

## **ARTICLE 89-03 WATER APPROPRIATIONS**

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### **CHAPTER 89-03-01 WATER PERMITS**

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#### **89-03-01-01. Submission of application for conditional water permit.**

An application for a conditional water permit must be submitted to the state engineer on the form provided by the state engineer. A map containing the information prescribed by the state engineer must accompany the application. Unless the state engineer first approves another type of map, the map must be prepared from a survey, aerial photograph, or topographic map, and must be certified by a surveyor licensed in the state of North Dakota. The state engineer may require information not requested in the application.

**History:** Amended effective April 1, 1989; February 1, 1994; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-03

### **89-03-01-01.1. Priority date.**

The date of receipt by the state engineer of a properly completed application must be noted on the application. Except for water applied to domestic, livestock, or fish, wildlife, and other recreational uses where a water permit is not required, this date of filing establishes the original priority date of an application, subject to final acceptance of the application and issuance of a perfected water permit by the state engineer. For water applied to domestic, livestock, or fish, wildlife, and other recreational uses where a water permit is not required, the priority date is the date the quantity of water was first used.

**History:** Effective April 1, 1989; amended effective August 1, 1994; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-04, 61-04-06.3

### **89-03-01-01.2. Land, property, or other interest requirement for conditional water permit.**

An applicant for a conditional water permit must have an interest or intent and ability to acquire an interest in the land where the point of diversion and conveyance system will be located. The applicant must demonstrate to the satisfaction of the state engineer that the applicant has the capability to put the water to beneficial use. If the applicant is seeking a permit for irrigation, the applicant must also have an interest or intent and ability to acquire an interest in the land to be irrigated. If the applicant is seeking a permit to impound water, the applicant must have an interest or intent and ability to acquire an interest in the land or other property inundated by the impounded water. The state engineer may require the applicant to submit evidence of such an interest. At any time the state engineer may require additional verification of land or property interest or other interest demonstrating the capability to put the water to beneficial use.

**History:** Effective April 1, 1989; amended effective August 1, 1994; April 1, 2004; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-03, 61-04-06

### **89-03-01-01.3. When a water permit for stored water must be obtained.**

A water permit may 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

### **89-03-01-01.4. Amount of water that may be held in storage under a water permit.**

Unless otherwise authorized by the state engineer, any person authorized to store water, except for flood control, may only fill the reservoir to the amount authorized in the permit once each year. The reservoir will be filled during the first runoff following February first of each year. A consumptive use authorized in the water permit must be taken from the stored water. Unless otherwise authorized by the state engineer and with the exception of water stored for flood control, any inflows to the reservoir after the reservoir has been filled for the year must be allowed to pass through the reservoir and downstream.

**History:** Effective November 1, 1989; amended effective July 1, 2014.

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

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

### **89-03-01-01.5. Sale of excess water by an incorporated municipality or rural water system.**

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.

**History:** Effective November 1, 1989; amended effective June 1, 1998; July 1, 2014.

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

**Law Implemented:** NDCC 61-02-27, 61-04-06.2

### **89-03-01-02. Correction of unsatisfactory application.**

If an unsatisfactory application is refiled within sixty days from the date the request for corrections is mailed and if it meets the required corrections and is accepted, it will take the priority date of its original filing.

**History:** Amended effective April 1, 1989; August 1, 1994; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-04

### **89-03-01-03. Amendment of application.**

1. An applicant may amend an application. If the state engineer determines the amendment is likely to adversely affect another applicant whose application was submitted after the application sought to be amended and before the proposed amendment, the state engineer must change the priority date of the amended application to the date the request for the amendment was received.
2. A request to amend an application may be by letter or by the submission of an amended application form for a conditional water permit.
3. If any notice of the water permit application has been mailed before the request to amend, the applicant must mail corrected notice of the application to all persons who were sent the original notice and must submit an affidavit of service of corrected notice to the state engineer. If the notice of the application has been published, the state engineer must publish a corrected notice. The state engineer may determine that corrected notice need not be mailed or published if the state engineer determines the amendment is insubstantial. The applicant must pay publication costs.

**History:** Amended effective April 1, 1989; April 1, 2000; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-04

### **89-03-01-03.1. Transfer of an application to another parcel.**

A request by the applicant to transfer an application for a water permit to another parcel of land owned or leased by the applicant must be submitted to the state engineer on the form provided by the state engineer.

**History:** Effective April 1, 1989; amended effective July 1, 2014.

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

**Law Implemented:** NDCC 61-04-03, 61-04-04, 61-04-15

### **89-03-01-03.2. Assignment of an application to another person.**

A request to assign an application for a water permit to another person must be submitted to the state engineer in writing. When title of land for which there is a pending application is transferred, either the transferee or the applicant may apply for assignment of the application. The request for assignment must describe the transferee's interest in the application for a water permit. The state engineer may request additional documentation of the transferee's interest.

**History:** Effective April 1, 1989; amended effective April 1, 2000; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-03, 61-04-04, 61-04-15

### **89-03-01-03.3. Evaporative losses.**

When an application involves water stored in a reservoir, a volume of water equal to the mean net evaporative loss over the surface area of the impoundment at the principal spillway elevation must be requested as an annual use that will come out of the stored water.

**History:** Effective April 1, 1989; amended effective August 1, 1994; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-03, 61-04-06.2

### **89-03-01-04. Notice of application.**

1. When a proper application is filed, the state engineer will forward the appropriate number of completed notice of application forms to the applicant. The notice must include the following essential facts:
  - a. Places and use of appropriation;
  - b. Amount of and purpose for which the water is to be used;
  - c. Applicant's name and address; and
  - d. Newspaper in which the notice of the water permit application will be published.

The notice must also state that the notice published in the newspaper will contain a date by which any person having an interest in the application may file written comments regarding the proposed appropriation with the state engineer and that anyone who files written comments will be mailed a copy of the state engineer's recommended decision on the application.

2. Upon receipt of the completed notice of application forms, the applicant must send a notice of application form as provided in North Dakota Century Code section 61-04-05. The determination of title owners at the time of the application must be based on title records on file with the appropriate county recorder. For land subject to a contract for deed, the contract's grantor and grantee must both be notified.

3. After notice of application forms have been mailed to those required by North Dakota Century Code section 61-04-05, the applicant must properly complete an affidavit of notice and return it to the state engineer. The affidavit of notice must state how the applicant determined the record title owners and must list the names and addresses of those who were sent notices.
4. If a properly completed affidavit of notice is not submitted within one hundred twenty days, the application must be considered to have been withdrawn by the applicant.

**History:** Amended effective April 1, 1989; November 1, 1989; February 1, 1994; April 1, 2000; April 1, 2004; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-05

#### **89-03-01-05. Publication of notice of water permit applications.**

In addition to the requirements in North Dakota Century Code section 61-04-05, a copy of the notice of the water permit application to be published must be sent to the applicant.

**History:** Amended effective April 1, 1989; November 1, 1989; February 1, 1994; August 1, 1994; April 1, 2000; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-05

#### **89-03-01-05.1. Notice of decision on water permit application.**

Repealed effective April 1, 2000.

#### **89-03-01-06. Filing proof of publication and mailing.**

Repealed effective April 1, 1989.

#### **89-03-01-06.1. Consideration of evidence not contained in the state engineer's record.**

Repealed effective April 1, 2000.

#### **89-03-01-06.2. Notice of continuance - Responsibility.**

Repealed effective July 1, 2014.

#### **89-03-01-06.3. Record - Official notice.**

Unless specifically excluded by the state engineer or the hearing officer, the record in each water permit application proceeding includes, when available, the following reports or records, or portions thereof, relevant to the proposed appropriation:

1. United States department of agriculture natural resources conservation service reports, including the North Dakota hydrology manual, North Dakota irrigation guide, and county soil survey reports.
2. United States geological survey and state water commission streamflow records.
3. United States geological survey and state water commission water quality data.
4. National oceanic and atmospheric administration climatological data.

5. United States geological survey topographic maps.
6. State engineer water permit files.
7. State engineer annual water use reports.
8. State water commission and United States geological survey ground water level data.
9. North Dakota board of water well contractors well completion reports.
10. State engineer test hole records.
11. State water commission water resource investigations reports and ground water study reports.
12. State water commission and United States geological survey county ground water study reports.
13. Information in state engineer and state water commission files, records, and other published reports.

**History:** Effective February 1, 1994; amended effective April 1, 2000; July 1, 2014.

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

**Law Implemented:** NDCC 61-04-05.1

#### **89-03-01-07. Necessity of works and construction of works for a conditional water permit.**

A permit application may only be considered if works are associated with the proposed appropriation. For any water appropriation that involves the construction of works that require a construction permit from the state engineer, the water permit may be issued before receipt of the construction permit. However, the water permit is not valid until the construction permit is issued.

**History:** Effective April 1, 1989; amended effective July 1, 2014.

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

**Law Implemented:** NDCC 61-04-02

#### **89-03-01-08. Point of diversion.**

The state engineer may not issue a water permit that allows for the appropriation of water from more than one water source. An appropriation from the main channel of a river and from a tributary of the river is an example of an appropriation from more than one water source. The state engineer may issue a water permit that allows for points of diversion from different locations from the same water source, provided the state engineer finds good cause for doing so.

**History:** Effective April 1, 1989; amended effective July 1, 2014.

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

**Law Implemented:** NDCC 61-04-06.2

#### **89-03-01-09. Appropriation not requiring water permit.**

An application for appropriation of water that does not require a water permit may be obtained from the state engineer to establish a priority date.

**History:** Effective April 1, 1989; amended effective July 1, 2014.

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

**Law Implemented:** NDCC 61-04-02

**89-03-01-10. Emergency or temporary authorization.**

Application for a temporary appropriation must be made on the form provided by the state engineer. In that request, the applicant must indicate the purpose for which water will be used, quantity of water needed, proposed point of diversion, type of use, place of use, rate of withdrawal, source of water, dates of proposed use, and applicant's address. The state engineer will evaluate the request and, if it is granted, the state engineer will list on the temporary authorization conditions that govern the appropriation.

An applicant for emergency use of water, if the situation warrants, may call the office of the state engineer requesting immediate use of water. Following an oral request and oral approval by the state engineer for authorization, a temporary application form must be submitted.

The applicant for temporary or emergency appropriations is responsible for all damages that may be caused to other appropriators or any other individual because of the emergency or temporary use of water.

**History:** Effective April 1, 1989; amended effective July 1, 2014.

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

**Law Implemented:** NDCC 61-04-02.1

**89-03-01-10.1. Temporary water transfer for irrigation.**

To accommodate annual crop rotation requirements, the holder of a water permit for irrigation may make a request to the state engineer for the temporary transfer of the volume of water appropriated from an approved point of diversion to another tract of land. The transfer must be made for an entire irrigation season and conform to the terms and conditions of the water permit, except that no water right will accrue to the land under temporary irrigation. Irrigation may not take place on the tract of land from which the transfer is made during that irrigation season. The request for a transfer must be made by May fifteenth of the year the transfer is to be in effect.

**History:** Effective August 1, 1994.

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

**Law Implemented:** NDCC 61-04-02.1

**89-03-01-10.2. Temporary permit fees.**

The following filing fee schedule will be used for temporary water permit applications. The fee must be included with the application. The state engineer may waive the fees for certain emergency uses of a temporary water permit, including firefighting.

Volume of Water Requested:

Less than one acre-foot	\$75
One to ten acre-feet	\$125
More than ten acre-feet	\$200

Filing fees are not required for requests made under section 89-03-01-10.1.

**History:** Effective July 1, 2014.

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

**Law Implemented:** NDCC 61-04-02.1, 61-04-06.2

### **89-03-01-11. Competing applications.**

Applications for conditional water permits from the same source for different uses will be considered competing applications if received by the state engineer within ninety days of each other.

**History:** Effective April 1, 1989.

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

**Law Implemented:** NDCC 61-04-06.1

### **89-03-01-12. Extensions and cancellation.**

Where the time has expired to put any portion of the water of a conditional water permit to the beneficial use named in the permit, the state engineer will notify the permittee. The state engineer will provide the permittee with a form to request an extension for applying the water to the beneficial use and to explain why an extension should be granted. Except in overriding circumstances, no extension will be granted when other conditional water permit applications are pending from a limited source of supply.

**History:** Effective April 1, 1989; amended effective July 1, 2014.

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

**Law Implemented:** NDCC 61-04-14

### **89-03-01-13. Report of water usage.**

The form for reporting water usage under North Dakota Century Code section 61-04-27 must include the permit number, amount of water usage, pumping rate, if applicable, and any other information the state engineer may require. One form must be filed for each water permit held.

**History:** Effective April 1, 1989; amended effective July 1, 2014.

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

**Law Implemented:** NDCC 61-04-27

#### **89-03-01-13.1. Fines - Water use reporting.**

1. A holder of a municipal, rural water, irrigation, or industrial water permit who fails to timely submit a complete and accurate water use report under North Dakota Century Code section 61-04-27 will be assessed a fine of two hundred fifty dollars for each water permit.
2. If the permitholder submits both the complete and the accurate water use report and payment of the fine before June first, the fine per water permit will be reduced to fifty dollars.

**History:** Effective July 1, 2014.

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

**Law Implemented:** NDCC 61-03-23, 61-04-27

### **89-03-01-14. Notice.**

When a statute or rule requires the state engineer or water commission to serve an order personally or by certified mail, the order may be served by regular mail with an affidavit of service indicating upon whom the order was served.

**History:** Effective February 1, 1997; amended effective July 1, 2014.

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

**Law Implemented:** NDCC 61-03-13