

NORTH DAKOTA STATE WATER COMMISSION

REGISTER

ATTENDANCE AT State Water Commission Mtg.

DATE Sept. 26, 1979 PLACE Bismarck, N.D.

PROJECT NO. \_\_\_\_\_

| Your Name          | Your Address              | Who do you Represent?<br>(Or Occupation) |
|--------------------|---------------------------|--|
| Homer Engelhorn    | Carrington                | GDCD                                     |
| William Bosse      | Cogswell                  | GDCD                                     |
| Stan Zschomler     | Bismarck                  | Fish + Wildlife Service                  |
| Laurie McMerty     | Minot                     | ND WATER USERS                           |
| Vance Gillette     | P.O. Box 2379<br>BIS N.D. | Three Affiliated Tribes                  |
| Fletcher H. Poling | Bis, N.D.                 | Basin Electric Power Co-op               |
| John Clement       | Box 1977, Bismarck        | AME Coal Gasification Co.                |
| David Spryng...    | Bis.                      | SWC                                      |
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## MINUTES

North Dakota State Water Commission  
Meeting Held In  
State Water Commission Conference Room  
Bismarck, North Dakota

September 26, 1979

The North Dakota State Water Commission held a meeting in the State Water Commission Conference Room in Bismarck, North Dakota, on September 26, 1979. Governor-Chairman, Arthur A. Link, called the meeting to order at 10:20 a.m., and requested Secretary Vernon Fahy to present the agenda.

MEMBERS PRESENT:

Arthur A. Link, Governor-Chairman  
Richard Gallagher, Vice Chairman, Mandan  
Alvin Kramer, Member from Minot  
Gordon Gray, Member from Valley City  
Arlene Wilhelm, Member from Dickinson  
Arthur Lanz, Member from Devils Lake  
Vernon Fahy, State Engineer and Secretary, North Dakota  
State Water Commission, Bismarck

MEMBER ABSENT:

Myron Just, Commissioner, Department of Agriculture, Bismarck

OTHERS PRESENT:

State Water Commission Staff Members  
Homer Engelhorn, Garrison Diversion Conservancy District, Carrington  
William Bosse, Garrison Diversion Conservancy District, Cogswell  
Stan Zschomler, Fish and Wildlife Service, Bismarck  
Laurie McMerty, North Dakota Water Users Association, Minot  
Vance Gillette, Three Affiliated Tribes, Bismarck  
Fletcher Poling, Basin Electric Power Cooperative, Bismarck  
John Clement, ANG Coal Gasification Company, Bismarck

The attendance register is on file in the State Water Commission offices (filed with official copy of minutes).

Proceedings of meeting were recorded to assist in compilation of the minutes.

**CONSIDERATION OF MINUTES  
OF AUGUST 23, 1979 MEETING -  
APPROVED**

Secretary Fahy reviewed the minutes and updated the Commission members on items discussed at the August 23, 1979 meeting held in Beulah, North Dakota. There

were no corrections or additions to the minutes as prepared.

It was moved by Commissioner Kramer, seconded by Commissioner Lanz, and unanimously carried, that the minutes of the August 23, 1979 meeting be approved.

**PROCEDURES AND SCHEDULES  
FOR UPDATING COMPREHENSIVE  
STATE WATER PLAN  
(SWC Project No. 322)**

Gene Krenz, Director of the Planning Division, was introduced by Secretary Fahy. Mr. Krenz presented a relatively detailed overview of the procedures and schedules which are being developed

for updating the Comprehensive State Water Plan.

In respect to comprehensive water planning in North Dakota, Mr. Krenz recalled that the State Planning Board developed a State Water Plan in 1937 on a hydrologic subdivision basis. That plan attempted to discover what the current problems were at that time and suggested ways of solving these problems. That particular plan did not look into the future in terms of what the state's needs were going to be. He did note that it has been observed that most of the problems that were in existence in 1937 are problems which are being coped with today, but only today these problems are more severe and far more complicated.

In 1964, the State Water Commission developed a State Water Plan consisting solely of a map, which indicated where storage opportunities existed. There was some attempt to project what the state's future needs would be.

In 1968, the State Water Commission developed the State Interim Water Resources Development Plan, part of which was funded by the Water Resources Council created in 1965. The Plan took approximately two years to complete. Some projections were made of what the state's long-term water needs were going to be by function.

Since the completion of the Interim Plan, Mr. Krenz indicated that planning has been concentrated on specific subbasins with the State of North Dakota, and also planning that is being done by the River Basin Commissions.

At this time, Mr. Krenz introduced the staff of the Planning Division: LeRoy Klapprodt, Dave Larson, Del Walby, Jennifer Rechlin and Linda Weispenning. He also noted that the position of an economist is yet to be filled. Mr. Krenz stated that the staff is working on updating the State Interim Water Resources Development Plan, noting that the primary purpose of the state water planning effort is

September 26, 1979

to establish what this state's short, mid, and long-term water resources needs are going to be. He indicated that the state does have a fairly good handle on this, but many changes are taking place.

Mr. Krenz stated that before a final plan is published it is estimated that the updating process will require approximately 30-32 months to identify the resource and determine how much of the resource is being used now and project the future needs of this resource. A critical point in determining the length of time for completion of the plan is the question of what level of energy development will be projected.

The staff is in the process of determining at the present time what the public participation program should be as it relates to the water planning process. Through public hearings and public information programs the citizens of North Dakota are going to be requested to help identify and sharpen the perception of what the state's problems are as well as what the state's goals and objectives are going to be.

Mr. Krenz discussed the area of involving other state agencies to participate actively in the process and to involve them at an early stage. He suggested that one alternative for involving the state agencies would be to create a Study Management Group. He also noted that his Division would be doing contact work with the state agencies prior to the next biennium so that these agencies can budget for some funds to cover time in the Plan Formulation process.

Following Mr. Krenz's presentation, the Commission members had comments and questions. It was the consensus of the Commission members that this item be an ongoing item on the agenda for future meetings.

Governor Link expressed his strong support of involving the other state agencies, both having an indirect and a direct interest in water resources. He stated that it is very important to contact the agencies at an early date and to involve them throughout the entire process. He suggested working very closely with the Natural Resources Council. Governor Link also suggested using the concept of public involvement that was used in the Devils Lake Basin Study as a model, but on a much larger basis, when updating the State Plan.

Secretary Fahy expressed his concern in involving the Indian tribes in the public participation process, so as to have a total accountability for water in the State Plan. He noted that two meetings have been held with the tribes in an attempt to coordinate an exchange of ideas to solve problems without litigation.

Mr. Vance Gillette, an attorney from Bismarck representing the Three Affiliated Tribes, was present at the meeting, and indicated that the tribes do want to be involved in the public participation

September 26, 1979

process for updating the State Plan. He expressed concern on behalf of the tribes 'how are the Indians going to benefit from coal gasification projects, Garrison Diversion, etc. when reservation lands are needed for the projects?' Mr. Gillette also indicated that it is his hope that the tribes can work with state representatives in a cooperative manner to discuss water problems, and try to solve these problems without litigation.

Governor Link thanked Mr. Gillette for sharing his concerns with the Commission members and invited continued representation by the tribes at future Commission meetings.

The Commission recessed the meeting at 12:10 p.m.; meeting reconvened at 1:45 p.m.

**CONTINUED DISCUSSION OF  
FISH AND WILDLIFE  
COORDINATION ACT**

Commission Counsel, Mike Dwyer, distributed copies of the State Engineer's comments to the Fish and Wildlife Service in Washington, D. C., on the proposed

rules to implement the Fish and Wildlife Coordination Act, which were published in the Federal Register on May 18, 1979. The State Engineer's comments are attached hereto as APPENDIX "A". Mr. Dwyer emphasized that the most significant portion of the comments request that the National Environmental Policy Act (NEPA) be addressed, as stated on page 3 (C) of the comments.

**CONTINUED DISCUSSION OF  
COST SHARING LEGISLATION  
(SENATE BILL 1241)**

Mike Dwyer briefly reported on the status of two bills on cost sharing legislation; one bill submitted by the President to Congress; and the other Senate Bill 1241.

Mr. Dwyer indicated that neither of these bills have any provisions for recognizing the investments made by the states.

**CONTINUED DISCUSSION OF  
INTERIM STUDIES**

Mike Dwyer stated that the most recent session of the Legislature approved HCR 3022, calling for an interim legislative

study of the powers, duties and jurisdictional boundaries of water management districts and legal drain boards. He indicated that it is the intent of the Natural Resources Interim Committee, which was assigned HCR 3022, to extensively review the present water management district laws, determine areas where improvements are necessary, and recommend those changes and improvements to the next legislative session.

Secretary Fahy indicated that he offered the expertise and services of himself and his staff to the Natural Resources Committee to assist in making these important water studies successful. This includes the preparation of draft legislation as well as providing detailed information. He noted that since the Water Management District Study would have a direct impact on the water management districts, he suggested to the Natural Resources Committee that an advisory committee be appointed, consisting of local water management persons as well as legislative representatives from the Natural Resources Committee, to provide guidance and direction for legislative

September 26, 1979

drafts and information to be submitted to the full Natural Resources Committee. The State Engineer was delegated with the task of appointing the advisory committee, consisting of the following: Ralph Christensen, Minot; Duane Breitling, West Fargo; Charon Johnson, Churchs Ferry; Raymond Schnell, Dickinson; Russ Dushinske, Devils Lake; Bud Wessman, Grand Forks; Jim Eastgate, Bismarck; Rolland Redlin, Minot; and Gordon Berg, Devils Lake.

Mr. Dwyer indicated that the advisory committee had their first meeting on September 25 and a great deal of interest was expressed in the Study. The committee, at this meeting, reviewed the existing laws pertaining to North Dakota water management districts and legal drain boards.

**DISCUSSION OF FEDERAL  
LEGISLATION PROPOSED  
RELATING TO 'WAIVER'  
OF VARIOUS IMPEDIMENTS  
TO PRIORITY ENERGY PROJECTS**

Mike Dwyer distributed, and briefly discussed, the State Engineer's letter and comments to the Congressional Delegation on proposed "fast track" federal legislation calling for waiver of federal, state and local procedural or substantive impediments

on the completion of priority energy projects. The State Engineer's comments are attached hereto as APPENDIX "B".

Mr. Dwyer explained that past experience has shown that federal requirements, and not the state or local requirements, have caused the serious delay of a number of worthy energy and water resource projects, and if Congress decides that "waiver" legislation is appropriate and necessary due to the energy crisis, the "waiver" should apply to the problem, which is the Federal Government, and not to state and local governments. A "waiver" of the requirement for a state water permit would cause serious disruption of established water use systems, and would provide for less efficient and effective allocation, use, and distribution of water resources.

**CONTINUED DISCUSSION OF  
STATUS OF RUSH LAKE  
(SWC Project No. 463)**

Mike Dwyer discussed the law suit filed in 1976 by the State Water Commission against a landowner and the local water management district concerning the

substantial draining of Rush Lake, which essentially destroyed the lake. Through the use of a map, Mr. Dwyer explained the entire situation.

He stated that the case contained three general issues:

- 1) The drainage and water management plan of the 1966-1969 Court case. Mr. Dwyer indicated that the District Court opined that the State Water Commission could not now challenge a Court-approved plan which it (State Water Commission) helped to develop.
- 2) Drainage and diking undertaken since 1969. Mr. Dwyer stated that this is the only unresolved issue to be decided in

September 26, 1979

the case, and was presently before Judge Harold Anderson.

- 3) The third general issue in this case is the general authority of the State Water Commission and the State Engineer over meandered lakes. This issue has been decided in favor of the defendants, but Mr. Dwyer indicated an appeal may be appropriate on this matter.

Mr. Dwyer concluded by saying he wanted to keep the Commission members up to date concerning this action.

REQUEST FOR SWC PARTICIPATION  
IN TOWNER COUNTY GROUND-WATER  
STUDY IN AMOUNT OF \$48,000  
(SWC Project No. 975)

Secretary Fahy stated that a request has been received from Towner County for participation in a ground-water study for that county. He indicated that this request marks something of a

milestone in the programs that the Commission carries on in that this is the last county to embark on such a study for the entire state. By 1983, the program will be essentially complete and North Dakota will be the first state to have a detailed reconnaissance knowledge of the water resources that are found in the ground-water system.

The total cost of the Towner County study is estimated to be \$188,000 over a three-year period. The breakdown of costs will be as follows: U. S. Geological Survey - \$90,000; State Water Commission - \$48,000; North Dakota Geological Survey - \$10,000; and Towner County - \$40,000.

It was the recommendation of the State Engineer that the Commission honor this request to conduct the ground-water study and approve participation.

It was moved by Commissioner Wilhelm and seconded by Commissioner Lanz to participate in the Towner County Ground-Water Study in an amount not to exceed \$48,000, contingent upon the availability of funds. All members voted aye; the motion carried.

CONSIDERATION OF WATER  
PERMIT REQUESTS  
(SWC Project No. 1400)

Secretary Fahy presented APPENDIX "C" for the Commission's consideration, representing the water permit requests. He recommended that the actions of the State Engineer be confirmed.

Discussion pursued on the application filed by Cargill, Inc., water permit application No. 3170, requesting 175.0 acre-feet of water from the West Fargo Aquifer.

September 26, 1979

Milton Lindvig discussed the situation with the Commission members, indicating that the Company had selected the site for their plant before locating an adequate water supply. The site that has been selected by the Company overlies the West Fargo Aquifer and the appropriation of water will be from that particular aquifer. Mr. Lindvig noted that this aquifer already has a declining water level condition and additional stress on the aquifer would continue to accelerate the decline. He explained several alternatives that have been discussed with the Company and the staff members.

The State Engineer indicated that on August 28, 1979, he approved 2.0 acre-feet of water for domestic use for Cargill, Inc., and the remainder of the request/application is being held in abeyance at this time.

It was moved by Commissioner Kramer, seconded by Commissioner Gallagher, and unanimously carried, that the actions of the State Engineer be confirmed. SEE APPENDIX "C"

The following applications were approved subject to conditions as specified on each permit:  
 No. 3170 - Cargill, Inc., Minneapolis, Minnesota (2.0 acre-feet of water for domestic use was approved at this time); No. 3158 - Martin Haugen and Gerald Fogderud, Dazey; No. 2994 - James Mongeon - Rolette; No. 3064 - Bratcher Brothers, Alexander; No. 3109 - Owen Thurlow, Carrington; No. 3174 - City of Sykeston; No. 1023 - City of Sykeston (this is a request for a change in point of diversion); No. 3186 - City of Braddock; No. 1795 - Grand Forks-Traill Water Users, Inc. - Thompson (this is a request for a change in point of diversion); No. 3188 - Grand Forks-Traill Water Users, Inc. - Thompson; No. 2949 - F.L. Tompkins, R.J. Ulrich, Jr., and Milton Rolle, Minot; and No. 2384 - F.L. Tompkins, R.J. Ulrich, Jr. and Milton Rolle, Minot (this is a request for a change in point of diversion).

The following applications were deferred:  
 No. 3197 - Marlin E. Baranyk, Wilton; and No. 1880 - City of Solen.

STATUS REPORT ON SOUTH  
 BISMARCK GROUND-WATER  
 STUDY  
 (SWC Project No. 1692)

At the request of Governor Link, Milton Lindvig briefed the Commission members on the status of the South Bismarck Ground-Water Study now underway. Mr. Lindvig indicated that approximately

80 wells will be drilled for observation purposes beginning this week. A

September 26, 1979

water table map will then be made to determine the fluctuations that occur over about a two-year period. Mr. Lindvig said the observations wells will be tested at least monthly and some of the wells will be equipped with continuous water level recorders. This will be carried on for about 18-24 months and then certain wells will be selected for the long-term permanent monitoring system.

REQUEST FOR SWC PARTICIPATION  
IN REPAIR OF JACKSON DAM IN  
MCKENZIE COUNTY  
(SWC Project No. 253)

Secretary Fahy indicated that a request has been received from the McKenzie County Water Management District for financial assistance in the repair of Jackson Dam.

Dave Sprynczynatyk reported that recently members of the State Water Commission staff had inspected Jackson Dam and found the embankment and spillway in need of repair. Considerable erosion is taking place along the embankment near the wing-walls of the spillway which will require some earthfill and rock riprap protection.

Mr. Sprynczynatyk said that the facility received some public use and if it is to be maintained as a water-base recreation area, repairs will have to be performed to insure stability. The McKenzie County Water Management District has expressed a willingness to obtain necessary easements for public access and also to share in the costs of repair. Total cost of repair is estimated at \$35,000. It was also discussed that the Water Commission and the Game and Fish Department share in the costs.

A request for financial assistance was forwarded to the Game and Fish Department. The Commissioner of that agency responded to the request indicating that their department is experiencing budgeting problems and cannot be a part of the rehabilitation effort for Jackson Dam.

It was recommended by the State Engineer that the State Water Commission participate financially in one-half of the costs for the repair of Jackson Dam.

It was moved by Governor Link and seconded by Commissioner Lanz that the State Water Commission participate in an amount not to exceed \$17,500, contingent upon the availability of funds, for the repair of Jackson Dam in McKenzie County. All members voted aye; the motion unanimously carried.

STATUS REPORT ON  
EPPING DAM  
(SWC Project No. 346)

Secretary Fahy reported that the Williams County Water Management Board was discussing land acquisition for the project with the landowners near Epping Dam. The area being discussed totalled 370 acres.

September 26, 1979

Dave Sprynczynatyk reported that the landowners were unwilling to give up that large an amount. He stated that he had met with a representative from the Game and Fish Department and from the State Parks and Conservation Department and that tentative agreement had been reached on acquiring only 180 acres. This will provide public access around approximately 90 percent of the lake. This will be discussed with the Board.

Mr. Sprynczynatyk also stated that the subsurface drilling had been completed and that final design would begin soon.

DISCUSSION OF RESOLUTION  
FROM CITIZENS WATER COMMITTEE  
CONCERNING WATER NEEDS IN STATE

Commissioner Wilhelm distributed, and discussed, a resolution (attached hereto as APPENDIX 'D') adopted by the Citizens' Water Committee on August 30, 1979,

relating to water needs of all users, municipal and rural, in the southwestern portion of North Dakota.

REQUEST FOR ADDITIONAL  
COST PARTICIPATION FOR  
RELOCATION OF PEMBINA  
MUSEUM DIKE  
(SWC Project No. 1444)

Secretary Fahy recalled that at the October 20, 1978 Commission meeting, funds were approved in the amount of \$2,775 to assist in the relocation of the Pembina Museum Dike. This is a project that was first constructed by the State Water Commission

in 1969. The cost estimate for the relocation of the dike is \$17,000. This estimate is \$5,000 more than the estimate prepared in 1978. The reason for this is that the dike was substantially changed during the spring flood of 1979 and more work must be done to accomplish the relocation. The city feels it is imperative that the dike be relocated this fall in order to prevent possible flooding next spring.

A request has been received from the City of Pembina asking for assistance in funding up to 50 percent of cost of relocation, in an amount not to exceed \$8,500. It is hoped that the City and the Water Management District can provide the remaining 50 percent.

It was recommended by the State Engineer that the Commission honor the City's request for financial assistance in an amount not to exceed \$8,500.

It was moved by Commissioner Gray, seconded by Commissioner Lanz, and unanimously carried, that the Water Commission participate in 50 percent of the total costs, in an amount not to exceed \$8,500, contingent upon the availability of funds, for the purpose of relocating the Pembina Museum Dike.

September 26, 1979

REQUEST FOR INVESTIGATION  
OF ODLAND DAM IN GOLDEN  
VALLEY COUNTY  
(SWC Project No. 394)

Secretary Fahy indicated that Odland Dam in Golden Valley County is in need of repairs and a request has been received that an investigation be conducted to determine the feasibility of constructing

a new dam downstream. Secretary Fahy stated that from a brief review of the situation a new dam downstream does appear to be the best solution. The Commission will be requested at a later date to assist in the financial costs.

REQUEST FOR FINANCIAL  
ASSISTANCE IN REPAIR OF  
SENTINEL BUTTE DAM IN  
GOLDEN VALLEY COUNTY  
(SWC Project No. 574)

Dave Sprynczynatyk reported that Sentinel Butte Dam in Golden Valley County is in need of repairs. The Golden Valley County Water Management District has been provided with an estimate of costs for the repairs.

Secretary Fahy stated that a request has been received from the water management district for Water Commission financial assistance. Secretary Fahy said that as much as possible of the repair work will be done by the Water Commission crews and if necessary a local contractor will be hired to assist in the repair.

It was suggested that since the Commission members have been made aware of the necessity of repairs for Sentinel Butte Dam, and the dam does supply the city with its water supply, that the work proceed this fall and financial participation be handled under the discretion of the State Engineer. It was the consensus of the Commission members that this item be handled as suggested by the State Engineer.

There being no further business to come before the Commission members at this time -

It was moved by Commissioner Gallagher, seconded by Commissioner Kramer, and unanimously carried, that the meeting adjourn at 3:15 p.m.

  
\_\_\_\_\_  
Arthur A. Link  
Governor-Chairman

ATTEST:

  
\_\_\_\_\_  
Vernon Fahy  
State Engineer and Secretary

September 26, 1979



**NORTH DAKOTA**

APPENDIX "A"

**STATE WATER COMMISSION**

**900 east boulevard  
701-224-2750**

**bismarck 58005  
north dakota**

September 14, 1979

Mr. Michael J. Spear,  
Associate Director - Environment  
Fish & Wildlife Service  
Department of Interior  
Washington, D.C. 20240

RE: Fish & Wildlife Coordination Act - SWC File #C3-3.17

Dear Mr. Spear:

This is to comment on the proposed rules to implement the Fish & Wildlife Coordination Act, which were published in the Federal Register on May 18, 1979. In the first instance, I would like to express my appreciation to you for extending the deadline for response to enable me to submit my comments for the record.

For the sake of clarity I will submit my comments in three parts. First I will discuss the statutory authority which is necessary for the promulgation of rules and regulations. Second, I will address the proposed rules in conjunction with President Carter's Executive Order 12044 of March 23, 1978, concerning the improvement of government regulations. Finally, I will raise the issue of the National Environmental Policy Act and its application to the proposed regulations.

A. Legislative Authority for the Proposed Regulations.

While an executive agency of the United States clearly has the authority to promulgate regulations, it is also generally recognized that administrative agencies do not have the authority to legislate by promulgation of regulations. That function is exclusively reserved to the Legislative branch of our government, the United State Congress. Once Congress has enacted legislation, executive agencies may promulgate rules and regulations to carry out and implement such legislation, but those rules and regulations may not express a different intent nor may they exercise authority beyond that which was granted by the legislation.

There are several areas of the proposed regulations which appear to go beyond the express authorization of Congress contained in the Fish & Wildlife Coordination Act (16 U.S.C. 661 et. seq). In hoping that you

GOVERNOR ARTHUR A. LINK  
Chairman

ALVIN A. KRAMER  
Minnot

ARTHUR J. LANZ  
Devils Lake

MYRON JUST, EX-OFFICIO MEMBER  
Comm. of Agriculture

RICHARD P. GALLAGHER  
Vice Chairman-Mandan

GORDON K. GRAY  
Valley City

ARLENE WILHELM  
Dickinson

VERNON FAHY  
Secretary & State Engineer

Michael J. Spear  
September 14, 1979  
Page 2

will comply with NEPA as I will express in this letter, I have chosen to identify only those specific sections of the proposed regulations which appear to be most critical in terms of application and impact.

1. Section 410.3. The definition of project seems broader than intended by 16 U.S.C. §662. I am not sure what you intend by the phrase "any action, or planning process which could condition an action", but it appears that to require Fish & Wildlife Coordination Act compliance for any and all planning, regardless of its relation to water resource development, goes beyond Congressional intent.

2. Section 410.11. Again, it appears that the application of the Fish & Wildlife Coordination Act has been stretched beyond the Congressional expressed purpose of 16 U.S.C. §662 and §663, in that it appears that any kind of "water resources activity" will require compliance with the regulations. The language of the Fish & Wildlife Coordination Act does not provide a basis for such a broad interpretation. For example, the portion of §410.11 which would require compliance with the Fish & Wildlife Coordination Act for hydro-power marketing decisions and allocation or contracting decisions clearly is in excess of the statutory authority contained in the Fish & Wildlife Coordination Act.

3. Section 410.24. The purpose of these comments is not to question the concept of equal consideration for fish and wildlife values. Indeed, fish and wildlife values, even without the Fish & Wildlife Coordination Act, should be given equal consideration. However, subsection b(3) of Section 410.24 provides that certain measures recommended by wildlife agencies cannot be considered unjustified for various reasons which are set out. This appears to turn the Fish & Wildlife Coordination Act into a "mandatory adoption" statute, rather than a "mandatory consideration" statute. Such an intent and result should be clearly expressed by Congress.

My concern with the intent and impact of the proposed rules, if promulgated, is that many water projects which presently experience extensive and unnecessary delays will suffer yet additional delays. I do not propose that wildlife consideration be forsaken. However, Section 410.23, subsection 6(e) and 6(f), place an onerous burden on action agencies in that wildlife agencies are not required to report, yet at any stage of a permit process or development of a project the action agency may be required to satisfy various demands in accordance with the proposed rules. I do not believe Congress would allow such a bureaucratic deferment to develop, and certainly the Fish & Wildlife Coordination Act does not provide the authority for such a potentially delaying situation to develop.

B. Executive Order 12044.

On March 23, 1978, President Carter issued Executive Order 12044 entitled "Improving Government Regulations". Section 3 of that Executive Order provides:

Michael J. Spear  
 September 14, 1979  
 Page 3

"Some of the regulations identified as significant may have major economic consequences for the general economy, for individual industries, geographical regions or levels of government. For these regulations, agencies shall prepare a regulatory analysis. Such an analysis shall involve a careful examination of alternative approaches early in the decision-making process.

North Dakota recognizes the importance of her fish and wildlife values. North Dakota is also a state which derives approximately 85% of its income from agriculture. In a state such as ours, it is essential that both interests be recognized and given due consideration in decisions and policies affecting either. This is being done in North Dakota. Regulations which very likely will have a substantial delaying impact on water resources development will certainly have a major economic consequence for the general economy and more specifically for the agricultural industry located in this geographic region. Therefore, it is requested that the Fish & Wildlife Service prepare a regulatory analysis so that your agency as well as the people of North Dakota have an opportunity to consider impacts of the proposed rules and alternative approaches early in the decision-making process.

C. Application of the National Environmental Policy Act to the Proposed Rules.

Before any action is taken to promulgate the proposed rules, it is strongly suggested that the National Environmental Policy Act first be addressed. NEPA clearly imposes a non-discretionary duty on all federal officers and agencies to prepare an Environmental Impact Statement (EIS) on "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Guidelines to federal agencies promulgated by the Council on Environmental Quality (CEQ) make it clear that the phrase "major Federal action" includes the making of new or revised regulations, rules, procedures, and policy. Utilizing the definitions contained in the new CEQ regulations, it is also certain that the federal action proposed in your draft rules will "significantly affect the human environment."

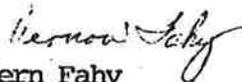
As is evidenced by controversy surrounding fish and wildlife mitigation in North Dakota, the proposed rules are and will be controversial. Due to the deference the Courts can be expected to give CEQ's new NEPA regulations (40 CFR Parts 1500-1508) as indicated by the attached letter of Nicholas Yost concerning the case Andrus v. Sierra Club, 47 USLW 4676, 9 ELR 20390, an EIS should be prepared for the proposed rules.

The NEPA provides the primary means by which States can be informed about and can affect what the Federal government is doing to the environment of the States. The EIS must be circulated to "state...agencies, which are authorized to develop and enforce environmental standards" for their "comments and views" which must then "accompany the proposals through the existing agency review processes." (42 U.S.C. 4332(2)(C)). It is respectfully requested of the Departments of Interior and Commerce that any decision concerning the proposed rules recognize the importance to states of the EIS created by Congress in the NEPA.

Michael J. Spear  
September 14, 1979  
Page 4

In summary, these comments are not intended to address the merits of the proposed regulations. North Dakota recognizes the importance of her fish, wildlife, and water resources. Rather, it is requested through these comments that the regulations be revised to conform to Congressional intent, that the procedures followed in adopting these regulations comply with procedural requirements which have been set out by the President through executive order, and that states such as North Dakota be given an opportunity to have substantial input into the development of regulations which will have a significant impact on the human environment through the preparation and circulation of an environmental impact statement. I intend to refer this matter to the North Dakota Attorney General for his review and consideration.

Sincerely,

  
Vern Fahy  
State Engineer

VF:MD:pjw  
cc: Governor Link  
Allen I. Olson  
Senator Milton Young  
Senator Quentin Burdick  
Representative Mark Andrews

EXECUTIVE OFFICE OF THE PRESIDENT  
 COUNCIL ON ENVIRONMENTAL QUALITY  
 722 JACKSON PLACE, N. W.  
 WASHINGTON, D. C. 20008



September 4, 1979

MEMORANDUM

FOR: Attorneys General

SUBJECT: Comment Concerning Impact of Supreme Court Decision  
 on CEQ's NEPA Regulations

You will recall that CEQ's new NEPA regulations, ordered by President Carter to reduce paperwork and delay and to secure better decisions, became effective throughout the government on July 30, 1979.

I enclose Environmental Law Reporter's excellent comment on the impact on the regulations of the Supreme Court's decision in Andrus v. Sierra Club, 47 U.S.L.W. 4676, 9 ELR 20390 (June 11, 1979)--Comment, Supreme Court Relies on CEQ's NEPA Rules to Hold EIS Requirements Inapplicable to Agency Budget Requests, 9 ELR 10122 (July-August, 1979).

I believe the comment accurately states the deference the Courts can be expected to give CEQ's new NEPA regulations (40 C.F.R. Parts 1500-1508).

NICHOLAS C. YOST  
 General Counsel

Enclosure

cc: NAAG Environmental Contacts



**NORTH DAKOTA**

APPENDIX "B"

**STATE WATER COMMISSION**

**900 east boulevard  
701-224-2750**

**bismarck 58505  
north dakota**

September 19, 1979

The Honorable Milton R. Young  
United States Senate  
5205 Dirksen Senate Office Building  
Washington, D.C. 20510

RE: SWC File #C3-3

Dear Senator Young:

Attached is a copy of the September 14 issue of "Western States Water", which provides a brief summary of various items of legislation relating to "waiver" of various impediments to priority energy projects. You will notice, and I'm sure you are keenly aware, of the various proposals which would provide for complete "waiver" of substantive requirements for energy projects, at the state, federal, and local level.

These proposals are of tremendous concern to me. First, they create a serious threat to the substantive and primary role of the states for allocation, distribution and management of water resources. A waiver of the requirement for a state water permit would cause serious disruption of established water use systems, and would most likely provide for less efficient and effective allocation, use, and distribution of water resources. It should be pointed out that it is the Federal requirements, and not state or local requirements, which have caused the serious delay of a number of worthy energy and water resource projects. NEPA, Section 404 of the Federal Water Pollution Control Act, requirements of the FERC, and other similar requirements have caused extensive and expensive delays to various projects.

The ANG coal gasification plant proposed for construction near Buelah, North Dakota, received all of its state and local permits in a timely and expeditious manner. However, its continued delay is solely the cause of the Federal government. Even as I write this letter, the Fish & Wildlife Service of the Department of Interior is proposing substantial and extensive regulations to implement the Fish & Wildlife Coordination Act, which are very serious in their potential to delay water resource and related energy projects.

If Congress decides that "waiver" legislation is appropriate and necessary

GOVERNOR ARTHUR A. LINK  
Chairman

RICHARD P. GALLAGHER  
Vice Chairman-Mandan

ALVIN A. KRAMER  
Minot

GORDON K. GRAY  
Valley City

ARTHUR J. LANZ  
Devils Lake

ARLENE WILHELM  
Dickinson

MYRON JUST, EX-OFFICIO MEMBER  
Comm. of Agriculture

VERNON FAHY  
Secretary & State Engineer

Milton R. Young  
September 19, 1979  
Page 2

due to the energy crisis, it is sincerely and respectfully requested that the "waiver" apply to the problem, which is the Federal government, and not to state and local governments. Application of a "waiver" provision to state and local requirements would not only cause major disruption of state and local planning development processes, but would be of no advantage to anyone in terms of expediting energy development.

Sincerely,

Vern Fahy  
State Engineer

VF:MD:pjw  
Incl.: as  
cc: Governor Link  
Attorney General Allen Olson  
SWC Members  
Mark Andrews  
Quentin Burdick

*bile*

# WESTERN STATES WATER

220 South 2nd East, Suite 200 Salt Lake City, Utah (801) 521-2200



A weekly report prepared by the staff of the Western States Water Council.

Jack A. Barnett - Executive Director

## FAST-TRACK LEGISLATION

Issue #279, September 14, 1973

The House Interstate and Foreign Commerce Committee on Tuesday approved a committee print of legislation proposed by John Dingell (D-MI). His legislation authorizes an emergency mobilization board to recommend to the President that he waive federal, state and local procedural or substantive impediments to the completion of priority energy projects. Such a waiver would be subject to a one-House congressional veto. (see WSWC newsletter, issue #275, 8/17) An amendment offered by Tim Wirth (D-CO) to delete such a waiver was defeated by a 26-16 vote. Further, two similar amendments which would exempt state and local laws and regulations from such a waiver were also defeated by similar margins. It now appears that Mr. Dingell's proposal will go to the Rules Committee as an amended version of H.R. 4985, which was reported by the Interior and Insular Affairs Committee on August 2. Morris Udall (D-AZ), chairman of that committee, is the sponsor of H.R. 4985, and it contains no waiver for substantive impediments to priority projects. The Rules Committee may act by early next week to decide what form the legislation will take when considered on the House floor--probably late this month--possibly on the 25th or 26th.

The Senate Energy and Natural Resources Committee is deadlocked over the waiver issue. The Committee is considering S. 1308, introduced by Chairman Jackson (D-WA), and last week Senator Johnston (D-LA) introduced an amendment giving an emergency mobilization board authority to override any law or other requirement found to impede completion of a priority energy project, independent of presidential or congressional action.

Senator Pete Domenici (D-NM) has introduced legislation, S. 1377, with a milder provision. Section 602 of the bill states that its purpose is to provide for the coordinated, prompt, and simplified process for federal approval of energy facilities, to expedite the federal approval process without affecting substantive federal authority or interfering with present federal agencies' responsibilities, and to foster integration of local, state, and federal procedures for approving energy facilities determined to be in the national interest. The bill would allow the President to intervene in agency decision-making to expedite projects as described in Section 212. Mr. Jackson's bill includes a similar provision in Section 612. However, S. 1377 would also provide that "the authority", an emergency mobilization board, "after consultation with the state and local authorities, shall propose a voluntary decision schedule to assist state and local authorities in coordinating their activities with actions by the federal government.... If the authority determines that a priority energy project is being delayed or threatened with delay by the inability or unwillingness of any state or local government to implement a schedule for timely review and decision, the authority shall notify the governor of such state and transmit to the Congress a statement describing the delay, the causes thereof, and recommending actions to alleviate or prevent a delay." The recommended action might be the waiver of state or local laws, procedures, or requirements. In addition to providing for a way around procedural and substantive impediments, both Mr. Domenici's bill (Sec. 618) and Mr. Jackson's bill (Sec 218) prescribe certain procedures with respect to judicial review of federal actions under their legislation.

The Western States Water Council is an organization of the Western States Governors representing the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington and Wyoming.

\* INDICATES PRIOR  
PERMIT STATUS

WATER PERMIT AGENDA FOR SEPTEMBER 26, 1979 MEETING

| NO.  | NAME AND ADDRESS  | SOURCE  | PURPOSE                              | AMOUNTS REQUESTED   | COMMENTS & RECOMMENDATIONS  |
|------|---|---|--------------------------------------|---|---|
| 3170 | Cargill, Inc. -<br>Minn., Minn.<br>(Cass County)<br><br>Priority: 3-26-79<br>Hearing: 5- 7-79<br>Deferred: 6-25-79                      | Ground Water<br>(West Fargo<br>Aquifer)<br><br>* NO PRIOR PERMITS | Industrial                           | 175.0 acre-feet   | Recommend for approval:<br>2.0 acre-feet for<br>domestic purposes<br><br>(Remainder of request<br>to be held in abeyance)<br><br>(portion of the<br>This permit was approved<br>by State Engineer on<br>August 28, 1979.) |
| 3158 | Haugen, Martin and<br>Fogderud, Gerald -<br>Dazey<br>(Barnes County)<br><br>Priority: 10-31-78<br>Hearing: 3-26-79<br>Deferred: 4-18-79 | Baldhill Creek<br>and Lake Ashtabula<br><br>* NO PRIOR PERMITS    | Recreation<br>(Fish and<br>Wildlife) | 22.6 acre-feet<br>storage;<br>7.8 acre-feet<br>annual use | 22.6 acre-feet<br>storage;<br>7.8 acre-feet<br>annual use<br><br>(This permit was approved<br>by State Engineer on<br>August 29, 1979.)   |
| 3197 | Baranyk, Marlin E. -<br>Wilton<br>(Burleigh County)<br><br>Priority: 8-28-79<br>Hearing: 9-17-79  | Missouri River<br><br>* NO PRIOR PERMITS                          | Irrigation                           | 338.2 acre-feet<br>169.1 acres                            | It is recommended that<br>action be deferred at<br>this time.   |
| 1880 | Solen, City of -<br>Solen<br>(Sioux County)<br><br>Priority: 8-14-79<br>Hearing: 9-17-79  | Ground Water<br><br>* NO PRIOR PERMITS                            | Municipal                            | 194.0 acre-feet   | It is recommended that<br>action be deferred at<br>this time.   |

| NO.  | NAME AND ADDRESS  | SOURCE  | PURPOSE    | AMOUNTS REQUESTED                | COMMENTS & RECOMMENDATIONS  |
|------|---|---|------------|----------------------------------|---|
| 2994 | Mongeon, James -<br>Rolette<br>(Rolette County)<br><br>Priority: 11-15-77<br>Hearing: 12-19-77<br>Deferred: 3-16-78     | Ground Water<br>(Shell Valley<br>Aquifer)<br><br>* NO PRIOR PERMITS   | Irrigation | 320.0 acre-feet<br>156.0 acres   | Recommend for approval:<br>202.5 acre-feet<br>135.0 acres<br><br>(31.5 acre-feet and<br>remaining 21.0 acres<br>shall be held in<br>abeyance) |
| 3064 | Bratcher Brothers -<br>Alexander<br>(McKenzie County)<br><br>Priority: 3- 3-78<br>Hearing: 5-22-78<br>Deferred: 6- 1-78 | Ground Water<br>(Unnamed Aquifer)<br><br>* NO PRIOR PERMITS   | Irrigation | 648.0 acre-feet<br>432.0 acres   | Recommend for approval:<br>307.5 acre-feet<br>205.0 acres<br><br>(Remainder of request<br>to be held in abeyance)                             |
| 3109 | Thurlow, Owen -<br>Carrington<br>(Foster County)<br><br>Priority: 12-15-78<br>Hearing: 1- 8-79<br>Deferred: 2-20-79     | Ground Water<br>(James River<br>Aquifer)<br><br>* NO PRIOR PERMITS  | Irrigation | 1521.0 acre-feet<br>1014.0 acres | Recommend for approval:<br>327.0 acre-feet<br>218.0 acres<br><br>(Remainder of request<br>to be held in abeyance)                             |
| 3174 | Sykeston, City of -<br>Sykeston<br>(Wells County)<br><br>Priority: 4-12-79<br>Hearing: 5- 7-79<br>Deferred: 6-25-69     | Ground Water<br>(Pipestem Creek<br>Aquifer)<br><br>* #1023 (Priority Date: 6-28-62) Granted 100.0 acre-feet | Municipal  | 65.0 acre-feet                   | 65.0 acre-feet  |

| NO.  | NAME AND ADDRESS   | SOURCE  | PURPOSE                            | AMOUNTS REQUESTED   | COMMENTS & RECOMMENDATIONS  |
|------|--|---|------------------------------------|---|---|
| 1023 | Sykeston, City of -<br>Sykeston<br>(Wells County)<br><br>Priority: 6-28-62<br>Hearing on<br>Amendment: 7- 3-79<br>Deferred: 7-25-79                          | Lake Hiawatha   | Municipal                          | This is a request<br>for a change in<br>point of diversion.   | It is recommended that<br>the request for a change<br>in point of diversion<br>be approved.   |
| 3186 | Braddock, City of -<br>Braddock<br>(Emmons County)<br><br>Priority: 4-24-79<br>Hearing: 7- 9-79<br>Deferred: 7-25-79   | Ground Water<br>(Fox Hills<br>Aquifer)<br><br>* NO PRIOR PERMITS  | Municipal                          | 25.0 acre-feet  | 25.0 acre-feet  |
| 1795 | Grand Forks-Traill<br>Water Users, Inc. -<br>Thompson<br>(Grand Forks Co.)<br><br>Priority: 9-14-71<br>Hearing on<br>Amendment: 8- 6-79<br>Deferred: 8-23-79 | Ground Water<br>(Elk Valley<br>Aquifer)<br><br>* #1795 (Priority Date: 9-14-71) Granted 650.0 acre-feet<br>#2497 (Priority Date: 7-22-76) Granted 200.0 acre-feet<br>#3095 (Priority Date: 4-27-78) Granted 400.0 acre-feet | Industrial-<br>(Rural<br>Domestic) | This is a request<br>for an additional<br>point of diversion. | It is recommended that<br>the request for an<br>additional point of<br>diversion be approved. |



## CITY OF DICKINSON

P.O. BOX 1037

DICKINSON, NORTH DAKOTA 58601

PHONE (701) 225-6765

APPENDIX "D"



September 6, 1979

HENRY SCHANK, PRESIDENT  
COMMISSIONERSART BAUMGARTNER      LAVERN JESSEN  
ERNEST BAILEY        ROBERT BAIRD

State Water Commission  
State Office Building  
900 East Boulevard  
Bismarck, North Dakota

Dear Commissioners,

|                       |  |
|-----------------------|--|
| STATE OF NORTH DAKOTA |  |
| September 6, 1979     |  |
| For Mr. Schank        |  |
| For Mr. Baumgartner   |  |
| For Mr. Ernest Bailey |  |
| For Mr. Lavern Jessen |  |
| For Mr. Robert Baird  |  |
| Return to State Eng   |  |
| File                  |  |

The following resolution was passed August 30, 1979 by the Citizens' Water Committee of the City of Dickinson.

The State Water Commission be informed by their member here present, Arlene Wilhelm, that the Citizens' Water Committee of the City of Dickinson desires that any proposal from Texas Eastern Pipeline Corporation: or any other potential water user, be made cognizant of the water needs of all users, municipal and rural, in the southwestern portion of North Dakota.

We wish the members of the State Water Commission to recognize that we are not endorsing any particular project. The need for water in this area is of such a magnitude that no potential source can be overlooked.

Respectfully,

Robert A. Stranik, Chairman  
Citizens' Water Committee