

NORTH DAKOTA STATE WATER COMMISSION

COST-SHARE POLICY, PROCEDURE, AND GENERAL REQUIREMENTS

The State Water Commission has adopted this policy to support local sponsors in development of sustainable water related projects in North Dakota. This policy reflects the State Water Commission's cost-share priorities and provides basic requirements for all projects considered for prioritization during the agency's budgeting process. Projects and studies that receive cost-share funding from the agency's appropriated funds are consistent with the public interest. The State Water Commission values and relies on local sponsors and their participation to assure on-the-ground support for projects and prudent expenditure of funding for evaluations and project construction. It is the policy of the State Water Commission that only the items described in this document shall be eligible for cost-share upon approval by the State Water Commission, unless specifically authorized by State Water Commission action.

I. DEFINITIONS AND ELIGIBILITY

- A. CONSTRUCTION COSTS** include but are not limited to, earthwork, concrete, mobilization and demobilization, dewatering, materials, seeding, rip-rap, re-routing electrical transmission lines, moving storm and sanitary sewer system and other underground utilities and conveyance systems affected by construction, irrigation supply works, and other items and services provided by the contractor. Construction costs are only eligible for cost-share if incurred after State Water Commission approval and if the local sponsor has complied with North Dakota Century Code in soliciting and awarding bids and contracts, and complied with all applicable federal, state, and local laws.
- B. ENGINEERING SERVICES** include preliminary and final engineering design including associated cultural and archeological studies, project inspections, construction contract management, material testing, flood insurance studies, hydraulic models, and geotechnical investigations. Administrative services and support services performed and charged by engineer companies are not engineering services. Engineering services are eligible costs if incurred after State Water Commission approval. If cost-share is expected to be greater than \$25,000, the local sponsor must follow the engineering selection process in NDCC 54-44.7 and provide a copy of the selection committee report to the Chief Engineer.
- C. IMPROVEMENTS** are construction related projects that upgrade a facility to provide increased efficiency or other benefits. Improvements do not include any activities that are maintenance, replacement, or reconstruction.
- D. INELIGIBLE ITEMS** will be excluded from cost-share and include but are not limited to:

- 1 Administrative, easement, and permit related costs;
- 2 Property acquisitions, property surveys, and legal expenses are ineligible items except under the Flood Recovery Grant Program or the Flood Protection Grant Program;
- 3 Projects that commence prior to a cost-share approval date, and project costs that have been incurred prior to a cost-share approval date, except for emergencies as determined by the Chief Engineer;
- 4 Project related operation, maintenance, replacement costs, and reconstruction costs;
- 5 Funding contributions provided by federal, other states, or other North Dakota state entities that supplant the project cost of the local sponsor; and
- 6 Work incurred outside the scope of the approved study or project;

E. **EXPANSIONS** are construction related projects that increase the project area served. Expansions do not include any activities that are maintenance, replacement, or reconstruction.

F. **LOCAL SPONSOR** must be a federal or state entity, a political subdivision, or a commission legislatively granted North Dakota recognition that applies necessary local funding to match State Water Commission cost-share. They provide direction for studies and projects, public point of contact for communication on public benefits and local concerns, and acquire necessary permits and rights of way.

G. **MAINTENANCE COSTS** include, but are not limited to, repairs and general upkeep of facilities, including deferred repairs, to allow facilities to continue proper operation and function.

H. **PROJECT** is the water-related construction activity.

I. **REPLACEMENT AND RECONSTRUCTION COSTS** include, but are not limited to, the removal of portions of facilities or components that have completed their useful life and substitution with different components to obtain the same or similar function of the original facilities or components.

J. **SUSTAINABLE OPERATION, MAINTENANCE, AND REPLACEMENT PLAN** is a description of the anticipated operation, maintenance, and capital replacement costs with a statement of the operation, maintenance, and replacement of the project will be sustainable by the local sponsor.

II. COST-SHARE APPLICATION AND APPROVAL PROCEDURES. The State Water Commission will not consider any request for cost-share of water related projects or studies unless an application is first made to the Chief Engineer by the local sponsor. No funds shall be used in violation of the Anti-Gift Clause of the North Dakota Constitution.

A. APPLICATION REQUIRED. An application for cost-share must be submitted by the local sponsor on the State Water Commission Cost-Share Request form. The application form is maintained and updated by the Chief Engineer and must include the following:

- 1 Category of cost-share activity
- 2 Location of the proposed project or study area
- 3 Description, purpose, goal, objective, narrative of the proposed activities
- 4 Delineation of costs
- 5 Potential federal or other state entity cost-share participation
- 6 Preliminary designs, if applicable
- 7 Status of required permitting
- 8 Potential territorial service area conflicts, if applicable
- 9 Sustainable operation, maintenance, and replacement plan for the project
- 10 Additional information as deemed appropriate by the Chief Engineer

Applications for cost-share are separate and distinct from the State Water Commission biennial project information collection effort that is part of the budgeting process. An application for cost-share is required in all cases. All local sponsors are encouraged to submit projects and studies needs during the budgeting process. Unless determined to be an emergency that directly impacts human health and safety, or that is a direct result of a natural disaster, requests submitted after the budgeting process may be held until action can be taken on applications that were included during budgeting.

Applications for cost-share are accepted at any time. Applications received 30 days or less before a State Water Commission meeting will not be considered at that meeting, and will be held for consideration at a future meeting.

B. PRE-APPLICATION. A pre-application process is allowed when cost-share assistance is being requested for an assessment project. This process will require the applicant to submit a brief narrative of the project, preliminary designs, and a delineation of costs. The Chief Engineer will then review the material presented, make a determination of project eligibility, and estimate the cost-share funding the project might anticipate receiving. A determination-of-eligibility letter will then be sent to the applicant noting the percentage of cost-share assistance that may be expected on eligible items as well as listing those items that are not considered to be eligible costs. In addition, the letter will state that the Chief Engineer will recommend approval when all cost-share requirements are addressed. The applicant may use the determination of eligibility letter to develop a project budget for use in the assessment voting process. Upon completion of the assessment vote and all other requirements an application for cost-share can be submitted.

C. REVIEW. Upon receiving an application for cost-share, the Chief Engineer shall review the application and accompanying information. If the Chief Engineer is satisfied that the proposal meets all requirements, the Chief Engineer shall present the application along with a recommendation to the State Water Commission for their action. The Chief Engineer's review of the application will include the

following items, and any other considerations that the Chief Engineer deems necessary and appropriate.

- 1 Applicable engineering plans and specifications;
- 2 Field inspection, if deemed necessary by the Chief Engineer;
- 3 The percentage and limit of proposed cost-share determined by category of cost-share activity and eligible expenses;
- 4 Assurance of sustainable operation, maintenance, and replacement of project facilities by the local sponsor;
- 5 Status of permitting and service area agreements;
- 6 Available funding in the State Water Commission budget, and budget priorities.

The Chief Engineer is authorized to cost-share up to \$50,000 and also approve cost overruns up to \$50,000 without State Water Commission action.

D. NOTICE. The Chief Engineer shall give notice to local sponsors when their application for cost-share is placed on the tentative agenda of the State Water Commission's next meeting.

E. AGREEMENT AND DISTRIBUTION OF FUNDS. No funds will be disbursed until the State Water Commission and local sponsor have entered into an agreement for state cost-share participation. No agreement will be entered until all required State Engineer permits have been acquired.

For construction projects, the agreement will specify that the local sponsor shall require all project contractors and service providers to agree to defend, indemnify and hold harmless the local sponsor and the state from any and all vicarious and other derivative claims that arise out of the contractor's performance under the agreement, except for claims based upon the local sponsor or state's own direct active acts of negligence, sole negligence or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. The local sponsor shall require that the local sponsor and the state be made an additional insured on the contractor's commercial general liability policy including any excess policies, to the extent applicable. The levels and types of insurance required in any contract shall be reviewed and concurred by the Chief Engineer. The local sponsor may not agree to any provision which limits or purports to limit the liability of a contractor or in which the local sponsor agrees to indemnify a contractor.

The Chief Engineer may make partial payment of cost-sharing funds as deemed appropriate. Upon notice by the local sponsor that all work or construction has been completed, the Chief Engineer may conduct a final field inspection. If the Chief Engineer is satisfied that the work has been completed in accordance with the agreement, the final payment will be disbursed to the project sponsor, less any partial payment previously made.

F. LITIGATION. If a project submitted for cost-share is the subject of litigation, the application may be deferred until the litigation is resolved. If a project approved for cost-share becomes the subject of litigation before all funds have been disbursed, the Chief Engineer may withhold such funds until the litigation is resolved.

III. COST-SHARE CATEGORIES. The State Water Commission will support the following cost-share categories based on percentages described in this section. Engineering services for all categories may be eligible for cost-share up to 35 percent.

A. PRE-CONSTRUCTION EXPENSES. The State Water Commission supports local sponsor development of feasibility studies, mapping, and engineering designs as part of pre-construction activities to develop support for projects within this cost-share policy. The State Water Commission may provide cost-share up to 35 percent of the eligible items of any cost-share application for the activities listed below. Copies of the deliverables must be provided to the Chief Engineer upon completion. The Chief Engineer will determine the payment schedule and interim progress report requirements.

- 1 Feasibility studies to identify water related problems and options to solve or alleviate the problem, and evaluate the options for technical and financial feasibility to provide a recommendation and cost estimate of the best option to pursue.
- 2 Mapping and surveying to gather data for a specific task such as flood insurance studies and flood plain mapping, LiDAR acquisition, and flood imagery attainment, which are valuable to managing water resources.

B. WATER SUPPLY PROJECTS

1 WATER SUPPLY GRANT AND LOAN PROGRAM

a) The State Water Commission supports water supply efforts and will use a grant and loan program. The local sponsor may apply for water supply funding, and the application will be reviewed to determine project category. Projects within categories (1) thru (5) below may be considered for loan funding up to 50 percent of project costs, and projects within categories (1) and (2) below may be considered for grant funding of up to 60 percent cost-share in lieu of a loan.

- (1) Addresses a lack of water supply for domestic use or upgrades a water supply to primary safe drinking water act standards;
- (2) Supports expansion of a water supply system serving an area that has a 3-year average population growth in excess of 3% per year, as determined by the Chief Engineer;
- (3) Water treatment improvements to address impacts from other State Water Commission projects; grant funding to be determined based on level of impact by State Water Commission project;
- (4) Assists with improvements in service areas where the anticipated cost per user each year (based on 5,000 gallons per month), divided by the average annual median income

- per user, is in the top quartile of all similar water systems in the state, as determined by the Chief Engineer;
- (5) Addresses extraordinary repairs or replacement needs of a water supply system due to damages from a recent natural disaster.

The State Water Commission will periodically set the interest rate on the loan program, taking into consideration other loan programs. If ability to pay for local cost-share is a concern, the Chief Engineer can provide a recommendation for public finance options.

Water Depots for industrial use receiving water from facilities constructed using State Water Commission funding or loans have the following additional requirements:

- (1) Domestic water supply has priority over industrial water supply in times of shortage. This must be explicit in the water service contracts with industrial users.
- (2) If water service will be contracted, public notice of availability of the water service contracts is required.
- (3) A portion of the water supply at any depot must be available on a non- contracted basis for public access.

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2 MUNICIPAL, RURAL AND INDUSTRIAL WATER SUPPLY PROGRAM. The federal Municipal, Rural, and Industrial Water Supply Program (MR&I) is administered according to the policies, procedures, and general requirements set forth in North Dakota Administrative Code Article 89-12.

C. FLOOD CONTROL PROJECTS. The State Water Commission may provide cost-share for eligible items of approved flood control projects protecting communities from flooding and may include the repair of dams that provide a flood control benefit.

- 1 FLOOD RECOVERY PROPERTY ACQUISITION GRANT PROGRAM.** This program is used to assist local sponsors with flood recovery expenses that provide long term flood damage reduction benefits through purchase and removal of structures. All contracted costs directly associated with the acquisition will be considered eligible for cost-share. Contracted costs may include: appraisals, legal fees (title and abstract search/update, property survey, closing costs, etc.), hazardous materials abatement needs (asbestos, lead paint, etc.), and site restoration.

The State Water Commission may provide cost-share of the eligible costs of approved flood recovery expenses that provide long term flood reduction benefits based on the following criteria and priority order:

- a) Local Sponsor has flood damage and property may be needed for construction of temporary or long-term flood control projects, may be cost-shared up to 75 percent.

- b) Local Sponsor has flood damage and property would increase conveyance or provide other flood control benefits, may be cost-shared up to 60 percent.

Prior to applying for assistance, the applicant shall adopt and provide to the Chief Engineer an acquisition plan (similar to plans required by Hazard Mitigation Grant Program (HMGP)) that includes the description and map of properties to be acquired, the estimated cost of property acquisition including contract costs, removal of structures, the benefit of acquiring the properties, and information regarding the ineligibility for HMGP funding. Property eligible for HMGP funding is not eligible for this program. The acquisition plan must also include a description of how the applicant will insure there is not a duplication of benefits.

Over the long-term development of a flood control project, following a voluntary acquisition program, the applicant's governing body must officially adopt a flood risk reduction plan or proposal including the flow to be mitigated. The flow used to develop the flood risk reduction plan must be included in zoning discussions to limit new development on other flood-prone property. An excerpt of the meeting minutes documenting the local sponsor's official action must be presented to the State Water Commission.

Eligible applicants must fund the local cost-share for acquisitions. Local cost-shares will not be waived. Federal funds are considered "local" for this program if they are entirely under the authority and control of the sponsoring entity.

The applicant shall include a perpetual restrictive covenant similar to the restrictions required by the federal HMGP funding with the additional exceptions being that the property may be utilized for flood control structures and related infrastructure, paved surfaces, and bridges. These covenants must be recorded either in the deed or in a restrictive covenant that would apply to multiple deeds.

The applicant shall provide justification acceptable to the Chief Engineer describing the property's ineligibility to receive federal HMGP funding. This is not meant to require submission and rejection by the federal government, but rather an explanation of why the property would not be eligible for federal funding. Example explanations include: permanent flood control structures may be built on the property; project will not achieve required benefit/cost analysis to support HMGP eligibility; or lack of available HMGP funding. If inability to receive federal funding is not shown to the satisfaction of the Chief Engineer, following consultation with the North Dakota Department of Emergency Services, the request for costs-share will be returned to the applicant for submittal for federal funding prior to use of these funds.

- 2 FLOOD PROTECTION PROJECT GRANT PROGRAM.** This program supports local sponsor efforts to prevent future property damage due to flood events. The State Water Commission may provide cost-share grants for up to 50 percent of eligible costs. Property acquisition, not eligible for HMGP funding, within the footprint of a project may be an eligible cost under this program.

Engineering design must be completed before any grants are approved. Local cost-share must be provided on a timely basis. For projects with no federal participation, the cost-share may be up to 60 percent.

- 3 FEMA LEVEE SYSTEM CERTIFICATION ANALYSES AND REPORTS.** The State Water Commission may provide cost-share up to 60 percent for eligible services for FEMA 44 CFR 65.10 flood control/reduction levee system certification analysis. The analysis is required for FEMA to accredit the levee system for flood insurance mapping purposes. Typical eligible costs include site visits and field surveys to include travel expenses, hydraulic evaluations, closure evaluations, geotechnical evaluations, embankment protection, soils investigations, interior drainage evaluations, internal drainage hydrology and hydraulic reports, system modifications, break-out flows and all other engineering services required by FEMA. Ineligible costs include project administration; data and document gathering; maintenance and operations plans and updates; services to recreate required documents/plans that have not been developed; and emergency warning systems implementation. The analysis will result in a comprehensive report to be submitted to FEMA and the Chief Engineer.

- 4 DAM SAFETY AND EMERGENCY ACTION PLANS.** The State Water Commission supports dam safety including repairs and removals, as well as emergency action plans. The State Water Commission may provide cost-share for up to 65 percent of the eligible items for dam safety repair projects and dam breach or removal projects. Dam safety repair projects that are funded with federal or other agency funds may be cost-shared up to 50 percent of the eligible non-matched costs. The intent of these projects is to return the dam to a state of being safe from the condition of failure, damage, error, accidents, harm or other events that are considered non-desirable.

The State Water Commission may provide cost-share up to 80 percent, limited to \$25,000, for emergency action plans (EAPs) of each dam classified as high or medium/significant hazard dam. The cost of a dam break model is only eligible for reimbursement for dams classified as a high hazard.

- 5 WATER RETENTION PROJECTS.** The goal of water retention projects is to reduce flood damages by storing floodwater upstream of areas prone to flood damage. The State Water Commission may provide cost-share up to 50 percent of eligible costs for flood retention projects. Water retention structures constructed with State Water Commission cost-share must meet state dam safety requirements, including the potential of cascade failure. A hydrologic analysis, including the operation plan, quantifying the flood reduction benefits for 25, 50, and 100-year events must be submitted with the cost-share application.
- 6 SNAGGING & CLEARING PROJECTS.** Snagging and clearing projects consist of the removal and disposal of fallen trees and associated debris encountered within or along the primary channel as well as any sediment that has accumulated in the immediate vicinity and any trees in imminent danger of falling in the channel. Snagging and clearing projects are intended to prevent damage to structures such as bridges, and maintain the hydraulic capacity of the channel during flood flows. The State Water Commission may provide cost-share for up to 50 percent of the eligible items for snagging and clearing on watercourses as

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defined in NDCC 61-01-06. Items that are not eligible include snagging and clearing of artificial/man-made channels; the dredging of watercourses for sediment/silt removal; the clearing and grubbing of cattails and other plant vegetation; or the removal of any other unwanted materials.

D. RURAL FLOOD CONTROL PROJECTS. The primary purpose of rural flood control projects is to manage runoff or drainage from agricultural sources or to provide flood control in a rural setting. Typically, rural flood control projects consist of drains, channels, diversion ditches, or ring dikes. Items that are not eligible include projects that are managing runoff or drainage from residential or urban sources.

1 DRAINS, CHANNELS, DIVERSION DITCHES. These projects are intended to improve the drainage and management of runoff from agricultural sources. The State Water Commission may provide cost-share up to 45 percent of the eligible items for the construction of drains, channels, and diversion ditches. Expansions may be cost-shared on the basis of increased drainage capacity achieved or increased area served. The cost-share of any one project is capped per biennium. County and township road crossing work that is an integral part of the drains, channels, and diversion ditches and the appropriate costs per the awarded contract bid are eligible for cost-share. A water resource district applying for cost-share for a rural assessment-based flood control project must comply with regulatory statutes per the North Dakota Century Code. If an assessment-based rural flood control project involves multiple districts, each district involved must join in the application for financial assistance.

Cost-share requests for rural assessment drains will only be processed after the assessment vote has passed, the final design is complete, and a drain permit has been obtained. If the local sponsor wishes to submit a cost-share request prior to completion of the aforementioned steps, a pre-application process will be followed.

Once the assessment vote has passed, the final design is complete, and the drain permit has been issued, a request for cost-share assistance may be submitted to the Chief Engineer who will then present the request to the State Water Commission for their consideration.

2 RING DIKES. This program is intended to protect individual rural homes and farmsteads. All ring dikes within the program are subject to the Commission's Individual Rural/Farmstead Ring Dike Criteria provided in Attachment A. Protection of a city, community or development area does not fall under this program, but may be eligible for the flood control program. The State Water Commission may provide up to 60 percent cost-share of eligible items for ring dikes, limited to a maximum cost-share of \$40,000. Landowners enrolled in the Natural Resource Conservation Service's (NRCS) Environmental Quality Incentive Program (EQIP) who intend to construct rural or farmstead ring dikes that meet the State Water Commission's elevation design criteria are eligible for a cost-share reimbursement of 20 percent of the NRCS construction payment,

limited to a combined NRCS and State Water Commission contribution of 80 percent of eligible project costs.

- E. **RECREATION PROJECTS.** The State Water Commission may provide cost-share up to 40 percent for projects intended to provide water-based recreation. Various types of projects may constitute a recreation project.
- F. **IRRIGATION.** The State Water Commission may provide cost-share for up to 50 percent of the eligible items for irrigation projects. The items eligible for cost-share are those associated with new central supply works, to include water storage facilities, intake structures, wells, pumps, power units, primary water conveyance facilities, and electrical transmission and control facilities.
- G. **BANK STABILIZATION.** The State Water Commission may provide cost-share up to 50 percent of eligible items for bank stabilization projects on public lands or those lands under easement by federal, state, or political subdivisions. Bank stabilization projects are intended to stabilize the banks of lakes or watercourses, as defined in 61-01-06 of the NDCC, with the purpose of protecting public facilities. Drop structures and outlets are not considered for funding as bank stabilization projects, but may be eligible under other cost-share program categories. Bank stabilization projects typically consist of a rock or vegetative design, and are intended to prevent damage to utilities, roads, buildings or other facilities adjacent to a lake or watercourse.

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ATTACHMENT A
INDIVIDUAL RURAL/FARMSTEAD RING DIKE CRITERIA

MINIMUM DESIGN CRITERIA

- **HEIGHT:** The dike must be built to an elevation 2 ft above either the 100-year flood or the documented high water mark of a flood event of greater magnitude, whichever is greater.
- **TOP WIDTH:** If dike height is 5 ft or less: 4 ft top width
If dike height is between 5 ft and 14 ft: 6 ft top width
If dike height is greater than 14 ft: 8 ft top width
- **SIDE SLOPES:** 3 horizontal to 1 vertical
- **STRIP TOPSOIL AND VEGETATION:** 1 ft
- **ADEQUATE EMBANKMENT COMPACTION:** Fill in 6-8 inch layers, compact with passes of equipment
- **SPREAD TOPSOIL AND SEED ON RING DIKE**

LANDOWNER RESPONSIBILITY

Landowners are responsible to address internal drainage on ring dikes. If culverts and flap gates are installed, these costs are eligible for cost-share. The landowner has the option of completing the work himself or hiring a contractor to complete the work.

If contractor does the work, payment is for actual costs with documented receipts.

If landowner does the work, payment is based on the following unit prices:

- **STRIPPING, SPREADING TOPSOIL, AND EMBANKMENT FILL:** Chief Engineer will determine rate schedule based on current local rates
- **SEEDING:** Cost of seed times 200%
- **CULVERTS:** Cost of culverts times 150%
- **FLAP GATES:** Cost of flap gates times 150%

OTHER FACTS AND CRITERIA

- The topsoil and embankment quantities will be estimated based on dike dimensions. Construction costs in excess of the 3:1 side slope standard will be the responsibility of the landowner. Invoices will be used for the cost of seed, culverts, and flap gates.
- Height can be determined by existing FIRM data or known elevations available at county floodplain management offices. Engineers/surveyors may also assist in establishing height elevations.
- The projects will not require extensive engineering design or extensive cross sections.
- A dike permit is required if the interior volume of the dike consists of 50 acre-feet, or more.

COST-SHARE POLICY, PROCEDURE, AND GENERAL REQUIREMENTS

It is the policy of the State Water Commission that the following categories of projects shall be eligible for cost-sharing, and that the projects are consistent with the public interest to receive cost-share funding from the agency's appropriated funds. Projects that receive Federal Emergency Management Agency funding and/or financial support from the State's Division of Emergency Management Fund are not eligible for funding through the State Water Commission. No funds shall be used in violation of the Anti-Gift Clause of the North Dakota Constitution.

ELIGIBLE ITEMS

It is the policy of the State Water Commission that the following items shall be eligible for cost-sharing upon approval by the State Water Commission:

- I. Construction costs, which include but are not limited to, earthwork, concrete, mobilization and demobilization, dewatering, materials, seeding, rip-rap, re-routing electrical transmission lines, moving storm and sanitary sewer systems, and other underground utilities and conveyance systems, irrigation supply works, and other items and services provided by the contractor. The costs must have been incurred after the cost-share approval date, except for emergencies as determined by Chief Engineer.

The eligibility of certain items for cost-share may be addressed on an individual basis.

NON-ELIGIBLE ITEMS

It is the policy of the State Water Commission that the following items shall not be eligible for cost-sharing by the State Water Commission:

- I. Engineering services (not applicable to "*Studies, Reports, Analyses, Surveys, Models, Assessments, Mapping*") to include but not limited to, project development, preliminary and final engineering design, project inspections, contract administration, material testing, preliminary analysis, flood insurance studies, cultural and archeological studies, hydraulic models, soils investigations, and surveying.

Note: In the event of an approved exception to allow engineering services as eligible, preliminary engineering costs preceding the cost-share approval date up to a maximum of two years will be considered eligible. Final engineering costs incurred after the cost-share approval date will be considered eligible.

- II. Acquisition of property interests in fee or easement for projects.
- III. Administrative and legal expenses incurred in connection with any project.
- IV. Maintenance, deferred maintenance, repairs. Maintenance work and deferred maintenance on any project shall not be an eligible item for cost-sharing, except for maintenance that may be required as a result of an unusual climatological event or dam safety repairs.
- V. Projects that do not receive cost-share approval prior to the commencement of the Project, except for emergencies as determined by Chief Engineer.

- VI. Construction costs incurred prior to cost-share approval.
- VII. Funding contributions provided by other entities that reduce the project cost to the applicant.
- VIII. Work incurred outside the scope of the project.
- IX. Technical assistance provided as in-kind may not be submitted for cost-share reimbursement.

The eligibility of certain items for cost-share may be addressed on an individual basis.

COST-SHARE APPLICATION AND APPROVAL PROCEDURES

It is the policy of the State Water Commission to provide cost-share funding for water development projects. The Chief Engineer has the authority to cost-share up to \$50,000 without State Water Commission action. Projects estimated in excess of \$50,000 must be presented to the State Water Commission for approval. The Chief Engineer is authorized to approve cost overruns up to \$50,000.

The following are general cost-share application procedures and requirements for State Water Commission and Chief Engineer approval:

- I. APPLICATION REQUIRED. The State Water Commission will not consider any request for cost-sharing for water-related projects unless an application is first made to the Chief Engineer. The applicant must be a federal or state entity, a political subdivision, or a commission legislatively granted North Dakota recognition.
- II. PERMITS. The applicant for cost-sharing must also address the appropriate federal, state, and local permits required. No contract will be initiated until all required permits have been issued.
- III. PRE-APPLICATION. A pre-application process is allowed when cost-share assistance is being requested for an assessment drain. Please see Drains, Channels, Diversion Ditches for more details.
- IV. CONTENTS OF APPLICATION. An application for cost-sharing must be in writing, but is not required to be in a prescribed format. A "North Dakota State Water Commission Project Information and Cost-Share Request Form" is available from the Commission upon request. The application must include the following:
 - A. Description and location of the proposed project
 - B. Purpose, goal, objective/narrative of the proposed project
 - C. Delineation of costs
 - D. Preliminary designs, if applicable
 - E. Scope of work for an engineering feasibility study
 - F. Additional information as deemed appropriate by the Chief Engineer
- V. REVIEW. Upon receiving an application for cost-sharing, the Chief Engineer shall review the application and accompanying information. If the Chief Engineer is satisfied

that the proposal meets all the requirements, the Chief Engineer shall present the application to the State Water Commission for approval (for projects where the state cost-share amount is greater than \$50,000), or he may make a determination for approval (state cost-share amount is \$50,000 or less). The Chief Engineer's review of the application will include the following items, and any other considerations that the Chief Engineer deems necessary and appropriate.

- A. If the application for cost-sharing is for project construction, a field inspection will be made, if deemed necessary by the Chief Engineer. Previous field inspections made by the Chief Engineer as part of a permit application may satisfy this requirement.
 - B. Engineering plans and specifications will be reviewed.
 - C. If the request is for a study, the Chief Engineer will review the application to ensure that the study qualifies as an eligible study as defined by the State Water Commission.
 - D. The amount of eligible cost-share will be determined by the project type or the amount requested by the applicant.
- VI. NOTICE & APPEARANCE OF THE APPLICANT. For projects with an excess state cost-share amount of \$50,000, the Chief Engineer shall place the application for cost-sharing on the tentative agenda of the State Water Commission meeting at which the application will be presented. The Chief Engineer shall give notice to such applicant when the project will be presented to the State Water Commission.
- VII. CHIEF ENGINEER'S RECOMMENDATION. The Chief Engineer will make a recommendation to the State Water Commission on an application in excess of \$50,000 for state cost-sharing at the meeting of the commission when such application for cost-sharing is presented for approval. No funds will be disbursed until the State Water Commission and applicant(s) have entered into a contract for state cost-share participation.
- VIII. LITIGATION. If a project for which an application for cost-sharing has been submitted is the subject of litigation, the application may be deferred until the litigation is resolved. If a project for which the State Water Commission or Chief Engineer has approved a cost-sharing request becomes the subject of litigation before the funds approved by the Commission have been disbursed, the Chief Engineer may withhold such funds until the litigation is resolved.
- IX. ENGINEERING DESIGNS, PLANS & SPECIFICATIONS. Engineering designs, plans, and specifications for the construction of a project must be approved by the Chief Engineer. The applicant/project sponsor must also comply with the North Dakota Century Code in the soliciting and awarding of bids and contracts, and all federal, state, and local laws.
- X. COST SHARING BY OTHER AGENCIES. All applications for cost-sharing shall be reviewed to determine if other local or state agencies are participating in the project costs. If so, the State Water Commission will take this into account, and may reduce the percentage of commission cost-sharing accordingly.

- XI. **PARTIAL & FINAL PAYMENTS** The Chief Engineer may make partial payment of cost-sharing funds as deemed appropriate. Upon notice by the applicant/project sponsor that all work or construction has been completed, the Chief Engineer may conduct a final field inspection. If the Chief Engineer is satisfied that construction has been completed in accordance with the designs, plans and specifications for the project, the final payment for cost-sharing as approved by the State Water Commission shall be disbursed to the project sponsor, less any partial payment previously made.
- XII. **MAINTENANCE AND REPAIRS.** Except as otherwise provided, the State Water Commission shall require that the applicant for cost-sharing be responsible for maintenance and repairs of the project.

PROJECTS ELIGIBLE FOR COST-SHARE

- I. *Rural Flood Control Projects.* The primary purpose of rural flood control projects is to manage runoff/drainage from agricultural sources or to provide flood control in a rural setting. Typically, rural flood control projects consist of drains, channels, diversion ditches, or ring dikes. The State Water Commission has established design criteria for rural flood control projects. Projects that are managing runoff/drainage from urban sources are not eligible for State Water Commission cost-share participation.
- A. Drains, Channels, Diversion Ditches. The Commission will provide cost-sharing up to 45 percent of the eligible items for the construction of drains, channels, and diversion ditches. Improvement reconstructions are reimbursed at 45 percent. The cost-share of any one project is capped per biennium. County and township road crossing work that are an integral part of the drains, channels, and diversion ditches and the appropriate costs per the awarded contract bid are eligible for cost-share. A Water Resource District applying for cost-sharing for a rural assessment-based flood control project must comply with regulatory statutes per the North Dakota Century Code. If an assessment-based rural flood control project is to be established within two or more districts, or the project is sponsored by two or more districts, and financial participation is sought from the State Water Commission, each district involved must join in the application for financial assistance.

Cost share requests for rural assessment drains will only be processed after the assessment vote has passed, the final design is complete, and a drain permit has been obtained. If an eligible entity wishes to submit a cost share request prior to completion of the aforementioned steps a pre-application process will be followed.

The pre-application process will require the applicant to submit a brief narrative of the project, preliminary designs, and a delineation of costs. The Chief Engineer and staff will then review the material presented, make a determination of project eligibility, and estimate the cost share funding the project might anticipate receiving. A determination-of-eligibility letter will then be sent to the applicant noting the percentage of cost share assistance that may be expected on eligible items as well as listing those items, which are not considered to be eligible costs. In addition, the letter will state that the Chief Engineer will recommend approval when all cost share requirements are addressed. The applicant may use the

determination-of-eligibility letter to develop a project budget for use in the assessment voting process.

Once the assessment vote has passed, the final design is complete, and the drain permit has been issued a request for cost share assistance can be submitted to the Chief Engineer who will then present the request to the State Water Commission for their consideration.

B. Ring Dikes. A ring dike program shall be developed and sponsored by a federal, state, or political subdivision consisting of one or more occupied farmsteads and/or rural residences. Ring dikes will receive up to a 60 percent cost-share of the eligible items, limited to a maximum of \$40,000 per ring dike. All ring dikes within the program are subject to the Commission's minimum design criteria standards, eligible items, and costs.

Design Criteria: The height is to be constructed greater of 2 ft. above the 1997 flood (or greater flood event if high water mark is documented) or 2 ft. above the 100-year flood. The top width is to be constructed as follows: If dike height is 5 ft. or less - 4 ft. top width, if dike height is between 5 ft. and 14 ft. - 6 ft. top width, if dike height is greater than 14 ft. - 8 ft. top width. Sides slopes constructed at 3 horizontal to 1 vertical. Strip topsoil and vegetation to a minimum of 1 foot. Adequate embankment compaction required with fill in 6 in. to 8 in. layers and compact with passes of equipment. The topsoil is to be spread and seeded. The payment schedule for work performed by the landowner is described in Attachment A.

Landowners are responsible to address internal drainage on ring dikes. If culverts and flap gates are installed, these costs are eligible for cost share.

Landowners enrolled in the Natural Resource Conservation Service's (NRCS) Environmental Quality Incentive Program (EQIP) who intend to construct rural/farmstead ring dikes meeting Commission's elevation design criteria are eligible for a cost-share reimbursement of 20 percent of the NRCS construction payment, limited to a combined NRCS and Commission contribution of 80 percent of total project costs.

- II. *Water Supply Projects.* The State Water Commission will provide cost-sharing for up to 60 percent of the eligible items of any cost-sharing application approved for water supply projects. These projects are commonly associated with dams and water retention methods. If sufficient funds are not available for all competing cost-sharing applications, water supply projects for domestic, municipal, and rural uses shall receive highest priority.
- III. *Flood Control Projects.* The State Water Commission will provide cost-sharing for up to 60 percent of the eligible items of all cost-sharing applications approved for flood control projects, except for the construction of flood retention projects which are cost-shared at 65 percent of all non-federal costs, excluding sponsor's administrative costs and applicable study project reimbursements. Flood retention costs up two years preceding the cost-share approval will be allowed. Flood control projects protect communities from flooding and may include the repair of dams that provide a flood control benefit. These projects are commonly associated with dams, dikes, levees, diversion channels, water

retention structures/methods, dam repairs, drop structures, and miscellaneous flood control programs.

- IV. *Dam Safety Projects.* The State Water Commission will provide cost-share for up to 65 percent of the eligible items of any cost-sharing application approved for dam safety repair construction projects. The cost-share percentage of 65 percent is only applicable to those dam safety repairs that do not have any other contributing partners. The local level would be responsible for 35 percent. On those dam safety repairs of which the North Dakota Game and Fish will be a third contributing party, the SWC will fund 33.33 percent, NDG&F 33.33 percent, and the local level will be at 33.33 percent. Dam safety repairs that are funded with federal funds, will be cost-shared at 50 percent of the non-federal costs. The intent of these projects is to return the dam to a state of being safe from the condition of failure, damage, error, accidents, harm or other events that are considered non-desirable.
- V. *Recreation Projects.* The State Water Commission will provide cost-sharing for up to 40 percent of the eligible items of any cost-sharing application approved for the purpose of water-based recreation. Upon proposed project review, the cost-share percentage of up to 40 percent may be adjusted to account for any contributing partners. Various types of projects may constitute a recreation project.
- VI. *Snagging & Clearing Projects.* The State Water Commission will provide cost-share for up to 50 percent of the eligible items for snagging and clearing on watercourses as defined in NDCC 61-01-06. Snagging and clearing projects consist of the removal and disposal of fallen trees and associated debris encountered within or along the primary channel as well as any sediment that has accumulated in the immediate vicinity and any trees in imminent danger of falling in the channel. Snagging and clearing projects are intended to prevent damage to structures such as bridges, and maintain the hydraulic capacity of the channel during flood flows. The snagging and clearing of artificial/man-made channels; the dredging of watercourses for sediment/silt removal; the clearing and grubbing of cattails and other plant vegetation; or the removal of any other unwanted materials are not eligible under State Water Commission's snagging and clearing cost-share policy. The Chief Engineer reserves the right to determine the eligibility of projects and the percentage of cost-share up to 50 percent.
- VII. *Studies, Reports, Analyses, Surveys, Models, Assessments, Mapping Projects.* The State Water Commission will provide cost-sharing up to 50 percent of the eligible items of any cost-sharing application approved for studies, reports, analyses, surveys, models, assessments, and mapping projects. The percentage of funds is limited by the maximum cost-share limits of eligible project categories to which the purpose of the project corresponds. Flood retention studies are limited to 50 percent and reimbursed costs will be accounted for in the applicable flood retention construction project. A paper and electronic copy of the study, report, analysis, survey, model, assessment or mapping project must be provided to the State Water Commission upon completion. Chief Engineer will determine payment schedule and interim progress report(s) requirements.
 - A. Engineering Feasibility Studies. An engineering feasibility study identifies a water-related problem and the alternatives/options to solve or alleviate the problem, an evaluation (analysis, surveys, models, assessments, reports, mapping) of the

alternatives/options for technical, engineering, and financial feasibility, and the selection of an alternative/option.

B. Mapping Products. The State Water Commission will provide cost-share up to 50 percent for projects with a purpose to gather data and/or accomplish a specific task such as, but not limited to, flood insurance studies and mapping projects, LiDAR acquisition, and flood imagery attainment that is valuable to managing water resources.

C. Emergency Action Plans (EAP's). The State Water Commission will provide cost-share up to 80 percent, limited to \$25,000, for emergency action plans (EAP's) of each dam classified as high or medium/significant hazard dam. Reimbursement per actual costs incurred. The cost of a dam break model is only eligible for reimbursement for dams classified as a high hazard.

D. FEMA Flood Control/Reduction Levee System Certification Analyses and Reports. The State Water Commission will provide cost-share up to 60 percent for eligible services for FEMA 44 CFR 65.10 flood control/reduction levee system certification analysis. Federally mandated, the analysis is required for FEMA to accredit the levee system for flood insurance mapping purposes. Typical eligible costs, limited to and as per FEMA guidelines, include site visits and field surveys to include travel expenses, hydraulic evaluations, closure evaluations, geotechnical evaluations, embankment protection, soils investigations, interior drainage evaluations, internal drainage hydrology and hydraulic reports, system modifications, break-out flows and all other engineering services as required by FEMA. Ineligible costs consist of project administration; data and document gathering; construction or reconstruction engineering designs for Levee compliance; maintenance and operations plans and updates to; services to recreate required documents/plans that have not been developed; emergency warning systems implementation; and engineering firm's indirect expenses. The analysis will result in a comprehensive report to be submitted to FEMA and the Commission. This cost-share policy is dependent upon federal funding availability and services and is subject to change.

VIII. *Irrigation.* The State Water Commission will provide cost-sharing for up to 50 percent of the eligible items of any cost-sharing application approved for irrigation projects. The cost-share must be limited to supporting the irrigation development efforts of political subdivisions. The items eligible for cost-share are those associated with new central supply works, to include water storage facilities, intake structures, wells, pumps, power units, primary water conveyance facilities, and electrical transmission and control facilities.

IX. *Bank Stabilization.* The State Water Commission will provide cost-share for up to 60 percent of eligible items of any cost-sharing application approved for bank stabilization projects on public lands or those lands under easement by federal, state, or political subdivisions. Bank Stabilization projects are intended to stabilize the banks of lakes and of watercourses, as defined in 61-01-06 of the NDCC, with the purpose of protecting public facilities. Drop structures and outlets are not considered for funding as bank stabilization projects, but may be eligible under other cost-share program categories.

Bank Stabilization projects, typically consist of a rock or vegetative design, and are intended to prevent the loss of land or damage to utilities, roads, buildings or other facilities adjacent to the lake or watercourse. The Chief Engineer reserves the right to determine the eligibility of projects and the percentage of cost-share up to 60 percent.

- X. *Technical Assistance.* The State Water Commission will provide cost-share of up to 50 percent of eligible costs based on the type of project as described above. In some cases a portion of the assistance provided may be in the form of in-kind technical assistance. The cost or value of the technical assistance will count toward the Commission's total contribution. The project sponsor, upon awarding a contract for the construction or other work to be performed for a project in which the State Water Commission is providing technical assistance, shall file a copy of the contract with the Chief Engineer.
- XI. *Emergency Municipal, Tribal, and Rural Water Supply Projects.* The State Water Commission will provide cost-share on the eligible items of any cost-share application approved for emergency municipal, tribal, and rural water supply projects. The percentage of cost-share will be calculated upon review of the application. These projects are associated water systems, whose primary source of water is the Missouri River, Lake Sakakawea, or Lake Oahe, that request emergency assistance due to low water conditions on the Missouri River, Lake Sakakawea, or Lake Oahe, and face a critical need or health risk as a result of the inability of the water intake system to supply an adequate quantity of quality water to the people served by the municipal, tribal, or rural water system.
- XIII. *Dam Removal/Breach Projects.* The State Water Commission will provide cost-share for up to 65 percent of the eligible items of any cost-sharing application approved for a dam removal/dam breach project. Upon proposed project review, the cost-share percentage of up to 65 percent may be adjusted to account for any contributing partners. Each project will be evaluated on, but not limited to, impacts to water rights; reservoir sediment disposal or stabilization, stream bank erosion; the plan for draining the reservoir; method used to breach the dam; and if applicable, sociological, ecological, and historical impacts. A North Dakota State Water Commission Dam Removal/Breach Permit is required.
- XIV. *Municipal, Rural, and Industrial Water Supply Program.* The Municipal, Rural, and Industrial Water Supply Program (MR&I) is administered according to the policies, procedures, and general requirements set forth in North Dakota Administrative Code Article 89-12.

FLOODWAY PROPERTY ACQUISITION COST-SHARE POLICY

- The State Water Commission (SWC) will provide cost share to cities or counties for acquisition of property in floodways to provide long-term flood reduction benefits that compliments, but does not duplicate, federal funding of flood mitigation projects. *This Floodway Property Acquisition Cost-Share Policy will supersede the remainder of the cost-share policy in the event there is any conflict.*
- On any acquisitions cost shared by the SWC, the property must not be eligible for federal Hazard Mitigation Grant Program (HMGP) funding. For the purpose of this policy, floodway is defined as the area needed to convey floodwaters. It does not refer to a specific return period flood. Use of the terms Individual Assistance

and HMGP refers to federal cost share programs through the Federal Emergency Management Agency (FEMA), not programs under this cost share policy.

- Prior to applying for assistance, the applicant shall adopt and provide to the SWC an acquisition plan (similar to plan required by HMGP) that includes the description and map of properties to be acquired, the estimated cost of property acquisition including contract costs, removal of structures, the benefit of acquiring the properties, and information regarding the ineligibility for HMGP funding. This plan must also include a description of how the applicant will insure there is not a duplication of benefits.
- Over the long-term development of a flood control project, following a voluntary acquisition program, the applicant's governing body must officially adopt a flood risk reduction plan or proposal including the flow to be mitigated. The flow used to develop the flood risk reduction plan must be included in zoning discussions to limit new development on other flood-prone property. An excerpt of the meeting minutes documenting the applicant's official action must be presented to the SWC.
- Eligible applicants must fund the local cost share for acquisitions. Local cost shares will not be waived. Disaster Community Development Block Grant funding may be used for local cost share and will not be considered as federal funds.
- The SWC cost shares are identified as follows:
 1. SWC cost share for applicant's acquisition of property for potential temporary or permanent flood control projects in counties designated for FEMA Individual Assistance in 2011 with the addition of Ransom County shall not exceed 75%.
 2. SWC cost share for applicant's acquisition of property that will provide additional conveyance (Open Space) but will not be protected by a proposed flood control project, in counties designated for FEMA Individual Assistance in 2011 with the addition of Ransom County, shall not exceed 60%.
 3. SWC cost share for all other applicants shall not exceed 50%.

Purchase and removal of structures are eligible acquisition costs. All contracted costs directly associated with the acquisition will be considered eligible for cost share. Contracted costs may include: appraisals, legal fees (title and abstract search/update, property survey, closing costs, etc.), hazardous materials abatement needs (asbestos, lead paint, etc.), and site restoration. Salary and administrative costs incurred by the local sponsor shall not be cost shared.

- The applicant shall include a perpetual restrictive covenant similar to the restrictions required by the federal HMGP funding with the additional exceptions being that the property may be utilized for flood control structures and related

infrastructure, paved surfaces, and bridges. These covenants must be recorded either in the deed or in a restrictive covenant that would apply to multiple deeds.

- The applicant shall provide justification acceptable to the SWC describing the property's ineligibility to receive federal HMGP funding. This is not meant to require submission and rejection by the federal government, but rather an explanation of why the property would not be eligible for federal funding. Example explanations include: permanent flood control structures may be built on the property; project will not achieve required benefit/cost analysis to support HMGP eligibility; or lack of available HMGP funding. If inability to receive federal funding is not shown to the satisfaction of the SWC, following the SWC's consultation with the North Dakota Department of Emergency Services, the requests for costs share will be returned to the applicant for submittal for federal funding prior to use of these funds.
- The SWC must vote to approve the funding allocation toward all floodway acquisition cost share requests. The Chief Engineer, or designee, will approve the specific payments under the funding allocation. Assistance pursuant to this policy will be limited by SWC's determination of funding availability.
- Highest priority for these funds shall be given to counties that qualified for FEMA Individual Assistance in 2011 with the addition of Ransom County, in the following order:
 1. Property has flood damage and may be needed for construction of long-term flood control projects.
 2. Property has flood damage and may be needed for construction of temporary flood control projects.
 3. Property has flood damage and would increase conveyance or provide other flood control benefits.
 4. Property **does not** have flood damage but may be needed for construction of long-term flood control project.
 5. Property **does not** have flood damage but may be needed for construction of temporary flood control projects.

The SWC recognizes additional areas still recovering from prior floods may also require assistance.

Property in counties that qualified for FEMA Individual Assistance in 2009 but not in 2011 will be considered as priority 6 through 10, in the same order as outlined for priorities 1 through 5 above.

Property in counties that did not qualify for FEMA Individual Assistance in either 2009 or 2011 will be considered as priority 11 through 15, in the same order as outlined for priorities 1 through 5 above.

Cost share policy for construction of permanent flood control on the property acquired is not addressed under this section.

ATTACHMENT A

NDSWC INDIVIDUAL RURAL/FARMSTEAD RING DIKE MINIMUM DESIGN CONSTRUCTION CRITERIA

Minimum Design Criteria

Height: The greater of 2 ft. above the 1997 flood (or greater flood event if high water mark is documented) or 2 ft. above the 100-year flood

Top Width:

If dike height is 5 ft or less: 4 ft. top width

If dike height is between 5 ft. and 14 ft: 6 ft. top width

If dike height is greater than 14 ft.: 8 ft. top width

Side Slopes: 3 horizontal to 1 vertical

Strip topsoil and vegetation: 1 ft.

Adequate embankment compaction:

Fill in 6 inch to 8 inch layers

Compact with passes of equipment

Spread topsoil and seed on ring dike

Landowners are responsible to address internal drainage on ring dikes. If culverts and flap gates are installed, these costs are eligible for cost share.

The landowner has the option of completing the work himself or hiring a contractor to complete the work.

If a contractor does the work, payment is for actual costs, per the bid/contract/quote.

If a landowner does the work, payment is based on the following unit prices:

<i>Stripping and spreading topsoil:</i>	\$0.40 per square yard
<i>Embankment fill:</i>	\$3.18 per cubic yard
<i>Seeding:</i>	Cost of seed times 200%
<i>Culverts:</i>	Cost of culverts times 150%
<i>Flap gates:</i>	Cost of flap gates times 150%

The topsoil and embankment quantities will be estimated based on dike dimensions. Invoices will be used for the cost of seed, culverts, and flap gates.

Height can be determined by existing FIRM data or known elevations available at county floodplain management offices. Engineers/surveyors may also assist in establishing height elevations.

The projects will not require extensive engineering design. Extensive cross sections will not be required.

A dike permit will be required if the interior volume of the dike consists of 50 acre-feet, or more.

Reimbursement is limited to 60% of the actual incurred eligible costs, a maximum of \$40,000 per ring dike, and minimum design criteria. This ring dike program is intended to protect individual rural homes and farmsteads. Protection of a community, city, or development area does not fall under this program. See flood control.

Landowners enrolled in the Natural Resource Conservation Service's (NRCS) Environmental Quality Incentive Program (EQIP) who intend to construct individual rural/farmstead ring dikes also meeting Commission's minimum design criteria are eligible for a cost-share reimbursement of 20 percent of the NRCS construction payment.

State Water Commission Water Supply Cost Share Policy

Effective date of June 13, 2012

1. Water Depots for industrial use receiving water from facilities constructed using SWC funding or loans have the following additional requirements:
 - A. Domestic water supply has priority over Industrial water supply in times of shortage. This must be explicit in the water service contracts with industrial users.
 - B. If water service will be contracted, public notice of availability of the water service contracts is required.
 - C. A portion of the water supply at any depot must be available on a non-contracted basis for public access.
2. The SWC will not provide written consent to sell, lease, abandon, encumber, or otherwise dispose of any part of the property used by the WAWS Authority, without a public competitive request for proposal/selection process
3. Water Treatment and Regional Water Supply Project construction funding or loans from the SWC have the following additional requirements:
 - A. Bidding and procurement will follow NDCC 48-01.2 and NDCC 54-44.7
 - B. The political subdivision shall require all project contractors and service providers to agree to defend, indemnify and hold harmless the political subdivision and the state from any and all vicarious and other derivative claims that arise out of the contractor's performance under the agreement, except for claims based upon the political subdivision or state's own direct active acts of negligence, sole negligence or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. The political subdivision shall require that the political subdivision and the state be made an additional insured on the contractor's commercial general liability policy including any excess policies, to the extent applicable. The levels and types of insurance required in any contract shall be reviewed and concurred by the Chief Engineer. The political subdivision may not agree to any provision which limits or purports to limit the liability of a contractor or in which the political subdivision agrees to indemnify a contractor.