

Date Issued: June 23, 1987 (AGO 87-12)

Requested by: Vern Fahy, North Dakota State Water Commission

- QUESTIONS PRESENTED -

I.

Whether the state engineer must process drainage applications received after January 1, 1987, which include the type IV and V wetlands described in section 14 of Senate Bill No. 2035, according to current law.

II.

Whether the state engineer may permit drainage that would exceed the 2,500 acre limit of section 6 of Senate Bill No. 2035 between now and July 22, 1987.

III.

Whether the state engineer may allow drainage that exceeds the 2,500 acre limit between July 22, 1987, the date most of Senate Bill No. 2035 takes effect, and July 1, 1989, the date sections 4 and 5 of the bill take effect. If not, may the state engineer condition a drainage permit to require the applicant to adopt mitigation measures to ensure the 2,500 acre limit is not exceeded?

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the state engineer must process drainage applications received after January 1, 1987, which include the type IV and V wetlands described in section 14 of Senate Bill No. 2035, according to current law. However, when Senate Bill No. 2035 becomes effective on July 22, 1987, the state engineer must then process drainage applications according to the provisions of the Senate Bill No. 2035.

II.

It is my further opinion that the state engineer may permit drainage that would exceed the 2,500 acre limit of section 6 of Senate Bill No. 2035 between now and July 22, 1987.

III.

It is my further opinion the state engineer may not allow drainage that exceeds the 2,500 acre limit between July 22, 1987, the date

most of Senate Bill No. 2035 takes effect, and July 1, 1989, the date sections 4 and 5 of the bill take effect. Since this limit may not be exceeded, the state engineer may condition a drainage permit to require the applicant to adopt mitigation measures to ensure the 2,500 acre limit is not exceeded.

- ANALYSES -

I.

The Fiftieth Legislature passed Senate Bill No. 2035. The bill concerns the drainage as well as the protection of wetlands. Section 14 of Senate Bill No. 2035 states as follows:

The replacement of wetlands requirement in sections 4 and 5 of the Act does not take effect until July 1, 1989. Until July 1, 1989, the drainage of type IV and V wetlands, as defined in U.S. fish and wildlife service circular 39 (1971 edition) is not permitted, except for permit applications submitted prior to January 1, 1987, or unless replaced in accordance with the provisions of sections 2 through 12 of this Act.

The State Water Commission has received a number of drainage applications since January 1, 1987, and will likely receive more before July 22, 1987, the effective date of Senate Bill No. 2035. It is probable the applications have and will continue to include the type IV or V wetlands referred to in section 14 of the bill. The inquiry is whether those applications which concern type IV and V wetlands should be processed pursuant to the law now in effect or pursuant to the requirements of section 14. The essential difference between present drainage law and Senate Bill No. 2035 is that present law does not require mitigation for the loss of wetlands while the bill imposes significant mitigation requirements.

The answer to the question depends upon whether the processing of applications takes place before or after July 22. In either instance, however, the law in effect must be followed.

With regard to applications processed before July 22, one must follow present law and not displace this law by application of a forthcoming law. Senate Bill No. 2035, and its section 14, do not become law until July 22, 1987. Therefore, until July 22 all drainage applications must be processed according to present provisions of the North Dakota Century Code.

However, on July 22, when Senate Bill No. 2035 and its section 14 take effect, pending drainage applications received since January 1, 1987, must be processed pursuant to the provisions of section 14. This conclusion applies to applications received before July 22 but which have not been processed. For any such applications section 14

has a retroactive effect. That the Legislature intended section 14 to be applied retroactively is expressly stated in the statute's second sentence. Such a clear intention is necessary for a statute to be retroactive. N.D.C.C. section 1-02-10; State v. Cummings, 386 N.W.2d. 468, 741 (N.D. 1986).

II.

Section 6 of Senate Bill No. 2035 establishes a wetlands bank. This bank is an accounting system to implement the policies of the bill. Section 6 states that the acreage of certain wetlands drained since January 1, 1987, is a debit to the bank and that the acreage of certain wetlands replaced is a credit to the bank. The section placed a 2,500 acre limit on the amount of acreage that may be carried as a debit. It is this section that gives rise to the question whether, between now and July 22, 1987, the day the bill takes effect, drainage may be permitted that would exceed the 2,500 acre limit.

All applications for drainage permits must be processed under existing law. Since present law places no limit on the amount of acreage that may be drained, between now and July 22 a permit may not be denied on the ground the project would exceed the 2,500 acre limit.

III.

Sections 4 and 5 of Senate Bill No. 2035 are the essential provisions regarding mitigation of wetland drainage. Section 4 concerns the need for a drainage permit and what must be done to receive a permit. Much of the section restates law now in effect. The section does, however, add a new requirement that drainage of certain wetlands must be mitigated by the replacement of an equal acreage of replacement wetlands or by debits to the wetlands bank. Section 5 discusses implementation of this new requirement. Section 6 of the bill says no more than 2,500 acres may be carried as a debit in the wetlands bank. Section 14 says "the replacement of wetlands requirement in sections 4 and 5 . . . does not take effect until July 1, 1989." It is the relationship of these four sections that gives rise to the question whether between July 22, 1987, and July 1, 1989, drainage may be allowed to exceed the 2,500 acre limit.

Section 14 only delays until July 1, 1989, the effective date of sections 4 and 5. The remaining sections of Senate Bill No. 2035 become law on July 22, 1987. Section 6 establishes the wetlands bank and says no more than 2,500 acres may be carried as a debit in the bank. Therefore, after July 22, 1987, the 2,500 acre limit is applicable. Section 6 is clear in its prohibition of drainage beyond this amount.

Since the limit may not be exceeded, the state engineer may condition a permit to require mitigation if the drainage would, without the condition, lead to the 2,500 acre limit being exceeded. The state engineer's power to impose such a condition may be founded on the state wetlands policy and the state water resources policy.

In section 2 of Senate Bill No. 2035 the Legislature states that "wetlands should be protected and preserved." This section also outlines the state's wetlands policy, a tenet of which is that "water development and wetland preservation activity should be balanced to protect and accommodate agriculture, water, and wetland interests and objectives." As Senate Bill No. 2035 instructs, this balancing is accomplished by allowing the drainage of wetlands so long as replacement wetlands are provided for.

Section 4 of Senate Bill No. 2035 says: "A permit may not be granted until the state water resources policy has been considered"

A part of this policy is that the general welfare of North Dakota largely depends upon the optimum protection of all water resources of the state. N.D.C.C. section 61-01-26(1). From Senate Bill No. 2035, it is clear that the preservation of North Dakota wetlands benefits the general welfare of the state.

Therefore, conditioning a drainage permit to require the permit holder to replace wetlands so that the 2,500 acre limit is not exceeded is within the state engineer's authority and is in furtherance of the legislative intent concerning wetlands and state water resources policy.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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