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## MEMORANDUM

**TO:** BOWMAN-SLOPE SOIL AND WATER CONSERVATION  
DISTRICT LAND USE PLAN STEERING COMMITTEE

**VIA:** EMAIL  
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**FROM:** KAREN BUDD-FALEN & CONNER NICKLAS  
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**THROUGH:** BRENDA YOUNKIN  
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**DATE:** SEPTEMBER 12, 2017

**RE:** NORTH DAKOTA WATER QUALITY

The purpose of this memorandum is to describe the water quality requirements created by North Dakota in compliance with the Clean Water Act.

### I. NORTH DAKOTA WATER QUALITY STANDARDS

North Dakota addresses water quality statutorily in Title 61, Chapter 28 of the North Dakota Century Code. N.D.C.C. § 61-28-01, *et seq.* (Act). Under this statute, the North Dakota Department of Health (Department) is authorized to protect water quality in the state. *Id.* at § 61-28-04. Under the Act, the Department is responsible for developing and maintaining a comprehensive program for the prevention, control, and abatement of new or existing pollution of the waters of the state. *Id.* The Department must also adopt effluent and new source performance standards which must include at least the minimum standards set forth in the Clean Water Act. *Id.* The Department also has the power to promulgate water quality control regulations. *Id.* § 61-28-05.

Although the statute is silent on specific surface water classifications, the Department created specific surface water classifications. N.D.A.C. § 33-16-02.1-09. Along with general water quality standards that are applicable to all waters of the state, there are also four surface water classifications. *Id.* Some of these standards include: (1) ensure the body is free from substances that will cause the formation of putrescent or otherwise objectionable sludge deposits; (2) prevent any floating debris or other materials in such amounts that it would cause the body to be “unsightly or deleterious;” (3) prevent materials that would cause a nuisance in the water body or make the fish undesirable to eat or make it otherwise inedible; (4) prevent substances that would make the water body toxic or harmful to humans or other plants and animals; (5) prevent oil or grease to enter the body of water that would cause a visible film or sheen on the water or cause discoloration on the surface which would prevent use of the water. *Id.* at § 33-16-02.1-08.

There are four surface water classifications set forth in the Department’s regulations. The first classification is reserved for Class I streams. *Id.* at § 33-16-02.1-09. Class I streams are streams that must be suitable for both resident fish species, swimming and other recreational use, and municipal or domestic use. *Id.* at § 33-16-02.1-09(1)(a). Class IA streams must be the same quality as Class I streams, except for when the natural water quality exceeds that of municipal or domestic use, other water treatment methods can be considered by the Department to make it suitable for human consumption. *Id.* at § 33-16-02.1-09(1)(b). Class II streams are the same as Class I, except that additional treatment may be required to meet drinking water standards, and the stream can be intermittent in nature. *Id.* at § 33-16-02.1-09(1)(c). Class III streams are waters that are suitable for agriculture and industrial uses. *Id.* at § 33-16-02.1-09(1)(d). For each classification of water there are different effluent standards the stream is held to. The Department has classified each stream in Appendix I of its water quality regulations. *Id.* at Appendix I. If a stream is not listed on Appendix I, the stream is assumed to be Class III. *Id.*

Similar classifications are made for lakes and reservoirs. *Id.* at § 33-16-02.1-09(1)(f). Class 1 lakes are for cold water fisheries; these are lakes capable of supporting cold water fish species. Class 2 lakes are for cool water fisheries; these are lakes capable of supporting cool water fish. Class 3 lakes are for warm water fisheries; these are waters capable of supporting natural

reproduction and growth of warm water fish, although some cool water species may also be present. Class 4 lakes are for marginal fisheries, meaning that the lake is capable of supporting a fishery on a short-term or seasonal basis. Finally, Class 5 lakes are not capable of supporting a fishery due to high salinity. The Department has classified each lake in Appendix II. *Id.* at Appendix II. If a lake is not listed on Appendix II, the lake is assumed to be Class 4. *Id.*

Further, the Department's main purpose in protecting water quality is to prevent degradation of water bodies. *Id.* at Appendix IV. One way the Department aims to prevent degradation is to protect existing uses on bodies of water. *Id.* An existing use is defined as any use actually attained in the water body on or after 1967. *Id.* When the Department determines an existing use on a body of water the Department will protect that use; this protection can result in extra requirements for that body of water, or reclassification of the water body when necessary. *Id.*

Finally, the level of antidegradation protection afforded to each body of water is ultimately determined by which category the body of water is listed under. *Id.* Overall, there are three categories. Category 1, is afforded very high levels of protection and automatically applies to Class I and Class IA streams and Class 1, 2, and 3 lakes, along with wetlands that are functioning at their optimal level. *Id.* Category 1 is also presumed to apply to Class II and Class III streams, unless it is shown that (1) there is no assimilative capacity for any of the parameters that may potentially be affected by the proposed regulated activity in the segment in question, or (2) an evaluation submitted by the project applicant demonstrates that aquatic life and primary contact recreation uses are not currently attained because of stressors that will require a long-term effort to remedy. *Id.*

Category 2 offers an intermediate level of protection and is used for Class 4 and Class 5 lakes and particular wetlands after antidegradation review. *Id.* Category 2 also encompasses Class II and III streams that meet one of the criteria listed above. *Id.*

Finally, Category 3 is afforded the highest level of protection and is categorized as Outstanding State Resource Waters. *Id.* A water body can only be designated as Category 3 once the Department has determined that there is

“exceptional value for present or prospective future use for public water supplies, propagation of fish or aquatic life, wildlife, recreational purposes, or agricultural, industrial, or other legitimate beneficial uses.” *Id.* The Department looks to six factors in making its determination (1) location, (2) previous special designations, (3) existing water quality, (4) physical characteristics, (5) ecological value, and (6) recreational value. *Id.* Any person can nominate a water body to be an Outstanding State Resource Water. *Id.* Once a body of water is nominated, if the Department determines that the water body is eligible, the Department undergoes a rulemaking process in which it solicits public comment and holds a public hearing regarding the nomination. Upon receiving public comment and listening to the recommendation of the Water Pollution Control Board, the Department and the State Water Commission will make a decision whether to designate the water body as an Outstanding State Water Resource. *Id.* If the designation is made, it can be reviewed on a periodic basis. *Id.*

## **II. ISSUES FOR BOWMAN-SLOPE LAND USE PLAN**

Given Wyoming’s experience with water quality monitoring by third parties in attempt to “protect” Wyoming’s water from multiple use, I recommend the following policies for the land use plan:

- A.** Describe the type of monitoring that the local governments believe is necessary related to determining compliance with North Dakota water quality scientific standards;
- B.** Support consideration of the potential economic or social development in the area in which the waters are located, including all areas directly impacted by the proposed classification, prior to making any water quality classification.

Should you have any questions, please do not hesitate to contact us.