

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION  
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1501

2007 HOUSE AGRICULTURE

HB 1501

# 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1501

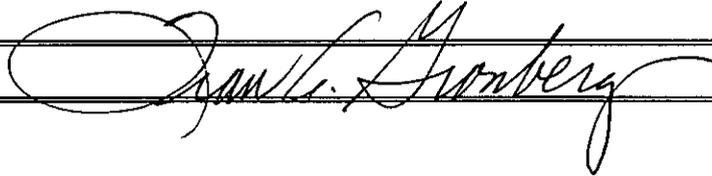
House Agriculture Committee

Check here for Conference Committee

Hearing Date 1-26-07

Recorder Job Number: 2031

Committee Clerk Signature



Minutes:

**VICE CHAIR KINGSBURY:** We will open the hearing on HB 1501.

**REPRESENTATIVE BRANDENBURG:** The bill deals with feedlots. One of the problems with feedlots is that when you start building a feedlot you have a lot of money invested. Someone files a law suit against you for as much as half a million dollars. In the lawsuit you could lose the amount you have invested, plus attorney fees.

**REPRESENTATIVE ONSTAD:** We are dealing with lawsuits and who will pay the attorney fees in the law suit.

**REPRESENTATIVE MUELLER:** Will this match with the Century Code? You do nothing wrong yet have to pay legal fees.

**REPRESENTATIVE FROELICH:** If they haul me into court, I could file a frivolous lawsuit.

**BILL NEWMAN,** Retired Supreme Court Justice and Executive Director of the ND Bar Association, answered some questions regarding laws in lawsuits. He discussed attorney fees, discovery process, and depositions that have recoverable fees.

A person bringing the law suit, if he loses the law suit, does not have to pay attorney fees for the defendant.

**ERICK AAMUNDSTAD:** We support the bill and what it is attempting to do.

**OLE JOHNSON:** Ole moved to N.D. to open a feed lot because he could not afford Washington law suits. If you start a feed lot in N.D. attorney fees could be as much as \$60,000.00.

**REPRESENTATIVE BRANDENBURG:** I bank with the same banker that I did when I first started farming. As to cost effectiveness to diversify, it is hard to get loans. People want to stop feed lots. They cripple the industry.

**REPRESENTATIVE MUELLER:** We need to do something positive for cattle. It is not a conspiracy, it is a given.

**WADE MOSER: STOCKMANS ASSOCIATION.** The Stockman's Association supports the intent of the bill. We deal with informed people as to the lots and how they are built. Hesitation cost money. Move on your plan.

**DEANA WIESO: LOBBYIST # 264, NORTH DAKOTA PORK COUNCIL.** We support this bill.

**L. DAVID GLATT:** Chief of the Environmental Health Section for the North Dakota Department of Health (testimony attached)

**GLATT:** Once the permit is issued, a suit has to be filed within 30 days.

**LYLE WITHAM, OFFICE OF THE ATTORNEY GENERAL:** The problem with the bill it is way too broad. Legislative Rules are involved. Permit says you can't pollute water. Investigations come into play. Violations come into play. Language in the bill is so broad. State agencies generally pay the attorney fees.

# 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1501

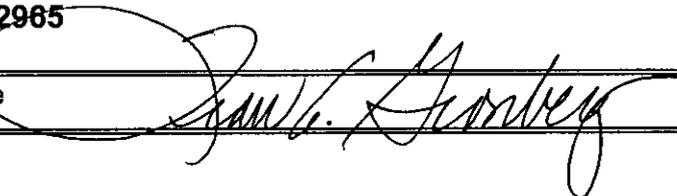
House Agriculture Committee **Sub Committee Meeting**

Check here for Conference Committee

Hearing Date: **2-6-07**

Recorder Job Number: **2965**

Committee Clerk Signature



Minutes:

**REPRESENTATIVE HEADLAND: We will call the subcommittee meeting to order.**

**Let the record show that Representatives Onstad, Wall and Brandenburg are here and other interested parties.**

**REPRESENTATIVE HEADLAND: At this time I will ask the Assistant Attorney General for comments as well the Health Department.**

**ASSISTANT ATTORNEY GENERAL. We spent some time talking and we have come up with some language that I think the Health Department can live with and not face any issues in terms of our program, keeping the delegation of our program under the clean water act. (copy attached of the General Rules of Statutory Construction that Apply to Judicial Review of Authority Exercised by a Municipality of Political Subdivision) Basically we have focused on permit proceedings because we understand that is where your major concern is. We have language that clarifies the appeals process, and the appeals process for criminal proceeding. There has to be an ability to sue for violations of the environmental law. In chapter 61- 20-08, but it only has to be for violations of the law, not on the permit proceedings. For permit proceedings it would require people, if they have issues, to raise them during the**

permit proceeding. If they fail to raise them, they can't sue on an action attacking the permit proceeding or they can't raise them after the permit proceeding is over. Basically what this language means is that once you have the permit, you are ready to go unless you operate the facility in some way that involves an environmental violation. That is basically the language we have proposed here as a possible language for you to look at. I think there are a couple things we want to do. Most of the regulations for feed lots are under chapter 61-28. The nutrient management plan provision for example is not under chapter 61-28 which is the water pollution section, but it is under the solid waste provision which is chapter 25-29. There is also the odor permit restrictions that might be quite specific. For example, if there is an order easement which the current law allows a facility, there might be something under an odor easement that needs to be considered. There might be some sight specific requirements in terms of some kind of controls to address potential problems that everybody agrees to go into the permit and those might be under the air provision. It might make more sense to stick this in Chapter 23-01. We have not had the chance to talk to all the different programs. Just Dennis, Dave and I have been working on this. Before we would propose that, we really would need some time to talk with some of the other division directors for our programs. That would only require changing the language from 61-28 to Chapter 23-01 and listing the chapters that would be included. It would definitely include 61-28, 23-25 and 23-29. Probably also the hazardous waste section and possibly a couple of others. Another potential problem is permit proceedings are not really covered under 28-32 and the language in the middle that

says accept this variety in the section appeal to file a permit termination governed by Chapter 28-32. Chapter 28-32 covers a lot of things that have nothing to do with appeal from a permit proceeding, so it might be wiser to limit that reference to the particular sections of 28-32. I need to talk to the North Dakota Health Department about what those particular sections are if you are interested in working at this approach. I think we would like to do that. We wanted to get you some language before we met here today and we did not have time to work that one out. That is what we brought here for you to look at. If you don't like it, go ahead with the bill as it is or we have our concerns that the current bill as it is with problems on delegation of the program.

**REPRESENTATIVE ONSTAD:** I think we accept the amendments and pass it on to the committee.

**REPRESENTATIVE WALL:** No question, just a comment. We need to amend this a little bit. My concern is how would impact to the criminal modification and how it could potentially impact all are other programs. I want to make sure we don't give Permits under way so we get permits under error. I don't like to create problems in The long run. I like the direction that this is going.

**REPRESENTATIVE BRANDENBURG:** We will interview again tomorrow on 1420 after we have time to look at this. Would it be ok with you Representative Headland to meet again afterwards? The question was brought up by Representative Onstad that if we get the right language and put it in writing in 1420. Is that something that is doable or is that for a separate bill?

**DAVE GLATT, ND HEALTH DEPARTMENT:** If we are going to go for an appeal for permit proceedings would like consistent approach for all permits that we do, so it makes some sense that we would put it in 23-01 so if there are any objections to permits, it applies to waste and water. I would like that consistency so that you as an operator would know that this is the process. It is consistent across the agency. I would like to talk with my directors first.

**CHAIRMAN HEADLAND:** Sounds like we are half way there.

**Any questions Representative Wall. None**

**Any questions Representative Brandenburg? None.**

**Any concerns from anyone. We will meet again tomorrow on 1420.**

**WE WILL MEET AFTER THE SESSION.**

# 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1501

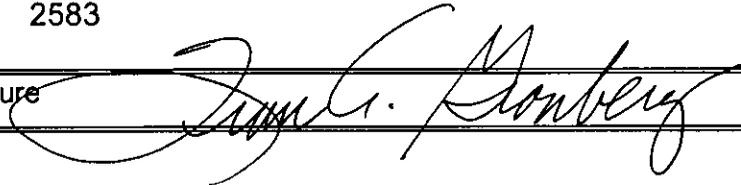
House Agriculture Committee

Check here for Conference Committee

Hearing Date: 2-8-07

Recorder Job Number: 2583

Committee Clerk Signature



Minutes:

**CHAIRMAN JOHNSON:** Opened the hearing on HB 1501. Several of us were missing when this bill was heard the other day. To bring us up to speed and to address some concerns, I've asked Lyle Witham from the AG's office to come down and see if he can help us fix this bill.

**LYLE WITHAM, OFFICE OF THE ATTORNEY GENERAL:** Discussion centered around statute 6128 dealing with water.

**CHAIRMAN JOHNSON:** Thank you for coming down Lyle and visiting with us. Representative Brandenburg do you want to preside over a sub committee on this? It is your bill. Representative Wall do you want to be on the committee? Representative Onstad was also selected as the third person for the sub committee. We will meet back here at 8:30 AM tomorrow morning.

**CHAIRMAN JOHNSON** the meeting on HB 1501

# 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1501

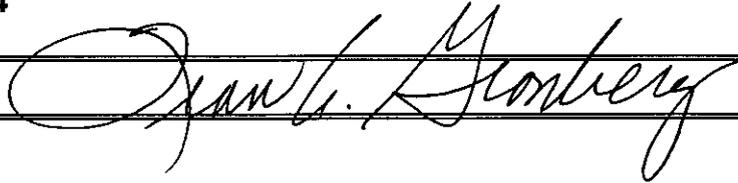
House Agriculture Committee

Check here for Conference Committee

Hearing Date: 2-8-07

Recorder Job Number: 3234

Committee Clerk Signature



Minutes:

**CHAIRMAN JOHNSON:** We will open the meeting on HB 1501.

**REPRESENTATIVE BRANDENBURG:**

The sub committee met on 1501 and if you look at the amendments it has two sections. Section 1 that deals with appeal from permit procedures as adopted by the sub committee and Section 2 deals with frivolous law suits.

**REPRESENTATIVE ONSTAD:** Mr. Chairman Sections 1 and 2. Rep Onstad read both sections. (amendments attached)

**REPRESENTATIVE WALL:** I concur with Rep Onstad. I think he summarized what happens very well especially in Sec. 2.

**REPRESENTATIVE FROELICH:** If you look at this section 2 amendment, the courts may award parties and they can do that now I suspect.

**REPRESENTATIVE BRANDENBURG:** The judge can rule in favor of the party that sued, but he does not have to. It saying now that if it's a frivolous law suit, the attorney fees and cost will be assessed from the person that brought the frivolous lawsuit. But it must be a frivolous lawsuit.

**CHAIRMAN JOHNSON:** On 1501 are you going to move the amendments.

**Sub Committee**

**REPRESENTATIVE BRANDENBURG:** Mr. Chairman, I will move the amendments  
Section one and Section two.

**REPRESENTATIVE WALL SECONDED THE MOTION**

**REPRESENTATIVE MUELLER:** Does this change the law.

**REPRESENTATIVE WALL:** Rep. Mueller, I don't know if this would help or  
not but last night I had a slow night and I read a case that originated in  
the State of Colorado. It is not apples to apples, I would agree, but there  
was a gold mining company that got sued by the Sierra Club and some  
other group and I won't go into great detail but there were about five  
points they got sued over. When they sorted it out the judge said on this  
point it is not a frivolous law suit therefore we are not going to charge any  
thing. The gold company had to correct it. There was not substantial reason that they  
ever suspected this gold company was doing something wrong. Then there were  
pages on how they divided legal fees and how they figured out who had the right  
receipts. If they matched they were going to pay for witness testimony. I am not  
saying it is right Rep Mueller but I think it must give wiggle room the court system.  
I was quite surprised by some of the cases they compensated and some cases that  
they didn't.

**REPRESENTATIVE BOE:** The must is a must award. I don't know exactly what the  
difference is but there doing two different things and that is probably why it is  
different.

**CHAIRMAN JOHNSON:** We have the amendments on HB 1501 before us

**CSHAIRMAN JOHNSON: We have HB 1501 BEFORE US AS AMENDED**

**REPRESENTATIVE BRANDENBURG MADE A MOTION FOR A DO PASS  
AS AMENDED.**

**REPRESENTATIVE WALL SECONDED THE MOTION  
THE MOTION PASSED ON A VOICE VOTE**

**REPRESENTATIVE MUELLER: Did this change the law other then adding  
some language to the law dealing in a certain area.**

**REPRESENTATIVE BRANDENBURG: I think it will change things as to frivolous  
lawsuits. We should have some protection.**

**REPRESENTATIVE ONSTAD: The reason they put that in because of the  
original bill. They follow the rules.**

**Rep Brandenburg made a Do Pass as Amended**

**Rep Wall seconded the motion**

**(yes) 13 (no) 0 (absent) 0**

**Carrier: Rep Wall**

Date: 2/8/07  
Roll Call Vote # 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

House Agriculture

Committee \_\_\_\_\_

Check here for Conference Committee

Legislative Council Amendment Number HB 1501

Action Taken Do Pass Amendment - Sect 1 and 2

Motion Made By Rep Brandenburg Seconded By Rep Wall

Representatives	Yes	No	Representatives	Yes	No
Chairman Dennis Johnson			Tracy Boe		
Vice Chair Joyce Kingsbury			Rodney Froelich		
Wesley Belter			Phillip Mueller		
Mike Brandenburg			Kenton Onstad		
Craig Headland			Benjamin Vig		
Brenda Heller					
John D Wall					
Gerry Uglem					

Total (Yes) 13 No 0

Absent 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Voice

Date: 2/8/07  
Roll Call Vote #: 2

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

House Agriculture Committee

Check here for Conference Committee

Legislative Council Amendment Number HB1501

Action Taken No Passes Amended

Motion Made By Rep. Brandenburg Seconded By Rep. Wall

Representatives	Yes	No	Representatives	Yes	No
Chairman Dennis Johnson	✓		Tracy Boe	✓	
Vice Chair Joyce Kingsbury	✓		Rodney Froelich	✓	
Wesley Belter	✓		Phillip Mueller	✓	
Mike Brandenburg	✓		Kenton Onstad	✓	
Craig Headland	✓		Benjamin Vig	✓	
Brenda Heller	✓				
John D Wall	✓				
Gerry Uglen	✓				

Total (Yes) 13 No 0

Absent 0

Floor Assignment Rep Wall

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1501: Agriculture Committee (Rep. D. Johnson, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1501 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new subsection to section 28-32-50 and a new section to chapter 61-28 of the North Dakota Century Code, relating to appeals regarding permits for livestock feedlots and other permitted facilities.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new subsection to section 28-32-50 of the North Dakota Century Code is created and enacted as follows:

In any civil judicial proceeding involving adverse parties to an appeal or enforcement action involving an environmental permit issued under chapters 23-20.3, 23-25, 23-29, or 61-28 in which two or more of the adverse parties are not an administrative agency or an agent of an administrative agency, the court may award the prevailing nonagency party reasonable attorney's fees and costs if the court finds in favor of that party and determines that the nonprevailing nonagency party acted without substantial justification, or on the basis of claims or allegations that are factually unsupported. The court shall award reasonable attorney's fees and costs if the court determines that the nonprevailing nonagency party's claims or allegations are frivolous as provided in section 28-26-01. If the appeal or civil judicial proceeding covered by this subsection involves multiple claims or allegations, the court may apportion attorney's fees and costs in proportion to the time reasonably spent by a prevailing party relating to claims pursued by the nonprevailing party that were frivolous, factually unsupported, or without substantial justification.

**SECTION 2.** A new section to chapter 61-28 of the North Dakota Century Code is created and enacted as follows:

**Appeal from permit proceedings.** An appeal from the issuance, denial, modification, or revocation of a permit for which public notice or hearing is required under this chapter may be made by the person who filed the permit application, or by any person who is aggrieved by the permit application decision, provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation. An appeal must be taken within thirty days after the final permit application determination is mailed by first-class mail to the permit applicant and to any interested person who has requested a copy of the final permit determination during the permit hearing process. Except as provided in this section, an appeal of the final permit determination is governed by chapter 28-32. The department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law. Except for violations of this chapter or any permit condition, rule, order, limitation, or other applicable requirement implementing this chapter which occur after the permit is issued, all challenges to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised in any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues that were raised to the department in the permit hearing process."

Renumber accordingly

2007 SENATE AGRICULTURE

HB 1501

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1501

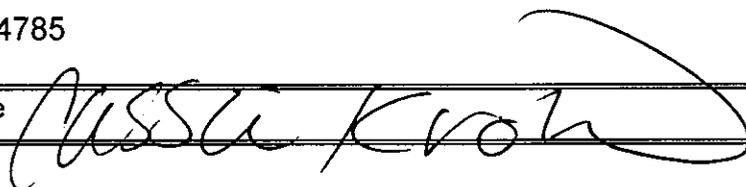
Senate Agriculture Committee

Check here for Conference Committee

Hearing Date: March 9, 2007

Recorder Job Number: 4785

Committee Clerk Signature



Minutes:

**Sen. Flakoll** opened the hearing on HB 1501, a bill relating to appeals regarding permits for livestock feedlots and other permitted facilities. All members (7) were present.

**Sen. Erbele**, district 28, testified in favor of the bill.

**Sen. Erbele**- I do have an interest in this bill, it deals with frivolous lawsuits for permitting that takes place specifically with feedlots.

**Sandy Tabor**, LEC, testified in favor of the bill.

**Sandy Tabor**- We took an interest in this bill when we saw the amendments that the house put on the bill. We were interested in it because it inappropriately applies to all of the different type of permits that might be issued by the health department but we noticed that section 2 did not so we actually have some amendments that would do just that (see attached).

**Sen. Taylor**- I am curious within your work with lignite is this law that you have seen in other states where lignite energy council involved?

**Sandy Tabor**- I think there is always sensitivity when we get into the regulatory area where some people try to delay things and that is the concern that we have. This would require industry to behave themselves too.

**Sen. Taylor-** does the judge have the opportunity before the case is even heard to say this has no standing before it gets into attorneys fees?

**Sandy Tabor-** there are always opportunities at the beginning of the lawsuit to file a summary judgment motion. This doesn't happen very often. They are filed fairly often but not acknowledged by the courts.

**Sen. Wanzek-** this law would apply to all parties?

**Sandy Tabor-** that's correct.

**Curtis Jabs,** Basin Electric, testified in favor of the bill.

**Curtis Jabs-** We support this bill and the amendments.

**Sen. Taylor-** out of curiosity does Basin Electric have this assurance in other states that you do business in?

**Curtis Jabs-** I don't know that.

**Eric Aasmundstad,** NDFB, testified in favor of the bill.

**Eric Aasmundstad-** We are in support of this bill and in full support of the amendments.

**Mike Beltz,** ND Ag Coalition, testified in favor of the bill. See attached testimony.

**Dave Glatt,** NDDH, testified in favor of the bill.

**Dave Glatt-** We support this and the amendments.

**Lyle Witham,** ND Ag Office-Health, testified in favor of the bill. Went over amendments in detail with the committee 18:36-34.07

**Rep. Brandenburg,** district 28, testified in favor of the bill.

**Rep. Brandenburg-** I stand in support of this bill and that it is really important that we add protection for these people.

No opposition to the bill.

**Sen. Flakoll** closed the hearing.

**Sen. Wanzek** motioned to move the amendments and was seconded by **Sen. Klein**, roll call vote 1: 7 yea, 0 nay, 0 absent. **Sen. Wanzek** motioned for a do pass as amended and was seconded by **Sen. Klein**, roll call vote 2: 7 yea, 0 nay, 0 absent. **Sen. Erbele** was designated to carry the bill to the floor.

Sandy Tabor

**PROPOSED AMENDMENT TO ENGROSSED HOUSE BILL NO. 1501**

Page 1, line 22, replace all of Section 2 with:

**SECTION 2.** A new section to chapter 23-01 of the North Dakota Century Code is created and enacted as follows:

**23-01-23.1 Appeal from permit proceedings.**

Appeal from the issuance, denial, modification, or revocation of a permit issued under chapters 23-20.3, 23-25, 23-29, or 61-28 may be made by the person or entity who filed the permit application, or by any person who is aggrieved by the permit application decision, provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation. Appeal must be taken within 30 days after the final permit application determination is mailed by first class mail to the permit applicant or holder and to any interested person who has requested a copy of the final permit determination during the permit hearing process. Except as provided in this section, appeal of the final permit determination is governed by sections 28-32-40, 28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49. The department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law. Except for violations of chapters 23-20.3, 23-25, 23-29, or 61-28 that occur after the permit is issued, or any permit condition, rule, order, limitation, or other applicable requirement implementing those chapters that occur after the permit is issued, all challenges to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised in any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues that were raised to the department in the permit hearing process.

*JF3*  
*3-9-7*

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1501

Page 2, line 2, replace "for which public notice is required" with "issued" and replace "this chapter" with "chapter 23-20.3, 23-25, 23-29, or 61-28"

Page 2, line 9, replace "chapter 28-32" with "sections 28-32-40, 28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49"

Page 2, line 11, replace "violations" with "a violation" and replace "this chapter" with "chapter 23-20.3, 23-25, 23-29, or 61-28 which occurs after the permit is issued."

Page 2, line 12, replace "this chapter" with "those chapters"

Page 2, line 13, replace "occur" with "occurs" and replace "all challenges" with "any challenge"

Renumber accordingly





**REPORT OF STANDING COMMITTEE**

HB 1501, as engrossed: Agriculture Committee (Sen. Flakoll, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1501 was placed on the Sixth order on the calendar.

Page 2, line 2, replace "for which public notice is required" with "issued" and replace "this chapter" with "chapter 23-20.3, 23-25, 23-29, or 61-28"

Page 2, line 9, replace "chapter 28-32" with "sections 28-32-40, 28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49"

Page 2, line 11, replace "violations" with "a violation" and replace "this chapter" with "chapter 23-20.3, 23-25, 23-29, or 61-28 which occurs after the permit is issued."

Page 2, line 12, replace "this chapter" with "those chapters"

Page 2, line 13, replace "occur" with "occurs" and replace "all challenges" with "any challenge"

Renumber accordingly

2007 TESTIMONY

HB 1501

**Testimony**

**House Bill 1501**

**Agriculture Committee**

**Friday, January 26, 2007; 9 a.m.**

**North Dakota Department of Health**

Good morning, Chairman Johnson and members of the House Agriculture Committee. My name is David Glatt, and I am chief of the Environmental Health Section for the North Dakota Department of Health. I am here today to provide testimony on House Bill 1501 related to pleadings regarding livestock feedlots.

The department has been granted program delegation by the U.S. Environmental Protection Agency to implement many elements of the federal Clean Water Act. As part of this delegation, we are tasked with the responsibility to evaluate and, if appropriate, provide operational permits to livestock facilities. Part of this responsibility includes the public's right to challenge the department's decision to grant a permit to a specific operation. The official challenge to a permit or conditions of a permit must be completed within 30 days of the department's issuing the permit to the feedlot owner. After the 30-day appeal time has passed, the right to challenge is limited to how the permit is being implemented or enforced by either the owner or the state.

Although we understand the intent of House Bill 1501, we are concerned that, as currently written, the bill could violate the requirements of the Clean Water Act and place our program delegation from the EPA in jeopardy.

Based upon our current understanding of the proposed legislation and our desire not to conflict with the provisions of the federal Clean Water Act and state law, we must oppose House Bill 1501 as written and recommend a do not pass.

This concludes my testimony. I am happy to answer any of your questions.

*Summons  
& Complaint  
As To Feed  
Lots*

## General Rules of Statutory Construction that Apply to Judicial Review of Authority Exercised by a Municipality or Political Subdivision

Cities, counties, and townships have only those powers given to them by the legislature:

“Cities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant. In defining municipal powers, the rule of strict construction applies. However, the manner and means of exercising those powers, unless prescribed by the legislature, are within the discretion of the City.”

**Ebach v. Ralston**  
469 N.W.2d 801, 804  
N.D., 1991.  
(Citations omitted.)

But within the authority given by the legislature, a court will recognize that cities, counties, and townships have broad discretion to exercise the powers delegated to them by state law:

“Our review of a municipality's adoption, interpretation and application of its own ordinances is strictly limited by the doctrine of separation of powers. A municipality has broad discretion to determine the manner and means of exercising the powers delegated to it by state law.

....

“In defining municipal powers, the rule of strict construction applies. Once a municipality's powers have been determined, however, ‘the rule of strict construction no longer applies, and the manner and means of exercising those powers where not prescribed by the Legislature are left to the discretion of the municipal authorities.’ Leaving the manner and

means of exercising municipal powers to the discretion of municipal authorities implies a range of reasonableness within which a municipality's exercise of discretion will not be interfered with or upset by the judiciary.”

**GO Committee ex rel. Hale v. City of Minot**

701 N.W.2d 865

2001 ND 136 ¶ 8

(Citations omitted.)

**NDCC 1-02-02 Words to be understood in their ordinary sense.**

Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.

**NDCC 1-02-03 Language - How construed.**

Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language. Technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition.

LETTER OPINION

2005-L-27

October 4, 2005

Mr. Lonnie W. Olson  
Ramsey County State's Attorney  
524 4th Ave NE Unit 16  
Devils Lake, ND 58301-2490

Dear Mr. Olson:

Thank you for your letter asking whether N.D.C.C. § 23-25-11(9) prohibits Ramsey County from enacting zoning regulations pertaining to animal feeding operations ("AFOs"). It is my opinion that N.D.C.C. § 23-25-11(9) does not prohibit Ramsey County from enacting such zoning regulations. The county's authority, however, is limited by N.D.C.C. §§ 11-33-02 and 23-25-11(9) to regulating the nature, scope, and location of AFOs. Your letter does not ask and this opinion does not address whether Ramsey County's ordinance meets or exceeds these limits.

ANALYSIS

Ramsey County adopted an animal feeding ordinance in 2004. An application for an AFO permit was submitted in the spring of 2005 but denied by the county under its animal feeding ordinance.

Counties, of course, have only the authority granted by statute. County of Stutsman v. State Historical Society of North Dakota, 371 N.W.2d 321, 329 (N.D. 1985). A question arose about the scope of the county's authority to deny the requested AFO permit in light of recent amendments to N.D.C.C. § 23-25-11. The Legislature amended the statute by, among other things, adding subsection 9. 2005 N.D. Sess. Laws ch. 243, § 1. Subsection 9 states:

Neither a county nor a township may regulate or through any means impose restrictions or requirements on animal feeding operations or on other agricultural operations except as permitted under sections 11-33-02 and 58-03-11.

According to your request, certain individuals read N.D.C.C. § 23-25-11(9) to prohibit counties from regulating AFOs. This position contradicts the plain language of the

LETTER OPINION 2005-L-27  
October 4, 2005  
Page 2

statute. Section 23-25-11(9) does not prohibit counties from regulating AFOs. It states that counties lack such authority "except as permitted under section[ ] 11-33-02." (Section 58-03-11 deals with the authority of townships.) In other words, a county's regulatory authority over an AFO is defined by section 11-33-02. Section 11-33-02(2) deals specifically with AFOs. Counties may "regulate the nature and scope of concentrated feeding operations permissible in the county . . . ." N.D.C.C. § 11-33-02(2). Additionally, "[a] regulation addressing the development of a concentrated feeding operation in the county may set reasonable standards, based on the size of the operation, to govern its locations." N.D.C.C. § 11-33-02(3).

This authority, however, is subject to restrictions. A county zoning "regulation may not preclude the development of a concentrated feeding operation. N.D.C.C. § 11-33-02(3); see also N.D.C.C. § 11-33-02(1) (counties may not regulate in a manner that prohibits farming or ranching, and defining "farming or ranching" to include livestock feeding and production operations). Further, county zoning may not impose substantial economic burden on a previously existing concentrated feeding operation. N.D.C.C. § 11-33-02(2).

Counties have statutory authority to regulate, through zoning, AFOs. N.D.C.C. § 11-33-02(2), (3). The newly enacted section 23-25-11(9) does not withdraw that authority. It merely states that counties, in exercising their zoning authority, are bound by the limits set in section 11-33-02. It is thus my opinion that Ramsey County may regulate animal feeding operations through zoning to the extent allowed by section 11-33-02.

Sincerely,

Wayne Stenehjem  
Attorney General

cmc/vkk

Amendment to HB 1501

Page 1, after line 12, insert:

**Section 2. Amendemnt.** A new subsection to section 28-32-50 of the North Dakota Century Code is created and enacted as follows:

In any civil judicial proceeding involving adverse parties to an appeal or enforcement action involving an environmental permit issued under chapters 23-20.3, 23-25, 23-29, or 61-28 in which two or more of the adverse parties are not an administrative agency or an agent of an administrative agency, the court may award the prevailing non-agency party reasonable attorneys fees and costs if the court finds in favor of that party and determines that the non-prevailing non-agency party acted without substantial justification, or on the basis of claims or allegations that are factually unsupported. The court must award reasonable attorneys fees and costs if the court determines that the non-prevailing non-agency party's claims or allegations are frivolous as provided in section 28-26-01. If the appeal or civil judicial proceeding covered by this subsection involves multiple claims or allegations, the court may apportion attorneys fees and costs in proportion to the time reasonably spent by a prevailing party relating to claims pursued by the non-prevailing party that were frivolous, factually unsupported, or without substantial justification.

*Appears in other section  
of code  
Adds it to App section of Code*

HB 1501

Page 1, line 1, after "Act" replace "to create and enact a new section to chapter 28-26 of the North Dakota Century Code, relating to pleadings regarding livestock feedlots" with "to create and enact a new section to chapter 61-28 relating to appeals regarding permits for livestock feedlots and other permitted facilities under chapter 61-28"

Page 1, line 4, replace all of Section 1 with:

**SECTION 1.** A new section to chapter 61-28 of the North Dakota Century Code is created and enacted as follows:

Appeal from permit proceedings. Appeal from the issuance, denial, modification, or revocation of a permit for which public notice or hearing is required under this chapter may be made by the person or entity who filed the permit application, or by any person who is aggrieved by the permit application decision, provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation. Appeal }  
→ must be taken within 30 days after the final permit application determination is mailed by first class mail to the permit applicant and to any interested person who has requested a copy of the final permit determination during the permit hearing process. Except as provided in this section, appeal of the final permit determination is governed by chapter 28-32. The department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law. Except for violations of this chapter or any permit condition, rule, order, limitation, or other applicable requirement implementing this chapter that occur after the permit is issued, all challenges to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised in any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues that were raised to the department in the permit hearing process.

*Voicing concern  
must take place in  
30 days*



P.O. Box 2599  
Bismarck, ND 58502  
(701) 355-4458  
FAX (701) 223-4645

**MEMBERS**

- AmeriFlax
- Milk Producers Association of North Dakota, Inc.
- Minn-Dak Farmers Co-op
- North Dakota Ag Aviation Association
- North Dakota Ag Consultants
- North Dakota Agricultural Association
- North Dakota Agri-Women
- North Dakota Association of Soil Conservation Districts
- North Dakota Association of Agricultural Educators
- North Dakota Barley Council
- North Dakota Beef Association
- North Dakota Corn Growers Association
- North Dakota Corn Utilization Council
- North Dakota Crop Improvement and Seed Association
- North Dakota Department of Agriculture
- North Dakota Dry Bean Council
- North Dakota Elk Growers
- North Dakota Farm Bureau
- North Dakota Farm Credit Council
- North Dakota Grain Dealers Association
- North Dakota Grain Growers Association
- North Dakota Lamb and Wool Producers
- North Dakota Oilseed Council
- North Dakota Pork Producers
- North Dakota Soybean Growers Association
- North Dakota State Seed Commission
- North Dakota Wheat Commission
- Northern Canola Growers Association
- Northern Plains Potato Growers Association
- Northern Pulse Growers Association
- Red River Valley Sugarbeet Growers

Testimony of Mike Beltz  
North Dakota Ag Coalition  
House Bill 1501  
March 9, 2007

Chairman Flakoll and members of the Senate Agriculture Committee:

My name is Mike Beltz. I farm near Hillsboro and am here today as the vice chairman of the North Dakota Ag Coalition. On behalf of the Ag Coalition, I encourage your support of HB 1501.

The Ag Coalition has provided a unified voice for North Dakota agricultural interests for 20 years. Today, we represent 30 statewide organizations and associations that represent specific commodities or have a direct interest in agriculture. Through the Ag Coalition, these members seek to enhance the business climate for North Dakota's agricultural producers.

The Ag Coalition takes a position on only a limited number of issues brought to us by our members that have significant impact on North Dakota's agriculture industry. HB 1501 is one of these bills because it works to protect those building livestock feedlots and other permitted facilities from unjust suits, thus allowing the unimpeded development of the agricultural and livestock industry.

In the past, suits have been filed against the construction of animal feedlots primarily for the purpose of temporarily stopping construction and forcing stockmen to spend money on the proceedings. This impedes on the growth and development of livestock operations. This bill would protect against frivolous or factually unsupported claims and would compensate stockmen for any time and money lost in such a case. In addition, the provisions in this bill would help prevent such trials and allow for the continued development of the agriculture industry.

Therefore, we encourage your support of HB 1501.

**11-33-02 Board of county commissioners to designate districts.**

1. For any or all of the purposes designated in section 11-33-01, the board of county commissioners may divide by resolution all or any parts of the county, subject to section 11-33-20, into districts of such number, shape, and area as may be determined necessary, and likewise may enact suitable regulations to carry out the purposes of this chapter. These regulations must be uniform in each district, but the regulations in one district may differ from those in other districts. A regulation or restriction may not prohibit or prevent the use of land or buildings for farming or ranching or any of the normal incidents of farming or ranching.

2. Definitions.

*County of Grant*

a. For purposes of this section, "farming or ranching" means cultivating land for production of agricultural crops or livestock, or raising, feeding, or producing livestock, poultry, milk, or fruit. The term does not include producing timber or forest products, nor does the term include a contract whereby a processor or distributor of farm products or supplies provides grain, harvesting, or other farm services.

For purposes of this section, "concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate. The term does not include normal wintering operations for cattle.

*definitions*

c. For purposes of this section, "livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, bison, elk, fur animals raised for their pelts, or other animals raised, fed, or produced as part of farming or ranching activities.

d. For purposes of this section, "nature" means the type or species of livestock.

e. For purposes of this section, "scope" means the size of the concentrated feeding operation as defined by the number of animal units.

f. For purposes of this section, "animal units" has the same meaning as defined by subdivision c of subsection 7 of section 23-25-11.

g. For purposes of this section, "location" means the set-back distance from the structure, fence, or other boundary enclosing a concentrated feeding operation, including any animal waste collection system, to the nearest occupied residence, to the nearest buildings used for non-farming or non-ranching purposes as defined or established in the regulations, or to the nearest land zoned for residential, recreational, or commercial purposes; but it does not include set-back distances for application of manure or other recycled agricultural material that is applied under a nutrient management plan approved by the department of health. Regulations may establish districts in a county for high-density agricultural production where set-back distances for concentrated feeding operations and related agricultural operations are less than other districts in the county. Regulations may establish districts around areas zoned for residential, recreational, or non-agricultural commercial uses for low-density agricultural production where set-back distances for concentrated feeding operations and related agricultural operations are greater than other districts in the county. Set-back distances may not be more than fifty percent greater or less than the set-back

distances provided in subdivision a of subsection 7 of section 23-25-11, and low-density agricultural production areas may not be more than one and one-half miles [2.4 kilometers] from the edge of the area zoned for residential, recreational, or non-agricultural commercial uses.

- h. For purposes of this section, "related agricultural operations" means an agricultural operation or agricultural processing facility that produces a product or by-product that may be used by a concentrated feeding operation.
- i. For purposes of this section, "standards" means regulations relating to nature, scope, and location.

~~2. 3.~~ A board of county commissioners may regulate the nature and scope of concentrated feeding operations permissible in the county; however, if a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of county commissioners shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation.

~~3.4.~~ A regulation may not preclude the development of a concentrated feeding operation in the county. A regulation addressing the development of a concentrated feeding operation in the county may set reasonable standards, based on the size of the operation, to govern its location.

~~4. For purposes of this section, "concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate, or in an area where the space per animal unit is less than six hundred square feet [55.74 square meters]. The term does not include normal wintering operations for cattle. For purposes of this section, "livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, and fur animals raised for their pelts.~~

5. A board of county commissioners may not prohibit, through regulation, the reasonable diversification or expansion of a farming or ranching operation.

6. This chapter does not include any power relating to the establishment, repair, and maintenance of highways or roads.

#### **58-03-11 Establishment of zoning districts - Limitation - Scope of zoning regulations and restrictions.**

1. For the purpose of promoting the health, safety, morals, or the general welfare, or to secure the orderly development of approaches to municipalities, the board of township supervisors may establish one or more zoning districts and within such districts may, subject to the provisions of chapter 54-21.3, regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, the height, number of stories, and size of buildings and structures, the percentage of lot that may be occupied, the size of courts, yards, and other open spaces, the density of population, and the location and use of buildings, structures, and land for

trade, industry, residence, or other purposes. All such regulations and restrictions must be uniform throughout each district, but the regulations and restrictions in one district may differ from those in other districts. The board of township supervisors may establish institutional controls that address environmental concerns with the state department of health as provided in section 23-20.3- 03.1.

2. A regulation or restriction may not prohibit or prevent the use of land or buildings for farming or ranching or any of the normal incidents of farming or ranching.

3. Definitions.

- a. For purposes of this section, "farming or ranching" means cultivating land for production of agricultural crops or livestock, or raising, feeding, or producing livestock, poultry, milk, or fruit. The term does not include producing timber or forest products, nor does the term include a contract whereby a processor or distributor of farm products or supplies provides grain, harvesting, or other farm services.
- b. For purposes of this section, "concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate. The term does not include normal wintering operations for cattle.
- c. For purposes of this section, "livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, bison, elk, fur animals raised for their pelts, or other animals raised, fed, or produced as part of farming or ranching activities.
- d. For purposes of this section, "nature" means the type or species of livestock.
- e. For purposes of this section, "scope" means the size of the concentrated feeding operation as defined by the number of animal units.
- f. For purposes of this section, "animal units" has the same meaning as defined by subdivision c of subsection 7 of section 23-25-11.
- g. For purposes of this section, "location" means the set-back distance from the structure, fence, or other boundary enclosing a concentrated feeding operation, including any animal waste collection system, to the nearest occupied residence, to the nearest buildings used for non-farming or non-ranching purposes as defined or established in the regulations, or to the nearest land zoned for residential, recreational, or commercial purposes; but it does not include set-back distances for application of manure or other recycled agricultural material that is applied under a nutrient management plan approved by the department of health. Regulations may establish districts in a township for high-density agricultural production where set-back distances for concentrated feeding operations and related agricultural operations are less than other areas in the township. Regulations may establish districts around areas zoned for residential, recreational, or non-agricultural commercial uses for low-density agricultural production where set-back distances for concentrated feeding operations and related agricultural operations are greater than other areas in the township. Set-back distances may not be more than fifty percent greater or less than the set-back distances provided in subdivision a of subsection 7 of section 23-25-11, and low-

density agricultural production areas may not be more than one-half mile [.8 kilometers] from the edge of the area zoned for residential, recreational, or non-agricultural commercial uses.

- h. For purposes of this section, "related agricultural operations" means an agricultural operation or agricultural processing facility that produces a product or by-product that may be used by a concentrated feeding operation.
- i. For purposes of this section, "standards" means regulations relating to nature, scope, and location.

3.4. A board of township supervisors may regulate the nature and scope of concentrated feeding operations permissible in the township; however, if a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of township supervisors shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation.

4.5. A regulation may not preclude the development of a concentrated feeding operation in the township. A regulation addressing the development of a concentrated feeding operation in the township may set reasonable standards, based on the size of the operation, to govern its location.

~~5. For purposes of this section, "concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate, or in an area where the space per animal unit is less than six hundred square feet [55.74 square meters]. The term does not include normal wintering operations for cattle. For purposes of this section, "livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, and fur animals raised for their pelts.~~

6. A board of township supervisors may not prohibit, through regulation, the reasonable diversification or expansion of a farming or ranching operation.

7. Sections 58-03-11 through 58-03-15 do not include any power relating to the establishment, repair, and maintenance of highways or roads.