

2013 HOUSE TRANSPORTATION

HB 1121

2013 HOUSE STANDING COMMITTEE MINUTES

House Transportation Committee Fort Totten Room, State Capitol

HB 1121
01/17/13
Job # 17342

Conference Committee

Committee Clerk Signature

Jeanette Cook

Explanation or reason for introduction of bill/resolution:

A bill relating to private actions impacting highway facilities or right-of-way.

Minutes:

Attachment #1

Chairman Ruby opened the hearing on HB 1121. (53 seconds)

Ron Henke, Director of Operations, North Dakota Department of Transportation presented testimony in support of HB 1121. See attached testimony #1. (3:20)

Chairman Ruby: Can you explain the pictures for us, please?

Ron Henke described what is seen in the pictures attached to testimony. Picture #1 shows a pipe that was run right up to a culvert which is a safety hazard. The disturbed ground is an environmental concern. Picture # 2 shows an environmental concern that may cause sedimentation to run into wetlands. Picture #3 and #4 are piles of snow where individuals have pushed snow across the road or cleaned a parking lot and left it close to the road. It creates a hazard from the ability of snow to fill in those places.

Representative Gruchella: What do you consider highway facilities?

Ron Henke: Townships roads, state highways, and county roads in the state.

Representative Gruchella: Is highway facility defined in code?

Ron Henke: I believe that is the way that it is in code.

Chairman Ruby: This is for every county and township as well as the state. They would be the ones either removing the snow or fixing the issue with the sediment or disturbed ground. Then they would be the one charging the landowner?

Ron Henke: The way we have written it, we have covered all highway facilities. You are correct. The counties already have a little piece in 24 that already allows them to do it. We just wrote it to cover all highway facilities.

Representative Weisz: How does this change things, if for example, you have a legal drain under the County Water Board that is within the highway right-of-way. Who has the ability to grant permission for the cleaning of sediment for a culvert in there? Does it change that process?

Ron Henke: We work with the Water Boards on legal drains to get them established. We generally permit them. We have a permit and allow them to come in and do maintenance for cleaning out purposes. This would not impact any of that.

Representative Delmore: Is there going to be a chart or something, so the landowners clearly know what the charge will be?

Ron Henke: We do not track these particular violations to the detail so I was able to tell how much was spent to try to correct these things. We track our maintenance costs, but not to a detail that it is specific to an issue. As far as recovering costs, our first goal would be to try to get the landowner to fix it themselves. If a state agency has to do it, we will keep track of the actual costs.

Representative Delmore: The bill states that the total cost of the correction must be paid by the person. So, if it was Chairman Ruby's land, you could charge him whatever you wanted to fix it. It is what the bill states. I understand intent, but the bill really is pretty clear. If a landowner has no idea what it will cost, or even if it is a problem for you, I think he should have a little more information before they are held liable.

Ron Henke: Our intent was not to go right away and fix a problem. We would work with the landowner on those costs.

Representative Delmore: If it is all highways, you are not always going to have a say in how it is handled, are you? To me there is a concern. I would like to have this spelled out a little clearer, especially when we are using several jurisdictions within the government.

Ron Henke: I agree with you. I don't have the section of law in front of me that already allows the counties to calculate their costs. I recall that that piece of law allows them to double it. That is what they send out to the landowner. It is already currently being done by counties.

Representative Drovdal: This bill would put more responsibility on the adjacent landowners and landowners. What responsibility would the state have in regard to timely response to requests to do work in right-of-ways?

Ron Henke: We have eight districts that work with land owners on a daily basis. They react to try to get through the issues and concerns to allow the work to happen as quickly as possible. We are getting more and more requests, so it takes a little longer. From a right-of-way perspective, we always put up right-of-way markers to identify the limits of the highway right-of-way.

Representative Drovdal: But in the case of a request that has not been responded to, what liability does the department have?

Ron Henke: I don't know if we have any. We meet with the landowners as soon as we can.

Representative Schatz: Would haying be involved in this? It says may not take ANY action. Do you need to get permission to hay the highway with this bill?

Ron Henke: I believe there is another section in state law about haying. Our intent is not to affect how we handle haying right now. We allow the landowners to go and do that work.

Representative Schatz: The words seem to say that a landowner would need permission. That may be different than the intent.

Representative Schatz: In a county situation where a landowner is farming the ditch, and the county decided that you shouldn't be farming the ditch. It says that the total cost of the correction would be assessed by the county. Would the county come out and seed the affected area, or would the farmer do it? It would be a lot cheaper for the farmer to do it.

Ron Henke: I can't speak for the counties as to how they enforce their existing law. I can tell you from the state side, that we currently talk to the landowner and tell them what needs to be corrected. We let them do the work.

Representative Kreun: You mentioned township, county, and state, I am assuming that would include Federal right-of-way too?

Ron Henke: That is correct. (16:08)

Chairman Ruby asked for further supporting testimony, and there was none. There was no opposing testimony to HB 1121.

Chairman Ruby closed the hearing on 1121.

Chairman Ruby called for discussion on HB 1121.

Representative Weisz: Currently in our county farming up to the slope of the ditch became an issue. The county had given several warnings over a period of a couple of years to the landowners to reseed the ditch to grass. After sufficient warnings the county seeded the ditch and sent the landowners the bill. The landowners had received plenty of notice. The county was in danger of losing Federal highway funds. As far as the haying goes, I think we already have permission to make hay by legislation. I don't think we need to worry about the haying.

Representative Schatz: We could add "except for haying" to the language, so it is clear to the landowners. Who is the proper authority for the state highway system? Who would one call when they have to do something in the ditch?

Ron Henke: We have eight district engineers that take care of that. They oversee a specific area in the state. That is who gets the phone calls.

Representative Schatz: If someone has a project that affects the ditch, do you call them, and then they have to come and look at it? What is the process?

Ron Henke: That is correct. They go out to the site and usually meet with the landowner to find out what they want to do.

Chairman Ruby: I think that the haying is covered in another statute. I think it is fine. It is much more definitive than us putting a word in this bill.

Representative Kreun: On line eight we could add "in an adverse manner".

Chairman Ruby: I'm not sure it is needed.

Vice Chairman Owens: I would like to hold the bill. There are at least two amendments that should be considered according to the discussion.

There was additional discussion about the landowner having to pay a bill for something being fixed by the state, and the notification process.

Chairman Ruby: We will hold the bill and let Vice Chairman Owens look back to certain sections that refer to the protection of the haying.

Representative Delmore: I don't see that it is clear in the bill that the landowner has a way of being notified and given the capability of fixing it him or herself. That is the process that I care about, even more than the cost.

Chairman Ruby: We will consider some change of language on the bill and bring it back for consideration at a later time.

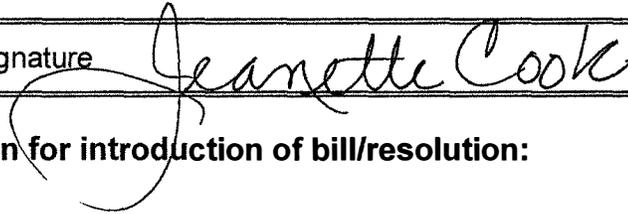
2013 HOUSE STANDING COMMITTEE MINUTES

House Transportation Committee Fort Totten Room, State Capitol

IHB 1121
01/18/13
Job # 17402

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Minutes:

Attachment #1

Chairman Ruby called the committee to order and asked the committee to revisit HB 1121. A rough draft of an amendment was provided to the committee. See attachment #1.

Chairman Ruby: Are you putting another section into the bill or just having some of the language integrated into it?

Representative Delmore: I believe our intent is to follow the same type of language and replace what the bill said with this amendment.

Representative Weisz explained the changes. The "notwithstanding" language wanted by Vice Chairman Owens is included. This will make it clear that things like haying, that are already in statute, aren't affected. This makes sure that the landowner has an opportunity to correct a problem, before the governing body that has jurisdiction over the right-of-way does it and sends a bill. We used twenty days because that is what is used in other sections of code. The landowner may be granted additional time to fix the problem.

Representative Delmore: We tried to stick with the original language wherever we could. We incorporated it with the counties' to make it clear that the landowner has a chance to fix the problem.

Representative Weisz: Starting on line seven, everything is replaced with this bill. (See attachment #1)

Representative Weisz and **Representative Delmore** explained why the word "individual" was used. The department started with the use of individual, so we continued with that.

Representative Becker: If you take out the word responsible it takes away the possibility that it can mean anything else except the individual referred to in the first line.

Chairman Ruby: We will delete the word "responsible" on the last line.

**Representative Delmore moved the amendment.
Representative Weisz seconded the amendment.**

A voice vote was taken, all responded "aye". The motion carried.

**Representative Delmore moved a DO PASS on HB 1121 as amended.
Representative Weisz seconded by the motion.**

Chairman Ruby called for any further discussion.

Representative Schatz: If the highway department is going to make you fix something that you did wrong. Do you have the right to protest it?

Chairman Ruby: I suppose, if you didn't do it.

Representative Schatz: Here is says you have twenty days. After twenty days...

Representative Weisz: They would send you the bill. You wouldn't pay it, and you would take them to court to prove that you weren't the responsible party. I don't think this bill gives you a specific recourse.

Representative Schatz: Is the land under a bridge part of the right-of-way?

Representative Weisz: Yes.

Representative Schatz: So, a person wanting to do something under that bridge would need permission.

Representative Delmore: That is part of the bill. It says that you can ask permission. But, if you are denied permission or don't ask and do it anyway, then if they say you have to make it right, you have to do it.

There was no further discussion.

A roll call vote was taken for a DO PASS as amended on HB 1121.

Aye 11 Nay 2 Absent 1

The motion carried.

Representative Kreun will carry HB 1121.

January 18, 2013

1/18/13 MC

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1121

Page 1, line 6, remove "from highway authority "

Page 1, line 7, replace "Individuals" with "Notwithstanding any other laws to the contrary, a person"

Page 1, line 11, replace "may" with "must"

Page 1, line 11, after "person" insert "that owns"

Page 1, line 11, after the second "or" insert "possesses the property within twenty days of receiving written notice from the person or"

Page 1, line 12, after "way" insert ". If the person that owns or possesses the property fails to correct the issue within the twenty day time period, the person or governing body having jurisdiction and control over the facility or right of way may correct the issue."

Page 1, line 13, replace "responsible" with "that owns or possesses the property"

Renumber accordingly

Date: 1-18-13
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1121

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number 13,8065,01001

Amendment

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Rerefer to Appropriations Reconsider

Motion Made By Delmore Seconded By Weisz

Representatives	Yes	No	Representatives	Yes	No
Chairman Dan Ruby			Rep. Lois Delmore		
Vice Chairman Mark Owens			Rep. Edmund Gruchalla		
Rep. Rick Becker			Rep. Kylie Oversen		
Rep. David Drovdal					
Rep. Robert Frantsvog					
Rep. Brenda Heller					
Rep. Curtiss Kreun					
Rep. Mike Schatz					
Rep. Gary Sukut					
Rep. Don Vigasaa					
Rep. Robin Weisz					

Vote to all age

Total (Yes) 13 No 0

Absent 1

Floor Assignment /

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

Date: 1-18-13
 Roll Call Vote #: 2

**2013 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1121**

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt
 Amendment

Rerefer to Appropriations Reconsider

Motion Made By Delmore Seconded By Weisz

Representatives	Yes	No	Representatives	Yes	No
Chairman Dan Ruby	✓		Rep. Lois Delmore	✓	
Vice Chairman Mark Owens	✓		Rep. Edmund Gruchalla	✓	
Rep. Rick Becker	✓		Rep. Kylie Oversen	✓	
Rep. David Drovdal		✓			
Rep. Robert Frantsvog	✓				
Rep. Brenda Heller	✓				
Rep. Curtiss Kreun	✓				
Rep. Mike Schatz		✓			
Rep. Gary Sukut	✓				
Rep. Don Vigesaa	✓				
Rep. Robin Weisz	✓				

Total (Yes) 11 No 2

Absent 1

Floor Assignment Kreun

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

REPORT OF STANDING COMMITTEE

HB 1121: Transportation Committee (Rep. Ruby, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). HB 1121 was placed on the Sixth order on the calendar.

Page 1, line 6, remove "from highway authority"

Page 1, line 7, replace "Individuals" with "Notwithstanding any other laws to the contrary, a person"

Page 1, line 11, replace "may" with "must"

Page 1, line 11, after "person" insert "that owns"

Page 1, line 11, after the second "or" insert "possesses the property within twenty days of receiving written notice from the person or"

Page 1, line 12, after "way" insert ". If the person that owns or possesses the property fails to correct the issue within the twenty day time period, the person or governing body having jurisdiction and control over the facility or right of way may correct the issue."

Page 1, line 13, replace "responsible" with "that owns or possesses the property"

Renumber accordingly

2013 SENATE TRANSPORTATION

HB 1121

2013 SENATE STANDING COMMITTEE MINUTES

Senate Transportation Committee
Lewis and Clark Room, State Capitol

HB 1121

2/22/2013

Job number 19381

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to private actions impacting highway facilities or right of way.

Minutes:

Attached testimony:1

Chairman Oehlke opened the hearing on HB 1121

Ron Henke, Director, Office of Operations, North Dakota Department of Transportation (DOT), in favor, this bill is to clearly inform the citizens of North Dakota that they should contact DOT before doing work on state highways right of way areas. The Department wishes to work with them in advance concerning these projects, so their impact can be considered and, if feasible, permission to proceed will be granted. It will also let them know that they are financially responsible for their actions. Attached testimony # 1

Senator Campbell Don't we already have laws regarding right of way, and permission to do ditch work? Do you need permission to leave a pipe in the right of way for a few days?

Ron Henke: We have laws but they are not too effective. We have not been able to enforce them. For mowing there is a section that allows landowners adjacent to the highway to be able to mow (not the interstate). The interstate right of way haying opportunities are put out for bids. It is in the law that whenever you come into the highway right of way you need permission, even for as little as one day. If a utility company puts in a utility line it is not considered an impact. As long as they do due diligence, take care of the area (level it out, reseed) and control erosion I don't see any impacts resulting from their work.

Senator Sitte If the exit pipe stopped right at the edge of the right of way, it might flood the ditches. If they had permission would it be acceptable?

Ron Henke we are asking them to come forward if they believe they will impact the highway. If they put this drainage/exit pipe right at the edge of the right of way it may over capacities a culvert or cause erosion issues, we will work with them so there is a more natural kind of drainage

Chairman Oehlke In picture 1, I see the ditch is torn up and where the pipe is going, what would be your recommendation?

Ron Henke: we contact the landowner, ask them to take the pipe down and move it off highway property. In the past we have taken care of these issues with our own maintenance forces to seed this back (or hire a contractor) and the state incurs those costs. Sometimes landowners put them back and we usually work this out with them

Chairman Oehlke have you had to do tiling along areas where the water is going to be running (put something to keep erosion from happening)? Is that part of the program? These are not natural drains, do they get pumped?

Ron Henke We would not necessarily like it on our right of way because we mow and take care of those ditches or allow farmers to farm them. If you put riprap it is a challenge to mow. We prefer that they do remedial action on their property instead of the states. Some drain tiles need a lift station to lift water high enough for it to get into some flow area. A bill last session passed dealing with drain tiling, if it is over 88 acres they need a permit from the water board, anything less, there is no approval required.

Richard Schlosser North Dakota Farmers Union, against the bill as written, concerned with the broad inclusion of the adjacent landowners and the practices they may have on their Ag land adjacent to that right of way. We understand DOT's concerns with water running into the right of way causing problems (standing water, cattails, silting). DOT referenced the section 61-32-03.1, which exempts drain tiling in anything less than 80 acres from a water board permit. We feel we should narrow the issue in 1121 to "draining into the right of way".

Chairman Oehlke does tiling add to spring flooding?

Richard Schlosser springs of '10 and '11 were extremely wet, we saw a lot of fast rapid runoff that contributed to this problem and we saw a lot of tiling. RCS and water boards do not usually allow tiling. To the east of us that is an issue. When you are up against planting days, farmers become concerned and want to get the water off. There are some controls, like a lift station by either pumping or not particularly in small acreages.

Scott Rising Soybean Growers Association In order to deal with water management issues currently we go thru local water boards, talk to our neighbors and make sure that we don't creates a problem for someone else. With this piece of legislation what I see going on is: you go to the water board, think you are free and clear, and find out that you missed the DOT. We will end up in a battle like we currently have with NRCS and fish and wildlife because they don't interpret things the same way. This bill appears to be very broad, maybe we need to talk with folks at the water commission and make some adjustments. I don't want to create a place where we have to do multiple stops to do a single action.

No other testimony, hearing closed

Senator Flakoll we can bring **senator Luick** before our committee, the preeminent authority on tiling in our chamber. **Chairman Oehlke** yes and make copies of piece of century code Richard mentioned.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Transportation Committee
Lewis and Clark Room, State Capitol

HB 1121

3/14/13

Recording job number 19887

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to private actions impacting highway facilities or right of way.

Minutes:

Attached testimony. 1

Chairman Oehlke opened the discussion on HB 1121 We want to find out what you feel about this bill. I see mostly problems especially with the liability issue.

Senator Larry Luick, District 25, Farmer, excavation contractor, provided general information to the committee on tiling. State, county or township ditches, were constructed to get material for the construction of roadways. I think they were also constructed for water removal. Who has the authority to drain into those ditches, if there is a problem with water going into them? We have laws that already cover causing damage in a highway right of way. I met with DOT and several eastern county water districts last summer discussing different possibilities on how to handle this. The concern was the energy of the water coming from a pump or lift station causing erosion in the ditch bottom. I suggested that getting the energy out of the water would eliminate or reduce the erosion and detriment to that ditch bottom. They were comfortable with that and it wouldn't be a problem. The other issue was cattails, which come from standing water in the bottom of the ditches. It will be an issue deciding what is causing this problem: the tiling water, high water table or surface water that is ponded up. I don't know if it is necessary to have legislation that says we have to have a way to control that. In my area farmers are coming to the realization that they have to find a way to take care of that with long reach mowers.

Chairman Oehlke is there any responsibility on the person dumping that water to create good tiling drainage? Part of the reason this bill is here is because of the abusive situations

Senator Luick I think it will be a case by case issue, there is no way you can blanket everybody with the same type of regulations. Some people are harder to train than others and they may need to be stepped on immediately, some are more conscientious.

Senator Axness when mowing ditches you have to get them back to DOT standards, is there already a penalty in place? Will this be a duplication of something already in law?

Senator Luick I believe there is something in law already.

Vice Chairman Armstrong It is always an infraction; there is no escalation to the crime. I think they are trying to make the penalty more significant and changing the language

Senator Sitte It seems more like a need for a public information campaign. Should we kill this bill?

Senator Luick: DOT covers most of the state; they are more in tune with what is happening in other parts. As tiling moves into different parts of the state you will see more of a problem. After they learn how to handle it the problems will go away.

Vice Chairman Armstrong: They are moving this into chapter 24, and currently it is in title 61 which is the wetlands chapter. (Attachment #1) Do you think there would be a problem of putting some kind of escalation clause on that, like third offense now becomes something else, leaving it in the wetlands chapter?

Senator Luick I think you are not too far off, I don't see any problem with that

Senator Flakoll what do you perceive as a greater deterrent an infraction or the scenario where you are given notice and if you haven't fixed it within 20 days they will do it for you and you have to pay?

Senator Luick somebody else fixing it for you and sending you the bill

Vice Chairman Armstrong the "front end permission" or coordination requirement bothers me. DOT does not move at farmers pace during planting and harvesting

Richard Schlosser, North Dakota Farmers Union, our concerns are: "the adjoining property owner affecting or impacting the right of way", this draws the landowner into a possible infraction or cost recovery. What is the liability with respect to that landowner and producer? Is he covered?

Chairman Oehlke the insurance policy will say if your negligence contributed to the property damage or bodily injury, you might face a lawsuit.

Senator Flakoll: are you looking at any proposed amendments?

Richard Schlosser not specifically but we think it is covered in other sections in terms of encroachment. Our plan is to do a series for our union farmers on the dos and don'ts. Regarding escalation clause we defer to Senator Luick on that, we wouldn't have a problem with that.

Larry Syverson, North Dakota Township Officers Association What we are looking at here is the use of public facilities. There are rules about it. There are months of planning that go into those projects there is time to get a permit from DOT or the county. The interest here is damages not fines, fines go into the school fund. The last two lines of the bill call for the total cost of the correction; this does the more public good.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Transportation Committee
Lewis and Clark Room, State Capitol

HB 1121
4/04/13
Job Number 20866

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to private actions impacting highway facilities or right of way

Minutes:

Attached testimony:

Chairman Oehlke opened the discussion on HB 1121. He summarized the bill and previous discussions.

Senator Campbell thinks this is more of a local Water Board and Water Commission issue, Soybean Growers and the Farmers Union are against it, we do not need the state to control this. Senator Sitte agrees with him

Vice Chairman Armstrong: Moved **DO NOT PASS**

Senator Campbell **SECONDED**

Discussion followed.

Vice Chairman Armstrong there are sanctions in other parts of the code that they can add an escalating offense to. By trying to solve one problem they may be getting authority under this little paragraph over a lot more things than we necessarily want them to have authority over. I have problems with the language: "coordination with and permission from" the North Dakota Department of Transportation (DOT) primarily for harvesting and planting periods of time. Those are high stress time sensitive issues depending on weather and things like that. What a farmer/rancher thinks is a reasonable amount of time for the North Dakota Department of Transportation (DOT) to get back to them on some of these issues might be different from what DOT thinks.

No further discussion

Roll call vote: Yes 7 No 0 Absent not voting 0

Carrier: Senator Campbell

Date: 4/4/13
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1121

Senate TRANSPORTATION Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Senator Armstrong Seconded By Senator Campbell

Senators	Yes	No	Senator	Yes	No
Chairman Dave Oehlke	✓		Senator Tyler Axness	✓	
Vice Chairman Kelly Armstrong	✓		Senator George Sinner	✓	
Senator Margaret Sitte	✓				
Senator Tim Flakoll	✓				
Senator Tom Campbell	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Campbell

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

REPORT OF STANDING COMMITTEE

HB 1121, as engrossed: Transportation Committee (Sen. Oehlke, Chairman)
recommends **DO NOT PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed HB 1121 was placed on the Fourteenth order on the calendar.

2013 TESTIMONY

HB 1121

HOUSE TRANSPORTATION COMMITTEE
January 17, 2013
9:00 a.m. – Fort Totten Room

North Dakota Department of Transportation
Ronald J. Henke, P.E., Director of Operations

HB 1121

Mr. Chairman and members of the committee, I'm Ron Henke, Office of Operations Director at the North Dakota Department of Transportation (DOT).

The purpose of HB 1121 is to clearly inform the citizens of North Dakota that they should contact the governing body having jurisdiction over highway right of way areas before beginning work. The Department wishes to work with residents concerning these projects in advance, so the impact of the project can be considered and if feasible permission to proceed will be granted. It will also let them know that they are financially responsible for their actions.

Lines 7 thru 10 are intended to let individuals who own land next to a highway facility know that they need to coordinate and obtain permission from the governing body having jurisdiction and control over the highway right of way prior to doing work there. Lines 10 thru 13 let those individuals know that they will be financially responsible for their actions to correct any impacts that may happen as a result of any work.

This proposed bill is very similar in nature to an existing state law in chapter 24-05-23 which gave the counties the ability to recover costs incurred for damages resulting from a right of way encroachment on county roads.

Right of way activities by citizens without prior approval are becoming more prevalent. Because of these activities the state is using additional resources in order to remove and reclaim the impacted area. In other cases the activity has impacted safety along that highway.

In addition, there are increased concerns that the State could be held responsible for environmental liabilities that come with unauthorized activities being done in the ditches or wetlands located along the highway.

We are asking that your committee give a favorable do pass on HB 1121.

(Please see attached pictures for examples)

Thank you.

#1



#2



HB 1121 Attachment

#3



#4



HB 1121

1

Impacts to highway facilities - Permission from highway authority required.

Notwithstanding any other statutes, individuals owning or possessing land adjoining or adjacent to highway facilities and right of way may not take any action affecting or impacting the facility or right of way without proper coordination with and permission from the person or governing body having jurisdiction and control over the right of way. Any action taken without permission which affects or impacts the facility or right of way ^{shall} may be corrected by the ~~person or~~ individual within 20 days of receiving written notice from the governing body having jurisdiction and control over the facility or right of way. If the individual fails to correct the issue within the 20 day time period, the governing body having jurisdiction and control over the facility or right of way may correct the issue, and the total cost of the correction must be paid by the ~~person~~ individual responsible.

SENATE TRANSPORTATION COMMITTEE

February 22, 2013

9 a.m. – Lewis and Clark Room

**North Dakota Department of Transportation
Ronald J. Henke, P.E., Director of Operations**

HB1121

Mr. Chairman and members of the committee, I'm Ron Henke, Office of Operations Director at the North Dakota Department of Transportation (DOT).

The purpose of HB1121 is to clearly inform the citizens of North Dakota that they should contact the DOT before beginning work on state highway right of way areas. The Department wishes to work with residents concerning these projects in advance, so the impact of the project can be considered and if feasible permission to proceed will be granted. It will also let them know that they are financially responsible for their actions.

Lines 7 thru 10 are designed to inform individuals who own land next to a highway facility that they need to coordinate and obtain permission from the governing body, which has jurisdiction and control over the highway right of way, prior to doing work. This is required only if that work will affect or impact the highway facility.

One example of work being done next to highway facilities that would not require obtaining prior permission is when utility companies install their facilities. The Department currently works with the Utility Companies if they need to cross over or under the highway facility, but not if they work parallel to the highway. We do not see this proposed bill changing the way utility companies work with land owners or with the DOT, as current practices have not resulted in any impacts.

Lines 11 thru 17 let those individuals know that they will be financially responsible for their actions to correct any impacts to the right of way that may occur as a result of any work. The bill also puts in place a 20 day time frame for the person to make the correction or the governing body having jurisdiction and control over the facility or right-of-way may correct the issue. The total cost to correct the issue must be paid by the person that owns or possesses the property.

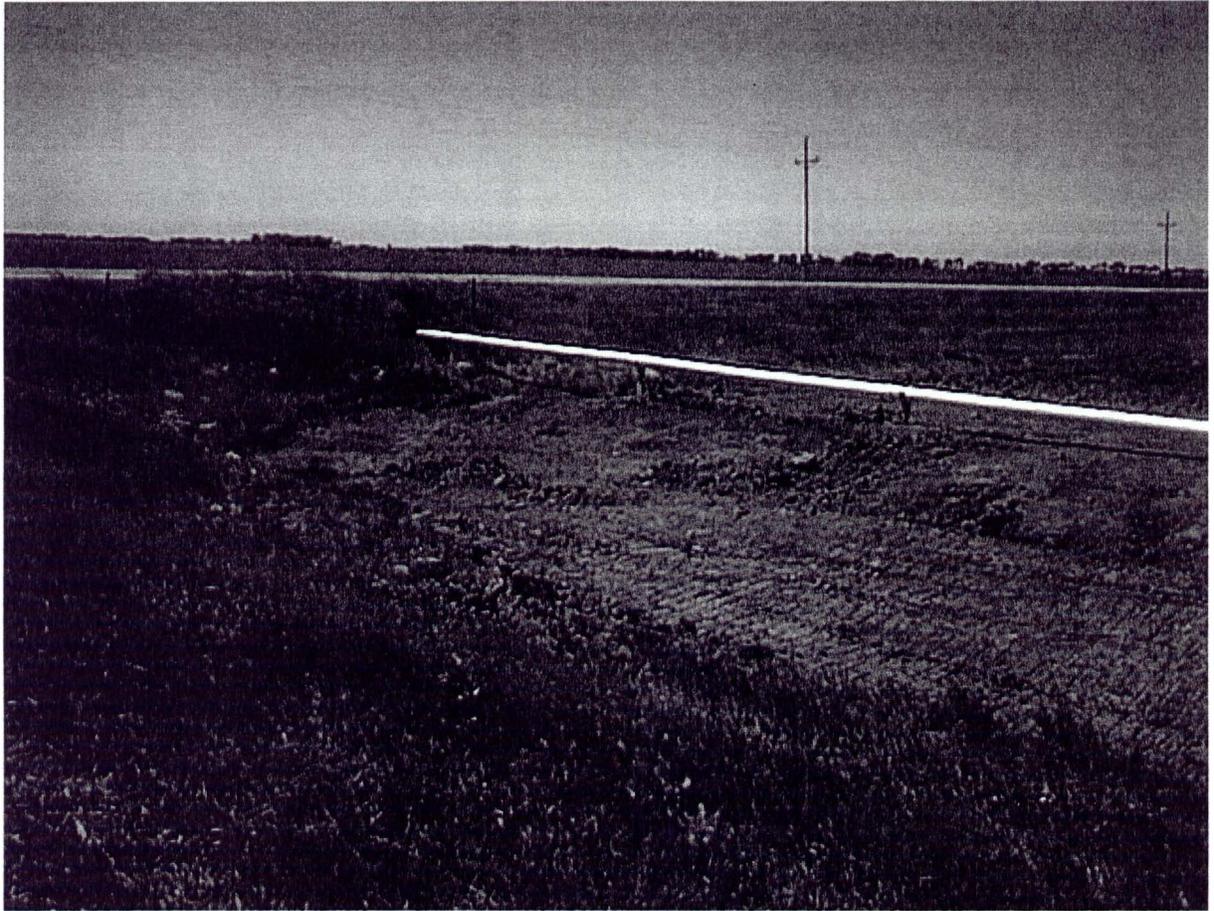
This proposed bill is very similar in nature to an existing state law in chapter 24-05-23 which gave the counties the ability to recover costs incurred for damages resulting from a right of way encroachment on county roads.

Right of way activities by citizens without prior approval are becoming more prevalent. Because of these activities the state is using additional resources in order to remove and reclaim the impacted area. In other cases the activity has impacted safety along that highway.

In addition, there are increased concerns that the State could be held responsible for environmental liabilities that come with unauthorized activities being conducted in the ditches or wetlands located along the highway.

We are asking that your committee give a favorable do pass on HB1121.

(Please see attached pictures for examples)
Thank you.



HB 1121 Attachment



**CHAPTER 61-32
WETLANDS****61-32-01. Legislative policy and intent.**

Repealed by S.L. 1995, ch. 599, § 3.

61-32-02. Definitions.

Repealed by S.L. 1995, ch. 599, § 3.

61-32-03. Permit to drain waters required - Penalty.

Any person, before draining a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more, shall first secure a permit to do so. The permit application must be submitted to the state engineer. The state engineer shall refer the application to the water resource district or districts within which is found a majority of the watershed or drainage area of the pond, slough, lake, or sheetwater for consideration and approval, but the state engineer may require that applications proposing drainage of statewide or interdistrict significance be returned to the state engineer for final approval. A permit may not be granted until an investigation discloses that the quantity of water which will be drained from the pond, slough, lake, or sheetwater, or any series thereof, will not flood or adversely affect downstream lands. If the investigation shows that the proposed drainage will flood or adversely affect lands of downstream landowners, the water resource board may not issue a permit until flowage easements are obtained. The flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. An owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required investigation. This section does not apply to the construction or maintenance of any existing or prospective drain constructed under the supervision of a state or federal agency, as determined by the state engineer.

Any person draining, or causing to be drained, a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more, without first securing a permit to do so, as provided by this section, is liable for all damage sustained by any person caused by the draining, and is guilty of an infraction. As used in this section, sheetwater means shallow water that floods land not normally subject to standing water. The state engineer may adopt rules for temporary permits for emergency drainage.

61-32-03.1. Permit to drain subsurface waters required - Permit form - Penalty.

Installation of an artificial subsurface drainage system comprising eighty acres [32.37 hectares] of land area or more requires a permit. The state engineer shall develop an application form for a permit for subsurface drainage of water. A person seeking to construct an artificial subsurface drainage system must submit an application to the water resource district within which is found a majority of the land area for consideration and approval. Water resource districts may attach any necessary conditions to an approved permit, but may not deny an application unless the water resource district determines the application is of statewide significance or the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers] of the proposed subsurface drainage. Water resource districts must forward copies of all approved permits to the state engineer. Water resource districts shall determine if the application proposes drainage of statewide significance. If so, the application must be referred to the state engineer for consideration and approval, and the state engineer shall make a determination within thirty days. The permit applicant shall provide a thirty-day notice to downstream property owners within one mile [1.61 kilometers] of the proposed subsurface drainage. If an investigation by a water resource district or a downstream landowner within one mile [1.61 kilometers] shows that the proposed drainage will flood or adversely affect lands of downstream landowners within one mile [1.61 kilometers], the water resource district may require flowage easements before issuing a permit. If an artificial subsurface drainage system drains into an assessment drain, natural watercourse, or pond, slough, or lake, a flowage easement is not required. Flowage easements must be filed for

record in the office of the recorder of the county or counties in which the lands are situated. A person that installs an artificial subsurface drainage system without first securing a permit to do so, as provided in this section, is liable for all damage sustained by a person caused by the draining, and is guilty of an infraction.

61-32-04. Administration - Rulemaking authority - Guidelines.

Repealed by S.L. 1995, ch. 599, § 3.

61-32-05. Wetlands bank.

Repealed by S.L. 1995, ch. 599, § 3.

61-32-06. Uniform wetlands classification.

Repealed by S.L. 1995, ch. 599, § 3.

61-32-07. Closing a noncomplying drain - Notice and hearing - Appeal - Injunction - Frivolous complaints.

Only a landowner experiencing flooding or adverse effects from an unauthorized drain constructed before January 1, 1975, may file a complaint with the water resource board. Any person may file a complaint about an unauthorized drain constructed after January 1, 1975. Upon receipt of a complaint of unauthorized drainage, the water resource board shall promptly investigate and make a determination of the facts with respect to the complaint. If the board determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to this title or any rules adopted by the board, the board shall notify the landowner by registered mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if known. The notice must specify the nature and extent of the noncompliance and must state that if the drain, lateral drain, or ditch is not closed or filled within a reasonable time as the board determines, but not less than fifteen days, the board shall procure the closing or filling of the drain, lateral drain, or ditch and assess the cost of the closing or filling, or the portion the board determines, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing on the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may immediately apply to the appropriate district court for an injunction prohibiting the landowner or tenant from constructing or maintaining the drain, lateral drain, or ditch and ordering the closure of the illegal drain. Assessments levied under this section must be collected in the same manner as assessments authorized by chapter 61-16.1. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. A person aggrieved by action of the board under this section may appeal the decision of the board to the district court of the county in which the land is located in accordance with the procedure provided in section 28-34-01. A hearing as provided for in this section is not a prerequisite to an appeal. If, after the first complaint, in the opinion of the board, the complaint is frivolous, the board may assess the costs of the frivolous complaint against the complainant.

61-32-08. Appeal of board decisions - State engineer review - Closing of noncomplying drains.

The board shall make the decision required by section 61-32-07 within a reasonable time, but not to exceed one hundred twenty days, after receiving the complaint. The board shall notify all parties of its decision by certified mail. The board's decision may be appealed to the state engineer by any aggrieved party. The appeal to the state engineer must be made within thirty days from the date notice of the board's decision has been received. The appeal must be made by submitting a written notice to the state engineer which must specifically set forth the reason why the board's decision is erroneous. The appealing party shall also submit copies of the written appeal notice to the board and to the nonappealing party. Upon receipt of this notice the board, if it has ordered closure of a drain, lateral drain, or ditch, is relieved of its obligation to

procure the closing or filling of the drain, lateral drain, or ditch. The state engineer shall handle the appeal by conducting an independent investigation and making an independent determination of the matter. The state engineer may enter property affected by the complaint for the purpose of investigating the complaint.

If the board fails to investigate and make a determination concerning the complaint within a reasonable time, but not to exceed one hundred twenty days, the person filing the complaint may file such complaint with the state engineer. The state engineer shall, without reference to chapter 28-32, cause the investigation and determination to be made, either by action against the board, or by personally conducting the investigation and personally making the determination.

If the state engineer determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to title 61 or any rules adopted by the board, the state engineer shall take one of three actions:

1. Notify the landowner by registered mail at the landowner's post-office address of record;
2. Return the matter to the jurisdiction of the board along with the investigation report; or
3. Forward the drainage complaint and investigation report to the state's attorney.

If the state engineer decides to notify the landowner, the notice must specify the nature and extent of the noncompliance and must state that if the drain, lateral drain, or ditch is not closed or filled within such reasonable time as the state engineer shall determine, but not less than thirty days, the state engineer shall procure the closing or filling of the drain, lateral drain, or ditch and assess the cost thereof, against the property of the landowner responsible. The notice from the state engineer must state that the affected landowner may, within fifteen days of the date the notice is mailed, demand, in writing, a hearing on the matter. Upon receipt of the demand, the state engineer shall set a hearing date within fifteen days from the date the demand is received. If, in the opinion of the state engineer, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. Upon assessment of costs, the state engineer shall certify the assessment to the county auditor of the county where the noncomplying drain, lateral drain, or ditch is located. The county auditor shall extend the assessment against the property assessed. Each assessment must be collected and paid as other taxes are collected and paid. Assessments collected must be deposited with the state treasurer and are hereby appropriated out of the state treasury and must be credited to the contract fund established by section 61-02-64.1. Any person aggrieved by action of the state engineer under the provisions of this section may appeal the decision of the state engineer to the district court in accordance with chapter 28-32. A hearing by the state engineer as provided for in this section shall be a prerequisite to such an appeal.

If the state engineer, after completing the investigation required under this section, decides to return the matter to the board, a complete copy of the investigation report shall be forwarded to the board and it shall include the nature and extent of the noncompliance. Upon having the matter returned to its jurisdiction, the board shall carry out the state engineer's decision in accordance with the terms of this section.

If the state engineer, after completing the investigation required under this section, decides to forward the drainage complaint to the state's attorney, a complete copy of the investigation report must also be forwarded, which must include the nature and extent of the noncompliance. The state's attorney shall prosecute the complaint in accordance with the statutory responsibilities prescribed in chapter 11-16.

In addition to the penalty imposed by the court in the event of conviction under this statute, the court shall order the drain, lateral drain, or ditch closed or filled within such reasonable time period as the court determines, but not less than thirty days. If the drain, lateral drain, or ditch is not closed or filled within the time prescribed by the court, the court shall procure the closing or filling of the drain, lateral drain, or ditch, and assess the cost thereof against the property of the landowner responsible, in the same manner as other assessments under chapter 61-16.1 are levied. If, in the opinion of the court, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners.

The authority granted in this section may only be exercised for drainage constructed after January 1, 1987.

61-32-09. Wetlands replacement fund - Continuing appropriation.

Repealed by S.L. 1995, ch. 599, § 3.

61-32-10. Exemption.

The wetland replacement requirements of sections 61-32-01 through 61-32-11 do not apply to surface coal mining operations until reclamation of the wetland area begins pursuant to chapter 38-14.1.

61-32-11. Application of prior law.

Repealed by S.L. 1995, ch. 599, § 3.