

## **NORTH DAKOTA STATE ENGINEER POLICY/PROCEDURE FOR TRANSFER AND REUSE OF WASTEWATER**

### **Policy Statement**

Unless otherwise stated, a North Dakota water permit is granted for consumptive use. Consumed water is not returned to its source; once granted a water permit, the permit holder can use and re-use the water indefinitely for the use listed on the permit. The permit holder is not required to return wastewater to the original source.

In the case of a municipal or rural water system or industrial water permit holder (not irrigation), the policy of the State Engineer pertaining to reuse of wastewater from beneficial use under a valid water permit is that the permit holder can reuse, transfer, or sell the wastewater to other parties as long as the water remains in the control of the permit holder or the receiving party and does not re-enter a natural waterway. Once the water is returned to a natural waterway, it returns to the possession of the State and can only be diverted for beneficial use if authorized by another valid State water permit.

If a change of use for the wastewater occurs in the transfer (e.g., municipal to industrial, industrial to municipal, municipal to irrigation, etc.), while the use of the water remains authorized under the original water permit, the receiving party must file for a water permit for the proposed use. The priority date of the new water permit will be the date of filing, and the water permit of the receiving party will always be subsidiary to the choice of the transferring party as governed by the agreement between the receiving and transferring party. Should the transfer relationship terminate, the right of the receiving party to the transferred water also terminates.

If a relationship for on-going direct transfer of water (without intervening discharge to a natural waterway) has been established, whether contractual or by practice, the receiving party has the right of use once the water is in control of the receiving party. Similarly, once the water has been transferred, the right of the transferring party to the transferred water is terminated. For example, if a wastewater hauler is hired to remove wastewater on an ongoing basis from an entity holding a water permit, once the water is under the control of the hauler, the right of beneficial use will transfer to the hauler unless otherwise specified or unless the hauler has not obtained a water permit for a change of use.

Under the principle of reasonable beneficial use, a transferee may not increase the normal use of water for sole purpose of enhancing sale of wastewater. A municipality or domestic water supplier, for example, may not deliberately increase or pad water use to provide increased flow to a wastewater system or to freshen wastewater beyond State return flow requirements for the purpose of enhanced wastewater sales.

**In summary:**

1. All rights to the use of wastewater by the entity generating the wastewater end with the discharge of that water to a natural watercourse or with the transfer of control of the wastewater to another entity.
2. For non-irrigation water use, the entity in control of the wastewater, whether the generator of the wastewater or another party, must obtain a new water permit for the intended use if it is different from the originally permitted use. For example, municipal wastewater used for industrial purposes requires a new permit. The priority date is that of the application for the new water permit.
3. Once transfer of water is complete, the receiving party has the right of use under conditions described above, unless contractual agreements between the party generating the wastewater and the party receiving the wastewater specify otherwise.
4. Any water rights obtained by the receiving entity exist only as long as the transfer relationship exists. For example, if a wastewater generating entity terminates the services of a wastewater disposal party, the water right for the wastewater will revert to the wastewater generating entity.
5. Where municipal or domestically generated wastewater would normally be returned to the stream from which it was diverted, and if the use of the wastewater by the receiving entity is other than municipal or domestic, the permit for the transferred water is junior to downstream water users having priority dates earlier to the water permit application for the transferred water.
6. A wastewater generating entity may not increase the wastewater stream through deliberate freshening (beyond levels required by State wastewater

discharge requirements) or increasing wastewater other than through normal use for which the water permit is intended.

### **Background Principles**

The following principles and precedents govern the sale or transfer of wastewater from a water permit holder to another party.

#### Montana v. Wyoming, 131 S.Ct. 1765 (2011)

In 2011, the U.S. Supreme Court in *Montana v. Wyoming* ruled in favor of Wyoming when Montana claimed that increased efficiency of water use by Wyoming irrigators denied Montana irrigators their rightful share of water because of lower return flows to the river. Although the ruling was based on specific language in the Yellowstone River Compact, two principles were used in the case – the laws of return flow and the doctrine of recapture.

1. Laws of return flow indicate that an appropriator who has a perfected senior water right may entirely fulfill the amount of the right. Irrigation appropriators may increase consumption through efficiency of application as long as the acreage doesn't change or may even expand acreage if that was within the development plan from the beginning.
2. The doctrine of recapture permits an appropriator who has diverted water for a specific beneficial use to recapture and reuse the appropriator's own runoff and seepage before it escapes the appropriator's control or property. Efficiencies are considered to be a form of reuse of what would have been return flows.

#### Industrial Use Permits

North Dakota's definition of "industrial use" specifically exempts the use from limitations on location of use.

"Industrial use" means the use of water for the furtherance of a commercial enterprise wherever located, including manufacturing, mining, or processing.

N.D.C.C. § 61-04-01.1 (emphasis added). Thus, water permits for industrial use allow the water to be transported off-site for industrial use at another location.

Therefore, the change of location would not be considered a loss of control under North Dakota law for industrial uses.

#### Irrigation Water Use Permits

Irrigation permit use is based on a point of diversion and a specific location and area of application. Hence, the criteria for retention or loss of control applied in *Montana v. Wyoming* are applicable. Water re-use is limited to the acreage for which the water permit was obtained. The water may not be sold or transferred off-site for beneficial use.

#### Municipal/Rural Water Use Permits

Transfers of municipal/rural water permit water is authorized under North Dakota Administrative Code, which provides:

Any incorporated municipality or rural water system that appropriates water in excess of its current needs under North Dakota Century Code section 61-04-06.2 may sell the excess water provided:

1. The municipality or rural water system is supplying all the demands of its residents or members;
2. The agreement for sale of water is terminable by the incorporated municipality or rural water system upon six months' notice to the purchasing entity; and
3. The agreement for sale is approved by the state engineer.

The excess water may not be sold for any use other than that stated in the conditional or perfected water permit. This section does not apply to agreements for the sale of water entered into before November 1, 1989.

N.D. Admin. Code § 89-03-01-01.5.

Wastewater that has not re-entered a natural watercourse and remains in the control of the municipal or rural water system is available and allowed for reuse; hence, transfer of water for the same use elsewhere is a part of the beneficial use allowed under the permit and is treated as one component of the water available for sale to other municipal or rural water systems.