

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ENERGY DEVELOPMENT AND TRANSMISSION COMMITTEE

Tuesday, November 29, 2011
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Rich Wardner, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Rich Wardner, John M. Andrisc, Lonnie J. Laffen, Stanley W. Lyson, Ryan M. Taylor, John Warner; Representatives Michael D. Brandenburg, Scot Kelsh, Mike Schatz

Members absent: Representatives Todd Porter, Shirley Meyer, Gary R. Sukut

Others present: Representative Jerry Kelsh, member of the Legislative Management, also was in attendance.

See [Appendix A](#) for additional persons present.

It was moved by Senator Warner, seconded by Representative Brandenburg, and carried on a voice vote that the minutes of the October 3, 2011, meeting be approved as distributed.

REGIONAL HAZE

Ms. Andrea Stomberg, Vice President, Electric Supply, Montana-Dakota Utilities Company, gave a presentation ([Appendix B](#)) on the Environmental Protection Agency's (EPA's) regional haze rules. She said the regional haze program is a visibility program and not a health protection program. She said the regional haze program requires states to draft compliance plans, including the identification of reasonable progress goals and the installation of best available retrofit technology on plants built between 1962 and 1977. In 2010, she said, North Dakota submitted a compliance plan with best available retrofit technology that would have reduced nitrous oxide by 43 percent and sulfur dioxide by 86 percent. She said the EPA failed to approve this plan and proposed very stringent nitrous oxide controls on the Leland Olds and Milton R. Young Stations of a reduction of nitrous oxide of 90 percent. She said the EPA argues that selective catalytic reactors will work on lignite and will work better on nitrous oxide. North Dakota argues that North Dakota lignite is different and the technology is not proven to work on cyclone boilers that burn North Dakota lignite without extraordinary reengineering. In addition, the state argues that the use of selective noncatalytic reduction has been proven to work and is less expensive. She said the EPA is expected to issue a final decision by January 26, 2012, at which point the state will have to determine whether to sue the EPA if the decision is adverse.

In response to a question from Senator Warner, Ms. Stomberg said the catalytic reduction uses a honeycomb in the flue gas stream. She said the honeycomb converter needs high temperatures, but if it is placed low in the passage where there is high heat, there also is high ash, which coats the honeycomb and makes the honeycomb not work. The solution is to place the honeycomb near the end of the gas stream and use natural gas to reheat the flue gas once the ash is removed. She said reheating the flue gas with natural gas is expensive.

In response to a question from Representative Brandenburg, Ms. Stomberg said she did not know if the settlement between the Wild Earth Guardians and the EPA over regional haze was a public settlement. She said the settlement required the EPA to enforce the rules previously made by the EPA. She said when a nonprofit sues the government to make the government enforce its rules, the nonprofit receives court costs.

In response to a question from Senator Laffen, Ms. Stomberg said use of selective catalytic reactors on Coyote Station would drive the rates of customers up \$5 to \$6 per month. She said 70 percent of the power created at this station stays in North Dakota. She said most of the energy created by Great River Energy goes to Minnesota.

Ms. Sandi Tabor, Vice President of Government Affairs, Lignite Energy Council, answered questions for the committee. She said the EPA recognizes that there are other sources of pollution from outside the state and country, but the EPA does not care enough to modify the air standards. She said there is more impact on haze from Canada than is produced in this state. She said this first round of action on regional haze will mainly affect cooperatives. She said the second round in 2018 will affect everyone. She said the actions will continue through 2064. She said litigation is a way for environmental groups to ensure the federal government is doing its job. She said the Department of Justice regulations allow attorney's fees to nonprofits that successfully force an agency to follow rules. She said states are not reimbursed when successful in a lawsuit against the EPA.

In response to a question from Representative Brandenburg, Ms. Tabor said the United States Chamber of Commerce has information on the last few groups that sued the federal government.

BILL DRAFT ACCEPTING THE PRESENT USE AND DISPOSAL OF COAL COMBUSTION RESIDUES

Committee counsel presented a bill draft [[13.0020.01000](#)] that would accept the present use and disposal of coal combustion residues.

In response to a question from Senator Warner, committee counsel said the bill draft contemplates heavy metal content in fly ash by accepting present regulations that regulate heavy metal content.

In response to a question from Representative S. Kelsh, committee counsel said testimony received by the committee stated that fly ash is not regulated as hazardous waste, and the EPA is considering whether to regulate fly ash as hazardous waste.

It was moved by Senator Andrist, seconded by Representative Brandenburg, and carried on a roll call vote that the bill draft to accept the present use and disposal of coal combustion residues be approved for recommendation to the Legislative Management. Senators Wardner, Andrist, Laffen, Lyson, Taylor, and Warner and Representatives Brandenburg and Schatz voted "aye." Representative S. Kelsh voted "nay."

Representative S. Kelsh said he wanted to receive testimony on how the regulation of fly ash affects first responders in an emergency.

Representative Brandenburg said when the EPA gets sued it is forced to make rules that could not get passed through Congress. He said lawsuits are an end run on the political process. He said the state should fight the EPA when the EPA is forced to make regulations through lawsuits.

Ms. Sandy Clark, Public Policy Director, North Dakota Farm Bureau, testified on the bill draft. She said lawsuits against the EPA by environmental groups to create regulations occur in the agricultural arena. She said the EPA settles with these groups and creates stricter rules. She said making rules through a lawsuit avoids public hearings.

TRANSPORTATION

Mr. Francis Ziegler, Director, Department of Transportation, provided written testimony ([Appendix C](#)) on the 2011 construction program--\$228.6 million for oil impact counties, \$142 million for county road projects, and 2012 construction season plans.

In response to a question from Senator Warner, Mr. Ziegler said interest from money borrowed from the Bank of North Dakota in advance of receiving federal funding is a recoverable cost; however, there is a cap.

In response to a question from Senator Taylor, Mr. Ziegler said emergency relief funding has passed in Congress, but there are caps and there has not been any direction on how the caps will be implemented. He said the information on caps will be available in two weeks to a month.

In response to a question from Senator Warner, Mr. Ziegler said funding for damaged roads as a result of flooding must be obligated within 24 months of either the appropriation or the event. He said the funds become obligated when documents are signed with the federal government not when bid or built.

In response to a question from Senator Warner, Mr. Ziegler said the department has completed \$103 million in temporary grade raises, which is about one-third of the work that needs to be done. He said these graded raises are gravel with sacrificial paving or gravel and are lifted just enough to get the road out of the water. He said there are 113 sites district engineers are looking at for raising roads due to water.

In response to a question from Senator Warner, Mr. Ziegler said although there may be a benefit to diverting rivers instead of raising roads, diverting water is an issue for the State Water Commission and water boards and not the Department of Transportation. He said the department's job is to keep roads out of water.

In response to a question from Senator Taylor, Mr. Ziegler said the reduction in the price of concrete between 2009 and 2010 was an anomaly. He said concrete paving dipped because of a surplus in the economy. He said the main issue for the price of concrete is trucking. He said the future price depends on bidding, and there needs to be competition.

In response to a question from Senator Laffen, Mr. Ziegler said the amount of consulting used by the department has increased from approximately 25 percent to 60 percent. He said the department can consult out work but still needs to monitor and manage.

In response to a question from Representative Brandenburg, Mr. Ziegler said he does not know if there will be caps on emergency relief funding.

Senator Wardner said the department has made substantial progress in oil country, and there is still a long road ahead.

PIPELINES

Mr. Justin Kringstad, Director, North Dakota Pipeline Authority, gave a presentation ([Appendix D](#)) on the transportation of crude oil and natural gas, including flaring. He said the state has two challenges. He said the first challenge is moving oil out of the state to market. He said rail moves approximately 18 percent of oil, and pipeline moves 67 percent of oil. He said 10 percent is refined in the state. He said the TransCanada Pipeline route is held up due to Nebraska. He said the two concerns relate to sand hills and aquifers. He said there already are many pipelines in the aquifer area at present. He expects the pipeline to be moved out of the sand hills.

In response to a question from Senator Andrist, Mr. Kringstad said the Canadian government is aggressively looking at new markets in China and Asia. He said the Canadian government expects the TransCanada Pipeline to be approved.

In response to a question from Senator Lyson, Mr. Kringstad said the Burlington Northern Santa Fe Railway Company can move 730,000 barrels per day. He said the state will not produce enough oil for there to be a rail handling shortage.

In response to a question from Senator Taylor, Mr. Kringstad said the cost to move oil by pipeline instead of rail is approximately \$2 to \$3 per barrel less. He said 75 percent of the oil is moved by truck to a transportation point, and 25 percent is moved through gathering pipelines in this state. He said there has been a shift in Mountrail County to pipelines. He said this is where the first major Bakken activity occurred.

Mr. Kringstad said there is a split between the West Texas Intermediate (WTI) price from Cushing, Oklahoma, and the Brent price which is the world price. He said the WTI price is depressed, and the Brent price is high. Historically, these prices have been coupled, but the Brent price has been up to \$25 per barrel more. He said when the prices were decoupled, North Dakota crude oil prices rose. He said it is not forecasted that the prices will remain decoupled for much more than two years. He said the WTI price will move up to meet the Brent price.

In response to a question from Senator Lyson, Mr. Kringstad said 92 percent of the energy captured is transported by pipeline.

In response to a question from Senator Lyson, Mr. Kringstad said there is five times to six times more energy in oil than gas.

In response to a question from Senator Taylor, Mr. Kringstad said 30 percent to 35 percent of natural gas is flared on a volume basis.

Mr. Kringstad said the second challenge relates to natural gas. He said the issue is what to do as to large-scale transmission as production grows. He said the Pipeline Authority will do a study of pipelines going out of the state.

In response to a question from Senator Taylor, Mr. Kringstad said there is a premium for sweet crude, and the numbers are available as to the premium for sweet crude.

EMINENT DOMAIN AND PIPELINE SITING STUDY

At the request of Chairman Wardner, committee counsel presented a background memorandum entitled [Eminent Domain and Pipeline Siting - Background Memorandum](#).

In response to a question from Representative J. Kelsh, committee counsel said a pipeline that travels through North Dakota without any on-ramp or off-ramp can be a common carrier upon application to the Public Service Commission.

Mr. Paul Mathews, landowner, Cogswell, provided written testimony ([Appendix E](#)) on the study. He said a reason government was formed was to protect private property rights, and eminent domain goes against this purpose. He said the use of eminent

domain by common carriers does not represent what most people would think of as a valid use of eminent domain. He recommended three changes in the law related to eminent domain.

1. Landowners deserve adequate warning of a pending pipeline route so they can prepare to explain concerns before the Public Service Commission.
2. Landowners deserve information on landowners' rights, eminent domain, and negotiation options.
3. Landowners deserve an adequate venue to appeal or negotiate terms of easements.

Mr. Matthews said bullying and threats are common in negotiation for pipeline right of way. He said abuses by pipeline companies need to be addressed.

In response to a question from Senator Wardner, Mr. Mathews said there is a small window of time to prepare when approached by a pipeline company. He said a person who is naive as to business matters would find it very difficult to negotiate with a pipeline company.

In response to a question from Senator Wardner, Mr. Mathews said the Public Service Commission hearings come quickly, and the commission only takes testimony in a proper format because of the hearing process. He said landowners need a government entity with which to air concerns and to receive information.

In response to a question from Senator Wardner, Mr. Mathews said he did not hear back on the route of the pipeline until a week before the Public Service Commission meeting.

In response to a question from Senator Lyson, Mr. Mathews said 90 days' notice before the meeting with the information on the proposed route would be beneficial for landowners.

In response to a question from Representative J. Kelsh, Mr. Mathews said the first offer was to have the pipeline 156 feet from his house. He said then two months later the pipeline company said sign or the pipeline company would proceed with eminent domain.

In response to a question from Senator Taylor, Mr. Mathews said he did not know the other landowners involved or whether rights that apply in the eminent domain process apply to the negotiation process. He said a state mediator that would listen to both sides and make recommendations would be useful.

Senator Wardner said a landowner should be provided information so the landowner knows the landowner's rights, and the landowner should have access to an attorney. He said eminent domain should be available but only as a last resort after working with the landowner. He said, to the contrary, a landowner should not be able to hold up an entire pipeline project.

In response to a question from Senator Laffen, Mr. Mathews said routing is not determined by the

Public Service Commission before the easement options are obtained.

In response to a question from Senator Wardner, Mr. Mathews said the pipeline could have been placed 156 feet from his home if he would have waived the 500-foot avoidance area.

In response to a question from Senator Wardner, Ms. Tammy Nelson-Mathews said she did not know of the 500-foot avoidance area and was only told that she would receive \$1,000 for signing the bonus.

Representative J. Kelsh said eminent domain should be available only after the negotiation process, and the pipeline has met the demands of the property owner and the property owner does not consent.

Senator Wardner said it is a terrible business practice to threaten landowners before working with landowners.

Mr. Bob Banderet, landowner, Cogswell, provided testimony on the Keystone Pipeline. He said he was told that 90 percent had signed, and 10 percent had been deemed hostile landowners. He said the Legislative Assembly should level the playing field by providing an incentive to pipeline companies to negotiate. He said reclamation is an issue that needs to be taken up with a lawyer. He said there is a hardship if there is a leak in the pipeline and told of an incident with a leak to a pipeline near his home.

In response to a question from Senator Wardner, Mr. Banderet said the landowner who had the leak on the landowner's property was compensated by the pipeline company.

In response to a question from Representative J. Kelsh, Mr. Banderet said the pipeline company contended it was in the process of shutting down the pipeline when told of the leak.

In response to a question from Senator Wardner, Mr. Banderet said he had heard that pipeline companies retain attorneys so none are available for landowners. He said it is a long road to get to the point where there is payment of costs under a court order in the eminent domain procedure. He said a landowner must pay the costs up to that point before there is reimbursement. He said he supports the suggestions made by Mr. Mathews, plus there should be some statutory procedures related to reclamation.

In response to a question from Representative J. Kelsh, Mr. Banderet said there is not much incentive for a pipeline company to negotiate because of the power of eminent domain.

Mr. Mark Trechock, Staff Director, Dakota Resource Council, provided written testimony ([Appendix F](#)) on changes in eminent domain law to provide regress for landowners. He said the core problem is that pipeline companies threaten landowners with eminent domain when the company does not have the right to eminent domain. He said there should be three changes in the law:

1. Clarify the meaning of the constitutional provisions in statute so that a common carrier is defined so as to not include a pipeline with no on-ramp or off-ramp in this state.

2. Require the Public Service Commission and Attorney General prepare and publish a guide for landowners and require the guide to be sent to landowners in advance of negotiation.

3. Do not allow the Public Service Commission to issue a route permit, which is necessary for eminent domain, if there are actions protesting the practices used to obtain easements.

Mr. Trechock said there should be language allowing the Public Service Commission jurisdiction to hear from aggrieved landowners.

ENERGY POLICY COMMISSION

Mr. Alan Anderson, Commissioner, Department of Commerce, presented written testimony ([Appendix G](#)) on recent activities of the Energy Policy Commission. He said the Energy Policy Commission is focusing on four topics--infrastructure, workforce, research and development, and federal regulations.

In response to a question from Senator Laffen, Mr. Anderson said Williston could learn from the growing pains in Wood Buffalo, Alberta, Canada. He said the mayor has offered to be available as a resource.

In response to a question from Senator Lyson, Mr. Anderson said infrastructure includes working with housing groups and on sewer, water, and utilities.

In response to a question from Senator Lyson, Mr. Anderson said this issue of infrastructure needs the input of local governmental entities.

In response to a question from Senator Wardner, Mr. Anderson said Wood Buffalo is a regional municipality of a large area in the Arctic Circle.

In response to a question from Senator Andrist, Mr. Anderson said the Legislative Assembly provided money along with federal planning dollars to address how small towns can grow responsibly. He said part of the tour of meetings in oil country will include learning what skill-sets are needed in small towns for controlled growth.

REFINING PROJECT

Mr. Mel Falcon, Operations Manager, Dakota Oil Processing, LLC, introduced Mr. Jeff Lincoln, Chief Engineer, Dakota Oil Processing, LLC, who provided a presentation ([Appendix H](#)) on a refinery near Trenton. Mr. Lincoln said there is a shortage of diesel fuel, and the price was \$4.85 in Williston a few weeks ago. He said the proposed plant will use 20,000 barrels per day and will be a diesel topping plant. He said the focus of the plant will be on diesel and kerosene and will produce 7,000 barrels a day of diesel. He said removing the sulfur is very expensive. He said one-third of the input will be produced as diesel fuel, and there will need to be transportation for the byproducts. He said the byproducts include naphtha which can be used to dilute tar sands oil in Canada. He said as the price of oil goes up, the profit margin for the project is reduced.

In response to a question from Senator Andrist, Mr. Falcon said the financing package has just been completed and sent to a firm in Denver for a capital raise. He said it is being marketed presently. He said there should be some local control.

In response to a question from Senator Taylor, Mr. Falcon said a 20,000 barrel per day refinery is a minor emitter and is regulated by the state rather than the EPA.

In response to a question from Senator Warner, Mr. Falcon said the real estate taxes paid by the refinery will be a tremendous boost to the school district and county. He said the state will receive income tax from the individuals involved in the project through the limited liability company business association.

In response to a question from Senator Wardner, Mr. Falcon said diesel may be sold onsite or can be shipped by rail. He said the refinery will not need a pipeline. He said the company is looking at a pipeline that goes to Minot and Fargo. He said the site is an excellent site, because it is easy to get crude oil at the site.

Mr. Falcon made the following recommendations for legislative changes:

1. Modify the Pipeline Authority bonding authority to include refineries, not just pipelines.
2. Waive the extraction tax if North Dakota crude is sold to a North Dakota refinery.

3. Waive the sales tax for building a refinery. He said the first year of operation is critical for profitability.

In response to a question from Senator Warner, Ms. Karlene Fine, Executive Director, Industrial Commission, said the Pipeline Authority does not provide a moral obligation. Ms. Fine said the Pipeline Authority is an agent of last resort and lends the name of the authority to revenue bonds. She said the state would not have an equity position.

In response to a question from Senator Andrist, Mr. Falcon said the waiver of the extraction tax would improve cashflow and would stabilize the profitability of the project.

Mr. Falcon said the company has done an evaluation of return on equity using different scenarios, and the project will work even in the worst-case scenario. He said in a volatile market it is hard to find a model to base the return on equity because the last refinery was built in 1972.

No further business appearing, Chairman Wardner adjourned the meeting at 1:45 p.m.

Timothy J. Dawson
Committee Counsel

ATTACH:8