



POLICY/GUIDELINES

REG-2020-3

STATEWIDE OR INTERDISTRICT SIGNIFICANCE DETERMINATIONS

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STATEWIDE OR INTERDISTRICT SIGNIFICANCE DETERMINATIONS

EFFECTIVE: 03/13/2020

POLICY VERSION 1

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1. POLICY STATEMENT

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

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

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

1.1. POLICY AUTHORITY AND IMPLEMENTATION

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

1.2. STATE ENGINEER ACCEPTANCE OR ENFORCEMENT

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

1.3. APPEALS

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

1.4. POLICY DEVIATIONS

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

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

2. PRE-APPLICATION CONSULTATION

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

3. GENERAL POLICY REQUIREMENTS

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

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

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

3.1.1.1. Drainage of a navigable watercourse or waterbody.

3.1.1.2. Drainage from a lake.

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

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

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

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

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

3.1.1.7.1. Drainage within the Devils Lake Basin.

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

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

- 3.1.2.1. Smaller drainage projects that drain sheetwater only, including:
 - 3.1.2.1.1. Deepening or widening of existing drains
 - 3.1.2.1.2. Small drains that are within a square mile and are not part of a phased drainage project
- 3.1.3. APPLICATIONS THAT MAY BE DRAINAGE OF STATEWIDE OR INTERDISTRICT SIGNIFICANCE. Based upon review of Criteria and Factors and notwithstanding the requirements of section 3.1.1 or 3.1.2, the following applications, unless a unique or complex situation exists, MAY be considered drainage of statewide or interdistrict significance:
 - 3.1.3.1. New drainage beyond the scope of section 3.1.2.1, including assessment and private drains, that may have a negative effect on a watercourse, pond, slough, or any series thereof with known flooding issues
 - 3.1.3.2. Drainage of a watercourse.
 - 3.1.3.3. Drainage of a slough, pond, or any series thereof.
 - 3.1.3.4. Drainage that results in an inter-basin transfer (HUC12 or HUC 10).
 - 3.1.3.5. Projects with known, special considerations for other state agencies, such as:
 - 3.1.3.5.1. Drainage with the potential of negatively affecting the water quality of the Sheyenne River.
 - 3.1.3.5.2. Drainage with the potential to spread known aquatic nuisance species populations, as identified by the State Game and Fish Department.
 - 3.1.3.6. Drainage that will have an effect on another district, albeit mitigated in some fashion.
 - 3.1.3.7. Drainage affecting public infrastructure, such as roads, highways, or stream crossings.
 - 3.1.3.8. If it is not readily apparent that an application is drainage of statewide or interdistrict significance, the State Engineer will solicit comments from the following entities to help inform the State Engineer's statewide or interdistrict significance determination:
 - 3.1.3.8.1. Comments must be requested from the following entities unless otherwise noted:
 - 3.1.3.8.1.1. The district(s) of jurisdiction;
 - 3.1.3.8.1.2. The Water Development and Planning Divisions of the State Water Commission;
 - 3.1.3.8.1.3. Any district that may be affected by the project;
 - 3.1.3.8.1.4. The State Game and Fish Department;
 - 3.1.3.8.1.5. The State Department of Environmental Quality;

- 3.1.3.8.1.6. The Department of Transportation, if applicable;
 - 3.1.3.8.1.7. The State Historical Society, if applicable;
 - 3.1.3.8.1.8. The State Department of Trust Lands, if applicable;
 - 3.1.3.8.1.9. The State Parks and Recreation Department, if applicable; and
 - 3.1.3.8.1.10. Other agencies or political subdivisions as appropriate.
- 3.1.3.8.2. Each entity must submit all comments in writing to the State Engineer. The State Engineer or district is not bound by any comment submitted. The State Engineer must receive comments within thirty days of the date requests for comments were sent.
- 3.1.3.9. Upon completion of the comment period, the State Engineer must conduct a review of the application and the comments submitted and determine if the application meets drainage of statewide or interdistrict significance.
- 3.1.3.10. The State Engineer must send notice and a copy of the State Engineer's statewide or interdistrict significance determination and rationale on the application to the district, the applicant, all entities listed in section 3.1.3.8.1., and anyone who has requested in writing to be notified.
- 3.1.3.11. As part of the State Engineer's notice, the State Engineer will attach conditions to a draft permit, as described in N.D.A.C. section 89-02-01-09.11. The State Engineer's conditions may address any comments received, which in the State Engineer's judgement, will otherwise mitigate the necessity, benefit, or purpose for classifying the application as drainage of statewide or interdistrict significance. In that scenario, upon the State Engineer's notice, the district must follow the procedure outlined in N.D.A.C. section 89-02-01-09.1(2). If the district approves the application, the district's approval must be noted on the draft permit document provided by the State Engineer and must include any draft State Engineer conditions in its approval. By signing the draft permit document, the district agrees to enforce the draft permit conditions therein.
- 3.1.3.12. If the application is deemed to be drainage of statewide or interdistrict significance, the district and State Engineer must follow the process in N.D.A.C. 89-02-01-09.1(1).

4. DEFINITIONS

- 4.1. "Drain" is defined in N.D.A.C. section 89-02-01-02(4) and otherwise in State Engineer policy.
- 4.2. "Lake" is defined in N.D.A.C. section 89-02-01-02(6) and otherwise in State Engineer policy.
- 4.3. "Pond" is defined in N.D.A.C. section 89-02-01-02(10) and otherwise in State Engineer policy.

- 4.4. "Slough" is defined in N.D.A.C. section 89-02-01-02(13) and otherwise in State Engineer policy.
- 4.5. "Watercourse" is defined in N.D.A.C. section 89-02-01-02(15) and otherwise in State Engineer policy.

5. POLICY ADDENDUMS

State Engineer Technical Memo – dated March 13, 2020

No Policy Revisions available

TECHNICAL MEMORANDUM

DATE: **March 13, 2020**

TO:  Garland Erbele, P.E., State Engineer

FROM:  John Paczkowski, P.E., Assistant State Engineer
 Aaron Carranza, P.E., Director, Regulatory Division
 Matt Lindsay, P.E., Manager, Engineering and Permitting Section

SUBJECT: **STATEWIDE OR INTERDISTRICT SIGNIFICANCE DETERMINATIONS**

North Dakota Century Code (N.D.C.C.) section 61-32-03 and North Dakota Administrative Code (N.D.A.C.) section 89-02-01-09 (Statewide Criteria) require the Office of the State Engineer (OSE) to determine whether an application for drainage meets “drainage of statewide or interdistrict significance.” While the statutes and rules do not provide the precise reason for such a determination, the OSE has historically viewed the determination as a jurisdictional determination over the drainage permit. A “statewide or interdistrict significance determination” by the OSE requires a drainage application to go through a more thorough permitting review process as outlined in N.D.A.C. section 89-02-01-09.1(1), commonly referred to as the “Statewide Process.” However, the Statewide Criteria do not describe in any detail what goes into a statewide or interdistrict significance determination review or how the criteria therein should be considered. Furthermore, while the Statewide Criteria have existed in a fairly consistent and similar form since the late 1970s, there has been inconsistency through time in its interpretation given the rule’s broad language.

Without further refinement of the Statewide Criteria, water resource districts and permit applicants are often left wondering what types of projects will be considered “drainage of statewide or interdistrict significance” by the OSE. Additionally, given the significantly more robust permitting review under the Statewide Process, applicants often try to avoid triggering a statewide or interdistrict significance determination from the OSE. Consequently, much of the OSE’s permit application review becomes devoted to determining how to classify an application rather than reviewing the proposed project contained within the application. This excessive determination process delays permit review and issuance while not providing much additional benefit for overall permit review.

Given the long history of the OSE’s Statewide Process, there have become common projects or scenarios where a drainage application will or will not undoubtedly be determined as proposing drainage of statewide or interdistrict significance. The OSE desires to make the statewide or interdistrict significance determination process less cumbersome, more transparent, and more predictable for the OSE, water resource districts, and permit applicants such that surface drainage permits are reviewed in a more timely manner.

Therefore, the OSE “Statewide or Interdistrict Significance” policy enclosed intends to establish clearer guidance as to what projects will and will not be determined as drainage of statewide or

interdistrict significance under N.D.C.C. section 61-32-03 and N.D.A.C. section 89-02-01-09. Specifically, this policy:

- Satisfies the OSE's requirement to consider the criteria in N.D.A.C. section 89-02-01-09, as well as provides an initial review of the evaluation factors in N.D.A.C. section 89-02-01-09.2.
- Identifies the types of projects and applications the State Engineer deems to be drainage of statewide or interdistrict significance under N.D.C.C. section 61-32-03 and N.D.A.C. chapter 89-02-01.
- Provides a new "may be drainage of statewide or interdistrict significance" process for certain types of drainage applications, which incorporates a standard 30-day comment period.
- Provides further context to State Engineer decisions on whether an application will be required to be reviewed through the "Statewide Process."

RECOMMENDATION

I recommend the State Engineer adopt the enclosed "Statewide or Interdistrict Significance Determinations" policy to better outline to State Engineer staff, water resource districts, and the general public what projects will be and will not be drainage of statewide or interdistrict significance. If adopted, the policy may inform future N.D. Administrative Code amendments, if necessary. However, I believe the policy expands upon existing Century and Administrative Code such that it can be implemented immediately without the need for Century or Administrative Code changes.