

Testimony
Budget Section
Tuesday, December 13, 2011
North Dakota Department of Health

Chairman Grindberg and members of the Budget Section, my name is L. David Glatt, Chief of the Environmental Health Section for the North Dakota Department of Health (Department). The Department is responsible for the implementation and oversight of many of the environmental protection programs in the state, including directing programs under the Clean Air Act (CAA).

During the 2011 legislative session, the Department was appropriated \$1 million for the purpose of defraying expenses associated with legal action against the U.S. Environmental Protection Agency (EPA). Pursuant to Section 5 of House Bill 1004, the Department is required to present a quarterly financial and project status update to this committee on actions associated with the litigation.

Financial Update: To date, a total of \$152,784 has been reimbursed from the funds allocated to the Department to pursue legal action against the Environmental Protection Agency as part of actions taken under the CAA. Additional expenses are not known at this time and are dependent on the direction litigation takes.

The Department is currently working with the Attorney General's Office and Moye White, LLP, of Denver to address the following legal challenges:

- **Sulfur Dioxide (SO₂) 1 hour Standard**

The EPA has proposed to implement a 1 hour SO₂ ambient air quality standard that, based upon language in the rule preamble, would require states to utilize predictive air quality models to determine compliance. North Dakota, along with four other states, has challenged the rule in its current form claiming the modeling requirement 1) is not allowed under the CAA; 2) is a departure from the historical practice of using monitoring data to determine compliance; and 3) was not appropriately vetted in a public forum. Based upon actual documented air quality performance, the state is concerned that model use, without consideration of appropriate air quality monitoring data, can result in the over-prediction of actual air quality conditions. The mischaracterization of air quality can result in the installation of unnecessary and expensive pollution control equipment. Since our last report, the state has participated in the following:

- EPA has solicited public comment on a draft guidance document titled "Guidance for 1 hour SO₂ NAAQS SIP Submissions." North Dakota, along with several other states, has provided comment challenging EPA in the following areas: 1) their proposal to utilize predictive air quality models to

determine compliance, 2) their desire to treat unclassifiable determinations the same as non-attainment determinations, and 3) the time allowed for states to submit air quality determinations.

- The state will also submit legal briefs to the District of Columbia Circuit Court indicating that EPA has not conducted required public review and comment on the modeling protocol and methods. Oral arguments in this case are scheduled for May 3, 2012, in the D.C. Circuit Court.

- **Best Available Control Technology (BACT)**

The federal Department of Justice in cooperation with the Environmental Protection Agency has challenged a state BACT determination made pursuant to a consent decree involving the Minnkota Power Cooperative (Minnkota), the EPA, the Department of Justice and the state of North Dakota. Since our last report, the state has participated in the following actions:

- The EPA has petitioned the federal district court in Bismarck to stay any decision on the Minnkota BACT until at least January 27, 2012. EPA contends that a pending federal Regional Haze decision on a Federal Implementation Plan for the state will supersede the state decision and make it irrelevant.

The state has filed an opposing brief stating that in fact the state BACT decision is relevant and has bearing on the pending BART (Best Available Retrofit Technology) decision and the federal district court decision should not be stayed. The state has also requested an expedited review by the court and is awaiting their decision.

- **Regional Haze State Implementation Plan (SIP)**

Since the Department's last report on the federal EPA proposal to disapprove portions of the North Dakota Regional Haze State Implementation Plan, the state has participated in the following actions:

- The state has submitted legal and technical comments challenging the proposed Federal Implementation Plan as part of a federally mandated public comment period. Comments included legal arguments detailing where EPA has exceeded their legal authority in this matter and usurped the authority granted the states by Congress under the CAA. Additional comments, in part, centered on the state's discretion to determine the appropriate modeling protocol, technical applicability of Selective Catalytic Reduction, unique characteristics of lignite coal and the appropriate method to calculate treatment costs.

- The state also provided oral argument on December 1, 2011, in Oakland, California, in front of the federal court requesting approval of a motion to intervene in a Interstate Transport Consent Decree. The EPA has used the Interstate Transport CD to justify their timing of the Regional Haze action in the state of North Dakota. In addition, the state requested that the court approve a motion to require EPA to explain why they should not be held in contempt of court as the Interstate Transport CD was not intended to address the Regional Haze Program and was used inappropriately by the federal government to justify their actions. The judge ruled from the bench and did not entertain either of the state's motions, indicating that they should be argued in front of the 8th Circuit Court, if needed, after EPA makes a final decision on the Regional Haze FIP.

This concludes my testimony. I will answer any questions you may have concerning this matter.