-03 — Contents of Water Management Plans~~
- ~~89-04-04 — Requirements for Protection of the Hydrologic System~~
- ~~89-04-05 — Diversion and Conveyance of Overland Flow Away From Disturbed Areas~~
- ~~89-04-06 — Stream Channel Diversions~~
- ~~89-04-07 — Requirements for Sediment Control Devices~~
- ~~89-04-08 — Ground Water Protection~~
- ~~89-04-09 — Permanent Impoundments~~
- ~~89-04-10 — Dams Constructed of or Impounding Waste Material~~
- ~~89-04-11 — Protection of Water Rights~~

CHAPTER 89-04-01 GENERAL PROVISIONS

Section

- ~~89-04-01-01 — Water Management Plan Required~~
- ~~89-04-01-02 — Intent~~
- ~~89-04-01-03 — Application~~
- ~~89-04-01-04 — Permit Requirements Satisfied~~
- ~~89-04-01-05 — Other State Agency Requirements~~
- ~~89-04-01-06 — Definitions~~

~~**89-04-01-01. Water management plan required.** A water management plan for all surface coal mining operations shall be required. The water management plan shall be submitted to the state engineer at the same time an application for a surface mining permit is submitted to the public service commission.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-01-02. Intent.** It is recognized that a variety of permits are required from the state water commission and the state engineer for activities affecting water resources on surface mining sites. It is also recognized that activities pursuant to one permit may be closely related to activities pursuant to another permit. Therefore, a water management plan for surface coal mining operations is being required to facilitate the processing and consideration of permit applications for surface coal mining operations where several permits may be required. This will ensure that the interrelated activities~~

~~affecting both ground and surface hydrology are considered in total in the preparation and design of a surface coal mining operation and will allow the applicant to secure approval of required permits from the state engineer in a single process, provided the appropriate requirements are satisfied.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-01-03. Application.** The requirements of this article shall be applicable to surface coal mining operations, as herein defined.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-01-04. Permit requirements satisfied.** Permits are presently required from the state water commission and the state engineer for the drainage of waters (North Dakota Century Code sections 61-15-08 and 61-16.1-41) and for the construction of dikes and dams (North Dakota Century Code section 61-16.1-38). A water management plan which satisfies the requirements of this article and has been approved by the state engineer, shall serve as approval of the permit requirements pursuant to North Dakota Century Code sections 61-15-08, 61-16.1-38, and 61-16.1-41. This does not preclude a permittee from securing a permit for additional construction affecting water resources which is necessary after the water management plan has been approved. Pursuant to North Dakota Century Code sections 61-16.1-38 and 61-16.1-41, local water management districts must also approve the appropriate activities. Therefore, those aspects of a water management plan which require the approval of local water management districts shall be submitted to and approved by the appropriate water management district.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-01-05. Other state agency requirements.** It is recognized that the public service commission, pursuant to North Dakota Century Code chapter 38-14.1, requires the submission of a total mining plan for approval by the public service commission before a mining permit is granted. The total mining plan required by the public service commission includes water management and water supply aspects. In order to avoid unnecessary duplication, the water management plan hereby required by the state water commission and the state engineer pursuant to these regulations shall be in the form required by the public service commission for water management related aspects of the total mining plan.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

89-04-01-06. Definitions. Unless the context otherwise requires, the following definitions apply to this article:

1. ~~"Acre foot" of water is the volume required to cover one acre [.404 hectares], one foot [30.48 centimeters] deep. Acre foot is the term commonly associated with reservoir storage. It is equal to 325,850 gallons [1,233,342 liters].~~
2. ~~"Active capacity" is the amount that can be released and utilized.~~
3. ~~"Aquifer" means a zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.~~
4. ~~"Board of commissioners" means the board of commissioners of a water management district.~~
5. ~~"Commission" means the state water commission (governor, commissioner of agriculture, and citizen members).~~
6. ~~"Compaction" means the reduction of pore spaces among the particles of soil or rock, generally done by running heavy equipment over the earth materials.~~
7. ~~"Dam" means any artificial barrier or obstruction, together with appurtenant works, if any, across a stream channel, water course, or natural drainage area which impounds or diverts water. All structures necessary to impound a single body of water shall be considered as one a dam.~~
8. ~~"Dead storage" is the amount of stored water that cannot be released due to physical conditions.~~
9. ~~"Dike" means an embankment constructed of earth and or other suitable materials to protect land against overflow from streams or from diffused surface waters.~~
10. ~~"District" means water management district.~~
11. ~~"Embankment" means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or other similar purposes.~~
12. ~~"Enlargement" means any change or addition to an existing dam or its appurtenant works which increases, or may increase, the maximum quantity of water which can be stored therein.~~

13. ~~"Ground water" means subsurface water that fills available openings in rock or soil materials such that they may be considered water saturated.~~
14. ~~"Hydrologic balance" means the relationship between the quality and quantity of inflow to, outflow from, and storage in a hydrologic unit such as drainage basin, aquifer soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage.~~
15. ~~"Hydrologic regime" means the entire state of water movement in a given area. It is a function of the climate, and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form and falls as precipitation, moves thence along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.~~
16. ~~"Impoundment" means a closed basin formed naturally or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.~~
17. ~~"Intermittent or perennial stream" means a stream or part of a stream that flows continuously during all (perennial) or continuously for at least thirty consecutive days (intermittent) of the calendar year because of ground water discharge or surface runoff. The term does not include an ephemeral stream which is one that flows continuously for less than thirty consecutive days of a calendar year and only in direct response to precipitation in the immediate watershed and whose channel bottom is always above the local water table.~~
18. ~~"Owner" includes all who own, control, operate, maintain, manage, or propose to construct a dam, also their agents, lessees, trustees, and receivers.~~
19. ~~"Permittee" means any individual, partnership, association, society, joint stock company, firm, company, corporation, instrumentality of the state, any governmental subdivision, or other business organization holding a permit to conduct surface coal mining and reclamation operations issued by the North Dakota public service commission.~~
20. ~~"Recharge capacity" means the ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.~~
21. ~~"Recurrence interval" means the precipitation event expected to occur, on the average, once in a specified interval. For example, the ten year twenty four hour precipitation event would be that twenty four hour~~

~~precipitation event expected to be exceeded on the average once in ten years. Magnitude of such events are as defined by the national weather service technical paper number forty, "Rainfall Frequency Atlas of the U.S.", May 1961, and subsequent amendments or equivalent regional or rainfall probability information developed therefrom.~~

- ~~22. "Runoff" means precipitation that flows overland before entering a defined stream channel and becoming streamflow.~~
- ~~23. "Safety factor" means the ratio of the available shear strength to the developed shear stress on a potential surface of sliding determined by accepted engineering practice.~~
- ~~24. "Sediment" means undissolved organic and inorganic material transported or deposited by water.~~
- ~~25. "Sedimentation pond" means any natural or artificial structure or depression used to remove sediment from water and store sediment or other debris.~~
- ~~26. "Slope" means average inclination of a surface, measured from the horizontal. Normally expressed as a unit of vertical distance to a given number of units of horizontal distance, e.g., 1v to 5h equals twenty percent equals eleven and three tenths degrees.~~
- ~~27. "Specifications" are written descriptions of the proposed construction.~~
- ~~28. "Stabilize" means any method used to control movement of soil, spoil piles, or areas of disturbed earth, and includes increasing bearing capacity, increasing shear strength, draining, compacting, or revegetating.~~
- ~~29. "State engineer" means the state engineer, appointed pursuant to North Dakota Century Code section 61-03-01, who is also the chief executive officer of the commission.~~
- ~~30. "Surface coal mining operations" means:
 - ~~a. Mining of coal by removing the suitable plant growth materials and the overburden lying above natural deposits thereof, and mining directly from the natural deposits thereby exposed.~~
 - ~~b. The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land, the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of~~~~

~~such activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to such activities.~~

- ~~31. "Surface coal mining and reclamation" means surface coal mining operations and all activities necessary and incidental to the reclamation of such operations. This term includes the term "surface coal mining operations".~~
- ~~32. "Surface water" means water, either flowing or standing, on the surface of the earth.~~
- ~~33. "Waste" means earth materials, which are combustible, physically unstable, or acid forming or toxic forming, wasted, or otherwise separated from product coal and are slurried or otherwise transported from coal processing facilities or preparation plants after physical or chemical processing, cleaning, or concentrating of coal.~~
- ~~34. "Water table" means upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.~~

General Authority: ~~NDCC 28-32-02, 61-02-11, 61-03-13~~

Law Implemented: ~~NDCC 61-02-14~~

CHAPTER 89-04-02
PROCEDURE FOR SUBMISSION AND APPROVAL OF
WATER MANAGEMENT PLANS

Section

89-04-02-01	_____	Filing Initial Water Management Plan
89-04-02-02	_____	Incomplete Water Management Plan
89-04-02-03	_____	Approval of Water Management Plan
89-04-02-04	_____	Modification
89-04-02-05	_____	Update of Plan

~~**89-04-02-01. Filing initial water management plan.** Upon receipt of a complete water management plan, the state engineer shall cause must forward the application the plan to be reviewed to determine if appropriate requirements are satisfied. Such review shall be complete when possible not more than sixty days from the date of receipt of a complete application.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-02-02. Incomplete water management plan.** If the water management plan is defective, or if the information contained therein is insufficient to enable the state engineer to make an informed decision on the water management plan, the water management plan shall be returned to the applicant for correction. The state engineer shall note thereon the information necessary to complete the water management plan.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-02-03. Approval of water management plan.** The state engineer shall note approval of a water management plan upon determination that appropriate requirements have been satisfied. Approval shall be in the form of a letter to the applicant, stating that appropriate requirements have been satisfied and that permit requirements of the state water commission and the state engineer for construction proposed at that time have been met.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-02-04. Modification.** Before approving the water management plan, the state engineer may require modification of the water management plan as necessary to meet the requirements of this article.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-02-05. Update of plan.** An operator shall be required to amend the operator's water management plan yearly so that the plan shall reflect all mining operations affecting water resources to be conducted within not less than the succeeding three years. Such amendments shall be submitted to the state engineer on or before the thirty first day of January of each year.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

CHAPTER 89-04-03
CONTENTS OF WATER MANAGEMENT PLANS

Section

- ~~89-04-03-01~~ — ~~General~~
- ~~89-04-03-02~~ — ~~Information on Hydrologic System~~
- ~~89-04-03-03~~ — ~~Compliance Provisions~~
- ~~89-04-03-04~~ — ~~Maps~~

~~**89-04-03-01. General.** A water management plan shall include, but shall not be limited to, the size, amount, or locations of all dams, dikes, drainage, ditches, wells, water uses, and all other water retention devices, water diversion devices, and potential hydrologic alterations.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-03-02. Information on hydrologic system.** Because water supplies may be affected several miles beyond the mined area, it is necessary to develop an analysis of the potentially affected area prior to mining. The hydrologic data to be submitted as part of the water management plan shall include:~~

- ~~1. A general account of the ground water hydrology (the water resources of the area).~~
- ~~2. A contour map or maps showing the water table or piezometric surface of the water in each aquifer (including water-bearing coal seams) that will be affected by mining. These maps shall be prepared using a minimum of one data point (a piezometer nest) per four square miles [10.4 square kilometers]. The locations of data points shall be shown on the map and given to the nearest ten acres [4.04 hectares]. Data accompanying the map or maps should include the lithologic and geophysical logs of the holes in which piezometers are installed, piezometer construction details, and elevations of the water level and land surface to the accuracy necessary for valid analysis of the ground water hydrology of the area. The area covered by the map or maps shall be the potentially affected area. Where feasible, water samples shall be collected from each of the data points for chemical analyses. The analyses shall include:
 - ~~a. Total dissolved solids.~~
 - ~~b. Hardness.~~
 - ~~c. Sodium.~~
 - ~~d. Iron.~~~~

- e. ~~Bicarbonate.~~
 - f. ~~Nitrate.~~
 - g. ~~Sulfate.~~
 - h. ~~Chloride.~~
 - i. ~~Acidity (pH).~~
 - j. ~~Sodium adsorption ratio (include calcium, magnesium, and sodium cation concentrations).~~
 - k. ~~Electrical conductivity.~~
3. ~~A general accounting of the water use in the area.~~
 4. ~~A general accounting of the surface water hydrology. This shall include the location and identification of streams, lakes, sloughs, ponds, natural drainageways, and watersheds.~~
 5. ~~A map showing all sources of water to be used annually by the facility. The map or report should indicate the water permit number of each source, and the amount of use.~~
 6. ~~A map showing all proposed reservoirs, impoundments, and dikes. Appropriate engineering data should be submitted for each of the structures.~~
 7. ~~A map showing the amounts and location of proposed discharges.~~
 8. ~~A map showing the natural drainage patterns of the area and how the proposed operation will alter these natural conditions.~~

General Authority: ~~NDCC 28-32-02, 61-02-11, 61-03-13~~

Law Implemented: ~~NDCC 61-02-14~~

89-04-03-03. Compliance provisions. ~~The total water management plan shall include engineering plans and specifications for proposed construction sufficient to meet the requirements of this article.~~

General Authority: ~~NDCC 28-32-02, 61-02-11, 61-03-13~~

Law Implemented: ~~NDCC 61-02-14~~

~~**89-04-03-04. Maps.** Maps required pursuant to this chapter shall be at a scale of 1:12,000 (one inch equals one thousand feet) [2.54 centimeters equals 300 meters] with legible contours.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

**CHAPTER 89-04-04
REQUIREMENTS FOR PROTECTION OF THE
HYDROLOGIC SYSTEM**

Section

- ~~89-04-04-01~~ — ~~Protection of the Hydrologic System~~
- ~~89-04-04-02~~ — ~~Monitoring Requirements~~
- ~~89-04-04-03~~ — ~~Monitoring Devices~~

~~**89-04-04-01. Protections of the hydrologic system.** The permittee shall plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long term adverse changes in the hydrologic balance that could result from surface coal mining and reclamation operations, both onsite and offsite. Changes in water quantity, in the depth to ground water, and in the location of surface water drainage channels shall be minimized.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-04-02. Monitoring requirements.** After disturbed areas have been regraded and stabilized in accordance with statutes and rules of the public service commission, the permittee shall monitor surface water flow. These data shall provide a basis for approval by the commission for removal of flow control systems. The state engineer shall determine the nature of data, frequency of collection, and reporting requirements.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-04-03. Monitoring devices.** Equipment, structures, and other measures necessary to accurately measure and sample the quantity of surface water discharges from the disturbed area of the permit shall be properly installed, maintained, and operated, as required by the state engineer, and shall be removed when no longer required.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

CHAPTER 89-04-05
DIVERSION AND CONVEYANCE OF OVERLAND FLOW AWAY FROM
DISTURBED AREAS

Section

~~89-04-05-01~~ ~~General~~

~~89-04-05-02~~ ~~Construction and Design~~

~~**89-04-05-01. General.** Overland flow from undisturbed areas may, if required or approved by the state engineer, be diverted away from disturbed areas by means of temporary or permanent diversion structures. The following requirements shall be met:~~

- ~~1. Temporary diversion structures are those used during mining and reclamation. When no longer needed, these structures shall be removed and the area reclaimed. Temporary diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a ten-year recurrence interval, or a larger event as specified by the state engineer.~~
- ~~2. Permanent diversion structures are those remaining after mining and reclamation and approved for retention by the state engineer and other appropriate state and federal agencies. To protect fills and property and to avoid danger to public health and safety, permanent diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a hundred year recurrence interval, or a larger event as specified by the commission. Permanent diversion structures shall be constructed with gently sloping banks that are stabilized by vegetation. Asphalt, concrete, or other similar linings shall not be used unless specifically required to prevent seepage or to provide stability and are approved by the state engineer.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-05-02. Construction and design.** Diversions shall be designed, constructed, and maintained using the best technology currently available. Appropriate sediment control measures for these diversions shall include, but not be limited to, maintenances of appropriate gradients, channel lining, revegetation, roughness structures, and detention basins.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

CHAPTER 89-04-06
STREAM CHANNEL DIVERSIONS

Section

~~89-04-06-01 Construction and Design Requirements~~
~~89-04-06-02 Removal~~

~~**89-04-06-01. Construction and design requirements.** Flow from perennial and intermittent streams within the permit area may be diverted only when the diversions are approved by the state engineer and they are in compliance with local, state, and federal statutes and regulations. When streamflow is allowed to be diverted, the new stream channel shall be designed and constructed to meet the following requirements:~~

- ~~1. The average stream gradient shall be maintained and the channel designed, constructed, and maintained to remain stable and to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable state or federal law. Erosion control structures such as channel lining structures, retention basins, and artificial channel roughness structures shall be used only when approved by the state engineer for temporary diversions where necessary or for permanent diversions where they are stable and will require only infrequent maintenance.~~
- ~~2. Channel, bank, and floodplain configurations shall be adequate to safely pass the peak runoff of a precipitation event with a ten-year recurrence interval for temporary diversions and a hundred year recurrence interval for permanent diversions, or larger events as specified by the state engineer.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14, 61-16.1-38~~

~~**89-04-06-02. Removal.** At the time temporary diversions are removed, the permittee shall ensure that downstream water treatment facilities previously protected by the diversion are modified or removed to prevent over-topping or failure of the facilities.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14, 61-16.1-38~~

CHAPTER 89-04-07
REQUIREMENTS FOR SEDIMENT CONTROL DEVICES

Section

89-04-07-01	Sediment Control Devices
89-04-07-02	Spillway Design
89-04-07-03	Requirements for Larger Ponds
89-04-07-04	Certification
89-04-07-05	Inspection
89-04-07-06	Discharge Structures

~~**89-04-07-01. Sediment control devices.** Appropriate sediment control devices shall be constructed and maintained as required by statutes and regulations governing water quality. Such sedimentation control devices shall be constructed in appropriate locations prior to commencement of mining operations.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-07-02. Spillway design.** Spillway systems shall be properly located to maximize the distance from the point of inflow into the pond to maximize detention times. Spillway systems shall be provided to safely discharge the peak runoff from a precipitation event with a twenty five year recurrence interval, or larger event as specified by the state engineer.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-07-03. Requirements for larger ponds.** If a sedimentation pond has an embankment that is more than twenty feet [6 meters] in height, as measured from the upstream toe of the embankment to the crest of the emergency spillway, or has a storage volume of twenty acre feet [24.6 cubic dekameters] or more, the following additional requirements shall be met:~~

- ~~1. An appropriate combination of principal and emergency spillways shall be provided to safely discharge the runoff resulting from a hundred year, six-hour precipitation event, or larger event as specified by the state engineer.~~
- ~~2. Ponds shall be designed and constructed with an acceptable static safety factor of at least one and one-half for maximum design flood elevation of the pool to ensure embankment slope stability.~~
- ~~3. The minimum top width of the embankment shall not be less than the quotient of $(H+35)/5$ where H is the height of the embankment as measured from the upstream toe of the top of the embankment.~~

4. ~~Ponds shall have appropriate barriers to control seepage along conduits that extend through the embankment.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14, 61-16.1-38~~

~~**89-04-07-04. Certification.** All ponds shall be designed and inspected under the supervision of, and certified after construction by, a registered professional engineer.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-07-05. Inspection.** All ponds, including those not meeting the size or other criteria of this chapter, shall be examined by the state engineer for structural weakness, erosion, and other hazardous conditions.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-07-06. Discharge structures.** Discharges from sedimentation ponds and diversions shall be controlled where necessary using energy dissipators, surge ponds, and other devices to reduce erosion and prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

CHAPTER 89-04-08
GROUND WATER PROTECTION

Section

~~89-04-08-01~~ ———— ~~Monitoring~~

~~**89-04-08-01. Monitoring.** Ground water levels, infiltration rates, subsurface flow and storage characteristics, and the quality of ground water shall be monitored in a manner approved by the state engineer to determine the effects of surface coal mining and reclamation operations on the recharge capacity of reclaimed lands and on the quantity of water in ground water systems at the mine area and in associated offsite areas. When operations are conducted in such a manner that may affect the ground water system, ground water levels shall be periodically monitored using wells that can adequately reflect changes in ground water quantity resulting from such operations. Sufficient water wells must be used by the permittee. The state engineer may require drilling and development of additional wells if needed to adequately monitor the ground water system. As specified and approved by the state engineer, additional hydrologic tests, such as infiltration tests and aquifer tests, must be undertaken by the permittee.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

CHAPTER 89-04-09
PERMANENT IMPOUNDMENTS

Section

~~89-04-09-01~~ Requirements for Permanent Impoundments

~~**89-04-09-01. Requirements for permanent impoundments.** The permittee may construct, if authorized by the state engineer pursuant to this chapter, permanent water impoundments on mining sites as a part of reclamation activities only when they are adequately demonstrated to be in compliance with applicable state statutes and regulations in addition to the following requirements:~~

- ~~1. The size of the impoundment is adequate for its intended purposes.~~
- ~~2. The impoundment dam construction is designed to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under the Watershed Protection and Flood Prevention Act (Pub. L. 83-566, 16 U.S.C. 1006).~~
- ~~3. The level of water will be reasonable stable.~~
- ~~4. Final grading will provide adequate safety and access for proposed water users.~~
- ~~5. Water impoundments will not result in the diminution of the quantity of water used by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

CHAPTER 89-04-10
DAMS CONSTRUCTED OF OR IMPOUNDING WASTE MATERIAL

Section

- ~~89-04-10-01~~ — ~~General~~
- ~~89-04-10-02~~ — ~~Construction of Dams~~
- ~~89-04-10-03~~ — ~~Inspection~~
- ~~89-04-10-04~~ — ~~Maintenance~~
- ~~89-04-10-05~~ — ~~Certification~~
- ~~89-04-10-06~~ — ~~Modification~~

~~**89-04-10-01. General.** No waste material shall be used in or impounded by existing or new dams without the approval of the state engineer. The permittee shall design, locate, construct, operate, maintain, modify, and abandon or remove all dams (used either temporarily or permanently) constructed of waste materials, in accordance with the requirements of this chapter.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-10-02. Construction of dams.**~~

- ~~1. Waste shall not be used in the construction of dams unless demonstrated through appropriate engineering analysis to have no adverse effect on stability.~~
- ~~2. Plans for dams subject to this section shall be approved by the state engineer before construction.~~
- ~~3. Construction requirements are as follows:
 - ~~a. Design shall be based on the flood from the probable maximum precipitation event unless the permittee shows that the failure of the impounding structure would not cause loss of life or severely damage property or the environment, in which case, depending on site conditions, a design based on a precipitation event of no less than hundred-year frequency may be approved by the state engineer.~~
 - ~~b. The design freeboard distance between the lowest point on the embankment crest and the maximum water elevation shall be at least five feet [1.52 meters] to avoid overtopping by wind and wave action.~~
 - ~~c. Dams shall have minimum safety factors as follows:~~~~

Case	Loading Condition	Minimum Safety Factor
I	End of construction	1.3
II	Partial pool with steady seepage saturation	1.5
III	Steady seepage from spillway or decant crest	1.5
IV	Earthquake (cases II and III with seismic loading)	1.0

- ~~d. The dam, foundation, and abutments shall be stable under all conditions of construction and operation of the impoundment. Sufficient foundation investigations and laboratory testing shall be performed to determine the factors of safety of the dam for all loading conditions in subdivision c and for all construction increments of construction.~~
- ~~e. Seepage through the dam, foundation, and abutments shall be controlled to prevent excessive uplift pressures, internal erosion, sloughing, removal of material by solution, or erosion of material by loss into cracks, joints, and cavities. This may require the use of impervious blankets, pervious drainage zones or blankets, toe drains, relief wells, or dental concreting of jointed rock surface in contact with embankment materials.~~
- ~~f. Allowances shall be made for settlement of the dams and the foundation so that the freeboard will be maintained.~~
- ~~g. Impoundments created by dams of waste materials shall be subject to a minimum drawdown criteria that allows the facility to be evacuated by spillways or decants of ninety percent of the volume of water stored during the design precipitation event within ten days.~~
- ~~h. During construction of dams subject to this section, the structures shall be periodically inspected by a registered professional engineer to ensure construction according to the approved design. On completion of construction, the structure shall be certified by a registered professional engineer experienced in the field of dam construction as having been constructed in accordance with accepted professional practice and the approved design.~~

General Authority: NDCC 28-32-02, 61-02-11, 61-03-13

Law Implemented: NDCC 61-02-14

~~**89-04-10-03. Inspection.** All dams shall be routinely inspected by a registered professional engineer, or someone under the supervision of a registered professional engineer.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-10-04. Maintenance.** All dams shall be routinely maintained. Vegetative growth shall be cut where necessary to facilitate inspection and repairs. Ditches and spillways shall be cleaned. Any combustible materials present on the surface, other than that used for surface stability such as mulch or dry vegetation, shall be removed. Any other appropriate maintenance procedures necessary, as determined by the state engineer, shall be followed.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-10-05. Certification.** All dams subject to this chapter shall be certified annually as having been constructed and modified in accordance with current prudent engineering practices to minimize the possibility of failures. Any changes in the geometry of the impounding structure shall be highlighted and included in the annual certification report. These certifications shall include a report on existing and required monitoring procedures and instrumentation, the average and maximum depths and elevations of any impounded structures, any fires occurring in the material over the past year, and any other aspects of the structures affecting their stability.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

~~**89-04-10-06. Modification.** Any enlargements, reductions in size, reconstruction, or other modification of the dams shall be approved by the state engineer before construction begins.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14~~

CHAPTER 89-04-11
PROTECTION OF WATER RIGHTS

Section
~~89-04-11-01~~ Water Rights and Replacement

~~**89-04-11-01. Water rights and replacement.** The permittee shall forthwith replace both the quantity and quality of the water supply of an owner of interest in real property who obtains all or part of the owner's supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from surface coal mine operation by the permittee. Upon receipt of a complaint by such owner that the owner's water supply has been so affected, the state engineer, upon making a determination thereon, shall issue an order for the permittee to replace such water supply.~~

~~**General Authority:** NDCC 28-32-02, 61-02-11, 61-03-13~~

~~**Law Implemented:** NDCC 61-02-14, 61-04-30~~

Article 89-08 is amended as follows:

ARTICLE 89-08

DAMS, DIKES, AND OTHER DEVICES

Chapter

89-08-01	Definitions
89-08-02	Construction Permits
89-08-03	Inspections
89-08-04	Operating Plan <u>Operation and Maintenance</u>

CHAPTER 89-08-01

DEFINITIONS

Section

89-08-01-01	Definitions
89-08-01-02	Definition of Unsafe Dam, Dike, or Other Device <u>[Repealed]</u>

89-08-01-01. Definitions. The following definitions apply in this article:

1. "Appurtenant works" means all works incident or attached to a dam, dike, or other device, including ~~but not limited to~~:
 - a. A spillway, either in the dam or separate from it;
 - b. The reservoir and its rim;
 - c. A low-level outlet; and
 - d. A water conduit, such as a tunnel, pipeline, or penstock, either through the dam, dike, or other device or their abutments.
2. "Construction" or "construct" means any activity for which a permit is required by North Dakota Century Code section 61-16.1-38, including construction, alteration, enlargement, or modification of a dam, dike, or other device.
3. "Dam" means any artificial barrier or obstruction, including any appurtenant works, constructed across a stream channel, watercourse, or an area that drains naturally or may to impound or attenuate the flow of water. All structures necessary to impound a single body of water are considered a single dam.

4. "Dike" means ~~an embankment~~ any artificial barrier, including any appurtenant works, constructed to divert surface waters to protect real or personal property.
5. ~~"District" means a water resource district.~~
5. "Diversion" means any open channel, culvert, or ditch constructed to reroute a watercourse as defined by North Dakota Century Code section 61-01-06.
6. "Embankment" means a structure created by an artificial deposit of material upon the natural surface of the land that is designed to act as a water control device, support roads or railways, or for other similar purposes.
6. 7. "Engineer" means a person who has been duly registered and licensed as an engineer by the North Dakota state board of registration for professional engineers and land surveyors.
7. 8. "Height" means the maximum vertical distance ~~in feet~~ from the stream channel bottom ~~at the centerline of the dam~~ or lowest elevation of a naturally draining area to the top of the ~~settled embankment~~ dam.
8. 9. "High-hazard dam" means ~~any~~ a dam located upstream of developed or urban areas where failure may cause serious damage to homes, industrial and commercial buildings, and major public utilities. There is potential for the loss of more than a few lives if the dam fails.
10. "Holding pond, lagoon, or dugout" means any artificial, hydraulically disconnected structure, including any appurtenant works, constructed to store water.
9. 11. "Inspection" means a visual or mechanical check, a measurement, a boring, or any other method necessary for determination of the adequacy of construction techniques, conformity of work with approved plans and specifications, or the safety and operating performance of a dam, dike, or other device.
10. 12. "Low-hazard dam" means a dam located in a rural or agricultural ~~areas~~ area where there is little possibility of future development. Failure of low-hazard dams may result in damage to agricultural land, township and county roads, and farm buildings other than residences. No loss of life is expected if the dam fails.
11. 13. "Medium-hazard dam" means a dam located in a predominately rural or agricultural area where failure may damage isolated homes, main

highways, or railroads, or cause interruption of minor public utilities. ~~The~~ There is potential for the loss of a few lives may be expected if the dam fails.

- ~~12-14.~~ "Other device" means a water control structure, other than a dam or dike, ~~which may include, but is not limited to, diversion ditches, dugouts, lagoons, including diversions and holding ponds, lagoons, or dugouts.~~
- ~~13-15.~~ "Owner" means any person who owns, controls, operates, maintains, manages, or proposes to construct a dam, dike, or other device, ~~except that for.~~ For the purpose of signing the a construction permit application for construction permit, "owner" means the person who owns the property or interest in property ~~upon which~~ where the dam, dike, or other device will be built.
- ~~14.~~ "State engineer" means ~~the state officer provided for in North Dakota Century Code section 61-03-01 or any of the state engineer's employees or authorized agents.~~
- ~~16.~~ "Top of dam" means the top of the settled embankment or the elevation of the uppermost surface of a nonembankment dam, excluding accessory features such as railings.
- ~~17.~~ "Unsafe dam, dike, or other device" means any such structure that threatens harm to life or property or is improperly maintained.

History: Effective November 1, 1989; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-01-02. Definition of unsafe dam, dike, or other device. ~~A dam, dike, or other device is unsafe if it threatens harm to life or property, or is improperly maintained. Repealed effective January 1, 2015.~~

History: ~~Effective November 1, 1989.~~

General Authority: ~~NDCC 28-32-02, 61-03-13~~

Law Implemented: ~~NDCC 61-03-21.2~~

CHAPTER 89-08-02 CONSTRUCTION PERMITS

Section	
89-08-02-01	Determining the Capacity of Dams, Dikes, or Other Devices
89-08-02-02	Contents of Application
89-08-02-03	Permit Does Not Absolve Liability for Damages
89-08-02-03.1	<u>Time to Complete Construction of Structure</u>
89-08-02-03.2	<u>Extending Time to Complete Construction of Structure</u>
89-08-02-04	<u>Temporary Emergency Construction Permits</u>
89-08-02-05	<u>Extension of Emergency Construction Permits</u>
89-08-02-06	<u>Removal of Emergency Structures</u>
89-08-02-07	<u>As Built Plans</u>

89-08-02-01. Determining the capacity of dams, dikes, or other devices. The impounding capacity of a dam is calculated based upon the elevation at the top of the settled embankment of the dam. The diverting capacity of a dike is calculated based upon the area protected as measured from the effective top of the dike. If the absence of the dike could result in more than fifty acre-feet of water inundating the protected area, a permit is required. The diverting capacity of a diversion ~~ditch~~ is calculated based upon the runoff from a the National Oceanic and Atmospheric Administration Atlas 14 twenty-five year, twenty-four hour, precipitation event. No construction ~~on the dam, dike, or other device~~ can begin until a construction permit is obtained.

History: Effective November 1, 1989; amended effective April 1, 2004; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-02. Contents of application. A completed construction permit application for a construction permit must be submitted to the state engineer along with include: plans and specifications; evidence recognized in a court of law sufficient to establish a prima facie case of establishing a property right in for the property that will be affected by the construction of the dam, dike, or other device; and any additional data or information required by the state engineer.

History: Effective November 1, 1989; amended effective June 1, 1998; April 1, 2004; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-03. Permit does not absolve liability for damages. The receipt of a permit, including a permit for emergency construction, does not relieve an applicant from liability ~~for damages~~ resulting from any activity conducted ~~pursuant to~~ under the permit.

History: Effective June 1, 1998; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-03.1. Time to complete construction of structure. Construction must be completed and the state engineer must be notified of completion in writing within two years from the date of final approval or the permit is void. The two-year period does not begin until any appeal is complete.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-03.2. Extending time to complete construction of structure. If the two-year period expires before construction is complete, the permit recipient may make a written request to the state engineer for a one-year extension. Only two extensions may be granted. All requests for extensions must be made at least sixty days before the expiration date and must specifically state why construction has not been completed.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-04. Temporary Emergency construction permits. A completed application for an emergency construction permit must be submitted to the state engineer along with any additional information required by the state engineer. If the state engineer determines an emergency exists, the state engineer may issue a temporary an emergency construction permit to construct a dam, dike, or other device capable of impounding, obstructing, or diverting more than fifty acre-feet of water. A temporary An emergency construction permit shall have a duration of not more than will expire in six months unless extended by the state engineer under 89-08-02-05.

History: Effective April 1, 2004; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-05. Extension of emergency construction permits. The applicant must submit a written request for an extension at least thirty days before the expiration of the emergency construction permit. If it is determined that an emergency still exists, the state engineer may issue a one-time, six-month extension to the permit's expiration date. If an emergency continues to exist after the one-time extension, an applicant may reapply under section 89-08-02-04 for a new emergency construction permit.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-06. Removal of emergency structures. Once the emergency has ended or upon permit expiration, whichever occurs first, all structures constructed under section 89-08-02-04 must be removed in their entirety and the disturbed area restored to pre-project conditions. The applicant must notify the state engineer in writing when the emergency structure has been completely removed.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-02-07. As built plans. As a condition on all construction permits, the owner of the dam, dike, or other device will provide the state engineer with "as built" plans within six months after the dam, dike, or other device has been constructed to provide details of the modifications that occurred during construction.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

CHAPTER 89-08-03 INSPECTIONS

Section

89-08-03-01	Inspections and Reports During Construction of High-Hazard Dams, Medium-Hazard Dams, And Low-Hazard Dams Over Ten Feet [3.05 Meters] in Height
89-08-03-02	Monitoring During Construction by the State Engineer
89-08-03-03	Changes in Construction
89-08-03-04	Requested Inspections
89-08-03-05	Periodic Inspections After Construction
89-08-03-06	As Built Plans [Repealed]
<u>89-08-03-07</u>	<u>Access to Dams for Inspection</u>

89-08-03-01. Inspections and reports during construction of ~~high-hazard dams, medium-hazard dams, and low-hazard dams~~ over ten feet [3.05 meters] in height. ~~In order to~~ To protect property and assure safety, the following are conditions to all construction permits for high-hazard dams, medium-hazard dams, or low-hazard dams over ten feet [3.05 meters] in height:

1. An engineer must be in charge of and responsible for inspections during construction.
2. Inspections during construction must be performed at intervals necessary to ensure conformity with the construction permit and the plans and specifications.
3. ~~Within seven days after~~ The information obtained during each inspection, the engineer in charge shall submit must be documented in a written report to the state engineer specifying the information obtained pursuant to the inspection. The report will specify any changes necessary under this section 89-08-03-03. The inspection reports must be provided to the state engineer upon request.

History: Effective November 1, 1989; amended effective April 1, 2004; January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-16.1-38

89-08-03-02. Monitoring during construction by the state engineer. The state engineer may monitor any dam, dike, or other device during construction to ensure conformity with the construction permit and the plans and specifications.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-04-11

89-08-03-03. Changes in construction. ~~If, pursuant to an inspection under section 89-08-03-01 or section 89-08-03-02, the state engineer or engineer in charge determines changes in construction are necessary to ensure safety, whether the changes are necessary because the dam, dike, or other device does not comply with the construction permit or plans and specifications, or an unforeseen condition is discovered, or for any other reason, the state engineer may order the appropriate changes and may order construction be stopped until the changes are made.~~

History: Effective November 1, 1989; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-04-11

89-08-03-04. Requested inspections.

1. ~~Upon receipt of an affidavit complaining a~~ written complaint that a dam, dike, or other device is unsafe because of its construction, maintenance, or operation, the state engineer shall will examine the available information and determine if the complaint is justified.
2. If the state engineer determines the complaint is unjustified, the state engineer shall must notify the complainant in writing of that fact. ~~If the complainant continues to request an inspection even though the state engineer determines the complaint is unjustified, the state engineer shall make the inspection upon receiving from the complainant a certified check or cashier's check in an amount sufficient to cover the total cost of inspection.~~
3. If the state engineer determines the complaint is justified, the state engineer shall ~~make the~~ will complete the necessary inspection upon receiving from the complainant a certified check or cashier's check in an amount sufficient to cover the total cost of inspection and make a determination regarding the structure's safety. If construction is ongoing, all construction activities must cease until the state engineer completes the inspection.
4. ~~If the dam, dike, or other device is defective, the state engineer shall require the owner of the dam, dike, or other device to pay the cost of inspection, and upon payment shall return the amount deposited by the complainant. If the cost of inspection is not paid within thirty days by the owner of the defective dam, dike, or other device, the cost of inspection shall become a lien against any of the owner's property.~~
5. ~~If the dam, dike, or other device is not found defective, any money deposited by the complainant for the inspection may not be returned.~~

History: Effective November 1, 1989; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-04-11, 61-03-21.1, 61-03-21.2

89-08-03-05. Periodic inspections after construction. ~~As a condition on all construction permits, the~~ The state engineer may require inspection of a dam, dike, or other device as often as necessary after construction to protect property and assure safety.

History: Effective November 1, 1989; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-04-11, 61-16.1-38

89-08-03-06. As built plans. ~~As a condition on all construction permits, the owner of the dam, dike, or other device will provide the state engineer with "as built" plans after the dam, dike, or other device has been constructed. Repealed effective January 1, 2015.~~

~~**History:** Effective November 1, 1989.~~

~~**General Authority:** NDCC 28-32-02, 61-03-13~~

~~**Law Implemented:** NDCC 61-16.1-38~~

89-08-03-07. Access to dams for inspection. The state engineer has authority to enter upon land to inspect a dam during construction, conduct periodic dam inspections after construction, or conduct a dam inspection in response to a complaint that the dam is unsafe. Except in emergency situations as determined by the state engineer, the state engineer will request permission from the landowner to enter the property. If the landowner refuses to give permission or fails to respond within five days of the request, the state engineer may request a district court order for authorization to enter the property to inspect the dam.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-21.1

CHAPTER 89-08-04
OPERATING PLAN OPERATION AND MAINTENANCE

Section

89-08-04-01	Operating Plan
<u>89-08-04-02</u>	<u>Maintenance Plan</u>
<u>89-08-04-03</u>	<u>Emergency Action Plan</u>

89-08-04-01. Operating plan. By the fifteenth of February of each year, the operator of a reservoir with a capacity of more than one thousand acre-feet ~~shall~~ must submit an ~~operation~~ operating plan for that year to the state engineer. The state engineer ~~shall~~ will review the operating plan, and if deficiencies or discrepancies exist, the state engineer ~~shall~~ must notify the owner of the dam of the deficiencies or discrepancies ~~within thirty days of discovering the deficiencies or discrepancies.~~ The owner of the dam ~~shall~~ must correct the deficiencies or discrepancies and return the corrected operating plan to the state engineer within fourteen days of receiving notice of the deficiencies or discrepancies. The ~~operation~~ operating plan must be approved by the state engineer ~~prior to~~ before the operation of the dam. If the operator receives no response from the state engineer within thirty days, the ~~operation~~ operating plan is approved. ~~The operation plan must contain at a minimum:~~

1. ~~A reservoir operation procedure;~~
2. ~~A maintenance procedure for the dam and appurtenant works; and~~
3. ~~Emergency procedures and warning plans.~~

History: Effective November 1, 1989; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-21

89-08-04-02. Maintenance plan. Dam owners must maintain their structures in an adequate manner. The state engineer may require the owner of a dam with a capacity of more than one thousand acre-feet to submit a maintenance plan for the dam and appurtenant works.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-21

89-08-04-03. Emergency action plan. The owner of a dam with a storage capacity of more than one thousand acre-feet must submit an emergency action plan for the dam to the state engineer. The plan must be approved by the state engineer. The plan must be maintained and updated on a regular basis, and copies of all updates must be submitted to the state engineer.

History: Effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-21

Article 89-12 is amended as follows:

ARTICLE 89-12

MUNICIPAL, RURAL, AND INDUSTRIAL WATER SUPPLY PROGRAM

Chapter

89-12-01 Municipal, Rural, and Industrial Water Supply Program

CHAPTER 89-12-01

~~MINICIPAL~~ MUNICIPAL, RURAL, AND INDUSTRIAL WATER SUPPLY PROGRAM

Section

89-12-01-01	Definitions
89-12-01-02	Eligibility for Program Funds <u>Eligible Projects</u>
89-12-01-03	<u>Application for Feasibility Study Funding</u>
89-12-01-04	<u>Application to Determine Eligibility - Initial Review by the State Engineer</u> [Repealed]
89-12-01-05	<u>Preliminary Engineering Reports - Initial Review by State Engineer - Bureau Requirements</u> [Repealed]
89-12-01-06	Feasibility Study - Review - Report <u>Application for Design and Construction Funding</u>
89-12-01-07	<u>Design and Construction Requirements</u> [Repealed]
89-12-01-08	<u>Funding - Priority</u>
89-12-01-09	<u>Reports to Commission and C-District</u> [Repealed]
89-12-01-10	<u>Contract Awards</u> [Repealed]

89-12-01-01. Definitions. As used in this chapter, unless the context or subject matter otherwise requires:

1. ~~"Applicant" means the party submitting a proposal.~~
2. ~~"Bureau" means the bureau of reclamation or its duly authorized agent.~~
3. ~~"C-district" means the Garrison Diversion Conservancy District or its duly authorized agent.~~
4. ~~"City" means any city organized under the laws of this state.~~
5. 1. "Commission" means the North Dakota state water commission or its designee.

6. ~~2.~~ "Design and construction" means preparation of the final design plans and the ultimate construction of a project.
7. ~~3.~~ "Feasibility study" means a report of sufficient detail to provide a sound estimate of capital costs, water costs to users, and operation, maintenance, and replacement costs.
4. "Garrison Diversion" means Garrison diversion conservancy district.
8. ~~5.~~ "Preliminary engineering report" means a reconnaissance level report containing sufficient information to determine whether additional detailed studies are merited.
9. ~~6.~~ "Program funds" means money available for municipal, rural, and industrial projects ~~including money available through the Garrison Diversion Reformulation Act of 1986, as amended by the Water Resources Development Act of 2000, Pub. L. 106-541, 114 Stat. 2572 (2000), administered by the bureau of reclamation.~~
10. "~~Proposal~~" means ~~an application submitted to the commission for financial assistance from program funds for municipal, rural, and industrial projects and associated costs.~~
11. ~~7.~~ "Public water system" means a pipd potable water system ~~for the provision to the public of piped water for human consumption, if the system has with~~ at least fifteen service connections or regularly serving ~~serves~~ at least twenty-five individuals.
12. ~~8.~~ "Regional water system" is a system that provides water to at least four public water systems and may also include rural water users.
13. ~~9.~~ "Rural water users" means all users, ~~including farms, unincorporated cities, villages, trailer courts, and livestock, excluding~~ incorporated cities.
14. "~~State engineer~~" means ~~the individual appointed by the commission pursuant to North Dakota Century Code section 61-03-01 or the state engineer's designee.~~

History: Effective June 1, 1994; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-02-14

Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-02. Eligibility for program funds Eligible projects. ~~The following types of projects and associated costs are eligible for financial assistance from program funds:~~

1. ~~Water supply projects. Design and construction activities for the following types of projects are eligible for financial assistance from program funds:~~
 - a. ~~Design and construction of projects for supplying water including:~~
 - (1) a. New ground water wells, including mechanical and electrical components.
 - (2) b. Pipelines from water sources to public water systems and principal supply works for systems.
 - (3) c. Booster pumping plants for supply lines.
 - (4) d. Intake works and pumping plants for new surface water ~~source~~ sources.
 - (5) e. New or enlarged storage facilities.
 - (6) f. New rural water systems or enlargements or extensions of existing rural water systems.
 - (7) g. New regional water systems or enlargements or extensions of existing regional water systems.
 - b. ~~Design and construction of water treatment projects including:~~
 - (1) h. New water treatment plants.
 - (2) i. Modifications to and upgrades of existing water treatment plants.
2. Program funds may be used for engineering, and legal, ~~and right-of-way~~ costs, ~~excluding the purchase of easements,~~ and costs incurred in conducting environmental reviews or cultural resources investigations, right-of-way costs (excluding the purchase of easements), and costs associated with the planning and, design, and construction of eligible projects listed in subdivisions a and b of subsection 1.
3. Program funds are not available for costs associated with operation, maintenance, and replacement of water supply or treatment systems or the costs associated with the preparation of the preliminary engineering report.

History: Effective June 1, 1994; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-02-14

Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-03. Application for feasibility study funding.

1. ~~An applicant~~ To be considered for program funds, the project sponsor must submit an application for program funds to the state chief engineer at the following address and Garrison Diversion that includes:

~~North Dakota State Water Commission
900 East Boulevard Avenue
Bismarck, North Dakota 58505-0850~~

The application must include the following:

- a. Information explaining the need for the ~~proposal~~ project, including its objectives and benefits.
- b. The area to be served by the ~~proposal~~ project.
- c. ~~Maps, diagrams, other illustrated documentation if these will make the proposal more understandable~~ A preliminary engineering report.
- d. The approximate cost of carrying out the ~~proposal, if available~~ project.
- e. The amount of funding sought from program funds and the amount the ~~applicant~~ project sponsor intends to contribute to carry out the ~~proposal~~ project.
- f. ~~Efforts made, and the~~ The results, of all efforts made to secure funds from sources other than program funds. If available, provide Provide the current rate schedule for the water supply and treatment ~~system~~ systems.
- g. Other information the ~~applicant~~ project sponsor believes pertinent or ~~requested by~~ that the state chief engineer requests.

2. ~~A copy of the application must also be sent to the c-district at the following address:~~

~~Garrison Diversion Conservancy District
PO Box 140
Carrington, North Dakota 58421~~

2. During review of the application, the chief engineer, in consultation with Garrison Diversion, may decide which parts of the project are eligible for funding from program funds.
3. After review of the application, the chief engineer may prepare a report setting forth the recommendations regarding the project feasibility study funding. If a report is prepared, it must address whether the project is consistent with statewide plans and programs, and the chief engineer will provide a copy to the commission and Garrison Diversion.

History: Effective June 1, 1994; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-02-14

Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-04. Application to determine eligibility - Initial review by the state engineer. ~~After the initial review of an application, the state engineer may decide:~~
Repealed effective January 1, 2015.

1. ~~The proposal is eligible for funding from program funds. If the proposal is eligible for funding, the state engineer shall notify the applicant in writing.~~
2. ~~The information provided is inadequate to review the proposal and may order the applicant to provide more information, or may obtain more information.~~
3. ~~The proposal is not eligible for funding from program funds. The state engineer shall notify the applicant of and include the reasons for ineligibility in writing.~~
4. ~~The state engineer shall submit a copy of all notifications to the c-district.~~

~~**History:** Effective June 1, 1994~~

~~**General Authority:** NDCC 28-32-02, 61-02-14~~

~~**Law Implemented:** NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08~~

89-12-01-05. Preliminary engineering reports - Initial review by state engineer - Bureau requirements. Repealed effective January 1, 2015.

1. ~~An applicant notified that its project is eligible for funding must submit a preliminary engineering report to the state engineer. The applicant shall contact the bureau at the initiation of the preliminary engineering report to discuss applicable federal requirements. The preliminary engineering report must contain:~~
 - a. ~~Name of the project sponsor and contact persons.~~
 - b. ~~A brief summary of the proposed project including:~~
 - (1) ~~Identification of the use of water and estimated water for each use.~~
 - (2) ~~Description of existing water quantity and quality.~~
 - (3) ~~Explanation of inadequacy of existing supplies.~~
 - (4) ~~Estimate of potential users.~~
 - (5) ~~User interest and how it was determined.~~
 - c. ~~A map of the project area showing:~~
 - (1) ~~Water sources (aquifers, lake, stream, other systems).~~
 - (2) ~~Proposed facilities.~~
 - (3) ~~Distribution systems.~~
 - (4) ~~Alternatives.~~
 - d. ~~Preliminary cost estimate for feasibility study, capital costs, and costs for all alternatives.~~
 - e. ~~Repayment concepts.~~
 - f. ~~Funding source for the applicant's share.~~
 - g. ~~Proposed project schedule.~~
 - h. ~~Identification of entity responsible for applicable reports or studies.~~
 - i. ~~Availability and cost of construction material.~~

- ~~j. Social and local economic climate.~~
 - ~~k. Special or unusual considerations such as public and construction safety, repayment contracts, biota transfer, and environmental.~~
 - ~~l. Special site conditions such as ground water table, soil conditions, right of way, and zoning constraints, and manmade features.~~
 - ~~m. Project's energy requirements and date of service.~~
 - ~~n. Documentation of the engineering selection process.~~
 - ~~o. Project's potential effect on economic development within project area.~~
 - ~~p. Documentation of cultural resources in the affected project area.~~
 - ~~q. An outline of the water conservation plan.~~
 - ~~r. Action necessary and action taken to comply with all applicable state and federal laws including the National Environmental Policy Act, Fish and Wildlife Coordination Act, Endangered Species Act, Clean Water Act, and state and federal laws pertaining to identification and preservation of cultural resources with letters from the appropriate agencies.~~
 - ~~s. Other information requested by the state engineer.~~
- ~~2. The applicant must consider whether an alternative project could satisfy the objectives of the applicant. The preliminary engineering report must set forth a general discussion of all other alternatives considered before and during report preparation, a description of the preferred alternative, and a no action alternative.~~
 - ~~3. The applicant shall submit one copy of the preliminary engineering report to the c-district and copies to the bureau as specified by the state engineer.~~
 - ~~4. After initial review of the preliminary engineering report, the state engineer may decide:

 - ~~a. The proposal is, or parts of the proposal are, eligible for program funds. The state engineer shall notify the applicant in writing that the proposal is, or parts of it are, eligible for funding.~~~~

- b. ~~The information provided is inadequate and may order the applicant to provide more information, or may obtain more information.~~
- e. ~~The proposal or parts of the proposal are not eligible for program funds. The state engineer shall notify the applicant and include the reasons for ineligibility in writing.~~
- d. ~~The state engineer shall submit a copy of all notifications to the c-district.~~

History: ~~Effective June 1, 1994.~~

General Authority: ~~NDCC 28-32-02, 61-02-14~~

Law Implemented: ~~NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08~~

89-12-01-06. Feasibility study – Review – Report Application for design and construction funding.

1. ~~An applicant whose project is eligible to receive program funds~~ A project sponsor requesting design or construction funding must submit a copy of a feasibility study to the state chief engineer. The feasibility study must include the following information:
 - a. ~~All the information required by subdivisions a, b, c, e, f, g, h, i, j, k, l, m, n, o, and r of subsection 1 of section 89-12-01-05. This information, however, must be updated and submitted in more detail and clarity.~~
 - b. ~~Project plans and alternative plans with a description of the preferred alternative.~~
 - c. ~~A description of proposed water treatment and storage facilities.~~
 - d. ~~Design criteria including population projections and water demands.~~
 - e. ~~Ability and willingness of beneficiaries to pay capital and other costs.~~
 - f. ~~Cost estimates for capital and other costs.~~
 - g. ~~Economic and engineering project cost analyses.~~
 - h. ~~Design and operation alternatives.~~
 - i. ~~Methods of construction.~~

- ~~j. Operation, maintenance, and replacement plan.~~
 - ~~k. Entity responsible for operation, maintenance, and replacement.~~
 - ~~l. Entity responsible for administration of contracts.~~
 - ~~m. A county soil map with prime farmland indicated.~~
 - ~~n. Water conservation plan.~~
 - ~~o. Any other information requested by the state engineer.~~
2. For projects that deliver Missouri River water to the Hudson Bay drainage area, a determination must be made that treatment will be provided to meet requirements of the Boundary Waters Treaty Act of 1909.
 3. ~~The applicant shall project sponsor must submit one copy~~ two copies of the feasibility study to ~~the e-district Garrison Diversion and copies one copy to the bureau as specified by the state~~ chief engineer.
 4. After review of the feasibility study, the ~~state~~ chief engineer, ~~shall in consultation with Garrison Diversion, may prepare a report setting forth its the recommendations regarding the project design or construction funding. The report shall~~ If a report is prepared, it must address whether the project is consistent with statewide plans and programs.
 - ~~5. The state chief engineer shall will provide a copy of the report to the commission and e-district~~ Garrison Diversion.

History: Effective June 1, 1994; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-02-14

Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-07. Design and construction requirements. Repealed effective January 1, 2015.

- ~~1. In order to receive program funds for design and construction, an applicant must submit to the state engineer:~~
 - ~~a. Documentation of the engineering selection process for design and construction engineering services and a copy of the contract for engineering services for design and construction.~~
 - ~~b. Engineering plans, designs, and specifications not less than forty days prior to the start of the invitation to bid date.~~

2. ~~No construction contract may be awarded or construction initiated until the plans, designs, and specifications have been approved by the state engineer, c district, and bureau. Any changes in plans must be approved by the state engineer, c district, and bureau.~~
3. ~~Construction contracts over two thousand dollars must incorporate the Davis-Bacon wage rate unless otherwise specified.~~
4. ~~The entity responsible for operation, maintenance, and replacement shall contract with water users for payment of:~~
 - a. ~~Water delivery.~~
 - b. ~~Hookup.~~
 - c. ~~Standby service charges.~~
 - d. ~~Other fees necessary.~~
5. ~~Documentation of the following must be made available to the state engineer and c district prior to the applicant receiving construction funds:~~
 - a. ~~Procurement process for services and goods.~~
 - b. ~~Necessary state water right permits.~~
 - c. ~~Necessary state permits controlling diversion and distribution.~~
 - d. ~~Rights-of-way for construction (easements).~~
 - e. ~~All contracts relating to the project.~~
 - f. ~~Applicable federal permits.~~

History: ~~Effective June 1, 1994.~~

General Authority: ~~NDCC 28-32-02, 61-02-14~~

Law Implemented: ~~NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08~~

89-12-01-08. Funding - Priority.

1. The commission shall may evaluate each eligible project based on the following criteria:

- a. Need for improving water supply quantity ~~and~~ or quality problems ~~or both~~.
- b. Local contribution to project funding.
- c. Location of project.
- d. ~~Equitable distribution of municipal, rural, and industrial funds.~~
- e. ~~d.~~ Ability to pay.
- f. ~~e.~~ Economic development.
- g. ~~f.~~ Water conservation plan and drought management plan.
- h. ~~g.~~ Other criteria determined to be relevant by the commission.

Based upon these evaluations, the commission ~~shall, after consultation with Garrison Diversion, may rank the eligible projects in priority order which, based on its judgment, that are in most need of funding. A report ranking the eligible projects must be in writing and include data substantiating the determinations. This data must be available to the public upon written request.~~

2. Program funds ~~must~~ may be provided to eligible projects to the extent funding is available as determined by the commission, ~~after consultation with the c-district Garrison Diversion. Program funds may be provided in the form of grants or loans, or both, and may be provided for a feasibility study or for design or construction of a project, or a combination of the three. The commission, after consultation with the c-district, shall decide whether to provide program funds, and the amount of funds, to an applicant for a feasibility study or for design or construction of a project, or a combination of the three~~ for feasibility, design, or construction.

History: Effective June 1, 1994; amended effective January 1, 2015.

General Authority: NDCC 28-32-02, 61-02-14

Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-09. Reports to commission and c-district. ~~After a project has been determined to be eligible for program funds, a report must be submitted to the commission and c-district by the end of each quarter regardless of whether funds have been requested. The quarterly report must include: Repealed effective January 1, 2015.~~

1. ~~A schedule and cost of work for the upcoming quarter.~~

2. ~~A written report describing progress during the preceding quarter and the cost of work performed during the preceding quarter.~~
3. ~~Other information requested by the commission.~~

History: ~~Effective June 1, 1994.~~

General Authority: ~~NDCC 28-32-02, 61-02-14~~

Law Implemented: ~~NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08~~

89-12-01-10. Contract awards. Repealed effective January 1, 2015.

1. ~~Prior to the award of any contract, the applicant shall provide the state engineer and c-district the following:~~
 - a. ~~A bid abstract.~~
 - b. ~~A statement of the low bidder's qualifications even if the contract is not awarded to the low bidder.~~
 - c. ~~A statement of intent to award the contract at least fifteen days prior to proposed contract award.~~
 - d. ~~A written justification describing the reasons for nonselection of the low bidder, and reasons for the proposed selection if the applicant plans to award the contract to other than the low bidder.~~
2. ~~Contracts must be pursuant to applicable federal procurement laws.~~
3. ~~The following items must be submitted to the state engineer and c-district after the award of the contract:~~
 - a. ~~The contractor's performance and payment bond.~~
 - b. ~~The contractor's certificate of insurance.~~
 - c. ~~The contractor's license.~~
 - d. ~~The contract.~~
4. ~~A construction management plan must be submitted to the state engineer and bureau within thirty days after the award of the contract. The construction management plan must include the following:~~
 - a. ~~Construction schedules.~~

- b. ~~Contract requirements.~~
- e. ~~Contractor qualifications, duties, and responsibilities.~~
- d. ~~Agreement for engineering services, including description of coordination activities with the commission.~~
- e. ~~Field office location, addresses, and phone numbers of project personnel.~~
- f. ~~Resumes of professional staff.~~
- g. ~~Safety program.~~
- h. ~~Other information requested by the state engineer.~~

History: ~~Effective June 1, 1994.~~

General Authority: ~~NDCC 28-32-02, 61-02-14~~

Law Implemented: ~~NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08~~

Article 89-14 is amended as follows:

ARTICLE 89-14

PUBLIC HIGHWAY STREAM CROSSINGS

Chapter
89-14-01 Stream Crossing Design

CHAPTER 89-14-01 STREAM CROSSING DESIGN

Section	
89-14-01-01	Standards
89-14-01-02	Definitions
89-14-01-03	Design Flood Frequency
89-14-01-04	Floodplain Consideration - Upstream Development
89-14-01-05	Allowable Headwater
89-14-01-06	Deviations

89-14-01-01. Standards. Except as provided in section 89-14-01-06, all highways constructed or reconstructed by the department of transportation, board of county commissioners, board of township supervisors, their contractors, subcontractors, or agents, or by any individual, firm, corporation, or limited liability company must be designed to meet the standards contained in this chapter. The department of transportation, ~~or any~~ board of county commissioners, board of township supervisors, their contractors, subcontractors, or agents, or any individual, firm, corporation, or limited liability company that fails to comply with these standards is not entitled to the immunity provided in ~~section~~ North Dakota Century Code sections 24-03-06, 24-03-08, or 24-06.26.1 of the North Dakota Century Code.

History: Effective May 1, 2001; amended effective July 27, 2001; January 1, 2015.

General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13

Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-02. Definitions.

1. "~~Construct~~ Constructed" means to construct a new highway on a new location or corridor.
2. "~~Reconstruct~~ Reconstructed" means to regrade or widen an existing roadbed on the an existing highway location. For purposes of this chapter, ~~reconstruct~~ reconstructed also includes replacing, modifying, or installing a stream crossing.
3. "Highway, street, or road" is defined in North Dakota Century Code section 24-01-01.1.

4. “Stream crossing” means an opening to permit the flow of water under, adjacent to, or because of a highway.

History: Effective May 1, 2001; amended effective January 1, 2015.

General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13

Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-03. Design flood frequency. The following table provides the minimum design standard recurrence interval of the event for which each type of stream crossing must be designed. ~~This represents a minimum design standard.~~ Nothing contained in this chapter is intended to restrict ~~the road authority~~ an entity from providing greater capacity.

Type of Crossing	State Highway System						County	
	Urban System		Rural System				Rural System	
	Regional	Urban Roads	Principal Arterial		Minor Arterial	Major Collector	Major Collector	Off ⁴ System
Interstate			Other					
Bridges & Reinforced Concrete Boxes	25 year ²	25 year ²	50 year ²	50 year ²	50 year ²	25 year ²	25 year ^{2, 3}	15 year ^{2, 3}
Roadway Culverts	25 year ²	25 year ²	50 year ²	25 year ²	25 year ²	25 year ²	25 year ^{2, 3}	15 year ^{2, 3, 5}
Storm Drains	10 year ¹	5 year ¹	10 year ²	10 year ²	10 year ²	10 year ²		
Underpass Storm Drains	25 year ¹	25 year ¹	50 year ²	25 year ²	25 year ²	25 year ²		

¹ Discharges ~~shall~~ must be computed using the rational method or other recognized hydrologic methods.

² Discharges ~~shall~~ must be computed using United States geological survey report 92-4020 or other recognized hydrologic methods.

³ If an overflow section is provided, the pipes and the overflow section, in combination, must pass the appropriate design event within the headwater limitations provided in this chapter.

⁴ Off system roads include all township roads.

⁵ For township roads, the recurrence interval is 10 years.

History: Effective May 1, 2001; amended effective July 27, 2001; January 1, 2015.

General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13

Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-04. Floodplain consideration - Upstream development. All stream crossings must comply with applicable floodplain regulations and regulatory floodway requirements. If a stream crossing is being replaced and buildings or structures are located upstream from the crossing, the stream crossing must not be ~~constructed or~~ reconstructed in a manner that increases the likelihood of impacts to those upstream buildings or structures ~~from that which existed with the stream crossing being replaced,~~

even if the capacity of the crossing being replaced was greater than the capacity otherwise required by this chapter. Any stream crossing constructed as part of a newly constructed roadway shall must be constructed to pass a one hundred-year event without the resulting increase in headwater impacting any existing buildings or structures. Structures, for the purposes of this section, include grain bins, silos, feedlots, and corrals. Structures do not include pasture fencing.

History: Effective May 1, 2001; amended effective January 1, 2015.

General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13

Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-05. Allowable headwater. The allowable maximum headwater when passing the design discharge must be measured from the bottom of the channel. For arch pipes, the maximum allowable headwater must be based on the rise of the pipe, and the pipe size category must be the equivalent round pipe size. For multiple pipe installations, the pipe diameter used to calculate the allowable headwater must be the diameter of the largest pipe. Tailwater resulting from downstream conditions, either natural or manmade, must be accounted for in the determination of the crossing's capacity and the resulting headwater. Additional guidance is provided in the North Dakota department of transportation design manual. If a crossing results in less than one-half foot [15.24 centimeters] of headloss when passing the appropriate design discharge, this section does not apply.

Streambed Slope (feet/mile)	Pipe Size	Allowable Headwater
< 5	24" - 54"	pipe diameter + 2 feet
	≥ 60"	1.5 pipe diameters
5 to 10	24" - 36"	pipe diameter + 2 feet
	42" - 54"	1.5 pipe diameters
> 10	≥ 60"	2 pipe diameters
	≥ 24"	2 pipe diameters

History: Effective May 1, 2001; amended effective January 1, 2015.

General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13

Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-06. Deviations. The board of county commissioners, board of township supervisors, their contractors, subcontractors, or agents, or any individual, firm, corporation, or limited liability company may deviate from the standards contained in this chapter if the deviation is approved in writing by the state engineer and the ~~director~~ of the department of transportation. A request to deviate from the standards must be made in writing and must set forth the reasons for the proposed deviation. The state engineer and department of transportation may grant a deviation for good and sufficient cause after considering public safety, upstream and downstream impacts, and other relevant matters.

The department of transportation may deviate from these standards if the ~~director~~ of the department determines it is appropriate to do so and the crossings are designed ~~in accordance with~~ under scientific highway construction and engineering standards. The basis for the ~~director's~~ department's decision must be documented in writing. ~~If a crossing results in less than one half foot [15.24 centimeters] of headloss when passing the appropriate design discharge, the headwater limitations of section 89-14-01-05 do not apply.~~

Roads constructed as part of a surface coal mining operation for use solely as part of the mining operation are not subject to the requirements of this chapter. Roads constructed ~~as a result~~ because of a surface coal mining operation for use by the public are bound by the requirements of this chapter, but deviations may be requested ~~in accordance with~~ under this section.

History: Effective May 1, 2001; amended effective January 1, 2015.

General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13

Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1