

**LETTER OPINION
2004-L-12**

February 9, 2004

Mr. Michael Connor
Devils Lake Basin Joint Water Resource Board
524 4th Ave Unit 27
Devils Lake, ND 58301-2400

Dear Mr. Connor:

Thank you for your letter asking whether the State Engineer's determination of what constitutes "maintenance" for which a drain permit is not required is reasonable.

Generally, a permit is required to drain ponds, lakes, or other waters having a watershed of 80 acres or more. N.D.A.C. § 89-02-01-03, see also N.D.C.C. § 61-32-03. A permit is not required to maintain drains, N.D.A.C. § 89-02-01-05(1), or natural drainways, Ness v. Ward County Water Resource District, 585 N.W.2d 793, 797 (N.D. 1998). Maintenance means removing silt and vegetation from a drain. N.D.A.C. § 89-02-01-02(7). It does not include deepening or widening a drain. Id. The State Engineer administers N.D.C.C. § 61-32-03 and rules implementing it, and thus is responsible for determining whether a proposed project is maintenance or is drainage for which a permit is required.¹ In a letter to you dated February 12, 2002, the State Engineer determined permissible maintenance, for which a drain permit is not required, to be "the siltation that has occurred since statehood."

"The construction of a statute by an administrative agency charged with its execution is entitled to weight and [courts] will defer to a reasonable interpretation of that agency unless it contradicts clear and unambiguous statutory language." Frank v. Traynor, 600 N.W.2d 516, 520 (N.D. 1999). An administrative agency "has a reasonable range of informed discretion in the interpretation and application of its own rules." Matter of Stone Creek Channel Improvements, 424 N.W.2d 894, 900 (N.D. 1988). An agency's expertise is entitled to special deference when the subject matter is complex or technical. Americana Health Care Center v. N.D. Dept. of Human Services, 540 N.W.2d 151, 153 (N.D. 1995).

¹ Water resource boards have responsibility for administering certain aspects of N.D.C.C. ch. 61-32 and the rules implementing it as well as responsibility under other provisions of N.D.C.C. title 61 regarding drains.

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When determining whether proposed work constitutes maintenance, a point in time from which siltation is measured must be selected. A member of the State Engineer's office informed this office that the condition of the land at statehood was chosen because that is when large scale agriculture began to take place in the state. According to the State Engineer's office, tilling of land increased erosion and siltation, which resulted in changes to naturally occurring drainage and water flow. See also Edward C. Murphy, Ann M.K. Fritz, and R. Farley Fleming The Jerusalem and Tolna Outlets in the Devils Lake Basin, North Dakota, Report of Investigation No. 100 N.D. Geological Survey, p. iv (1977) (the first occurrence of cultivated grasses and Russian thistle in soil samples were found in sediment deposited at the time of statehood).

It is my opinion that the State Engineer's interpretation of what constitutes maintenance is reasonable and is entitled to deference.

Sincerely,

Wayne Stenehjem
Attorney General

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