

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

### NATURAL RESOURCES COMMITTEE

Thursday, April 26, 2012  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Representative Chuck Damschen, Chairman, called the meeting to order at 10:00 a.m.

**Members present:** Representatives Chuck Damschen, Dick Anderson, Duane DeKrey, David Drovdal, Lyle Hanson, Bob Hunsakor, Mike Nathe, David S. Rust; Senators Bill Bowman, Robert Erbele, Layton Freborg, Oley Larsen, Philip M. Murphy, Connie Triplett

**Members absent:** Representatives Michael D. Brandenburg, Curt Hofstad, Scot Kelsh, Vicky Steiner; Senator Randy Burckhard

**Others present:** See [Appendix A](#)

**It was moved by Representative Rust, seconded by Representative Anderson, and carried on a voice vote that the minutes of the February 22, 2012, meeting be approved as distributed.**

#### ENVIRONMENTAL PROTECTION AGENCY STUDY

Ms. Sandi Tabor, Vice President of Government Affairs, Lignite Energy Council, gave a presentation ([Appendix B](#)) on environmental regulation and the coal industry. As to sulfur dioxide, she said, the Environmental Protection Agency (EPA) wants to use modeling, and the state wants to use actual data to show compliance with the rule. She said this state has sued the EPA, and oral arguments are in May. As to mercury, she said, the mercury rule was issued in late 2011. She said the rule contains a subcategorization for lignite so lignite has a lower level of compliance. She said there is inadequate time to comply with the rule by 2015. She said the state may extend this deadline by one year. She said this state has joined Michigan in a petition for court review. As to regional haze, she said, the EPA partially agreed with the state but rejected the state modeling program. She said the state has filed a petition for review. As to carbon dioxide emissions, she said, there are proposed rules for carbon dioxide emissions that require that any new lignite plant meet the level of emissions of a natural gas plant. She said to do this there will need to be carbon dioxide capture, and this will increase the cost of electricity by approximately 50 percent. She said the EPA has stated that these rules will not apply to existing plants, but she expects there will be a challenge to this interpretation.

In response to a question from Representative Nathe, Ms. Tabor said there will most likely not be any new lignite plants in North Dakota due to proposed and potential rules.

In response to a question from Representative Drovdal, Ms. Tabor said although significant pollution comes from Canada, the EPA cannot regulate Canadian plants. She said this state and the federal government work with Canadian interests but what Canada does in the future is unknown. She said the federal government in Canada primarily regulates air quality.

In response to a question from Senator Bowman, Ms. Tabor said although the EPA does a cost analysis, the cost of regulation does not even come close to the actual costs. She said the costs are based upon the EPA's assumptions that are wrong.

As to coal combustion residuals, Ms. Tabor said the issue is to regulate fly ash and bottom ash as hazardous or nonhazardous waste. She said the argument to regulate residuals as hazardous is because the residuals contain trace metals. She said the reason to not regulate residuals as hazardous waste is because the trace minerals are not in a high enough level to be regulated. She said the EPA is doing a risk assessment, and if the EPA finds a hazard, the EPA will regulate residuals. She said there is legislation in Congress to have residuals regulated as nonhazardous waste.

As to stream protection, Ms. Tabor said the federal Office of Surface Mining Reclamation and Enforcement is working to protect streams from the mining in the Appalachian Mountains in which mountaintops are removed. She said the fear is that regulations relating to mountaintop mining will be applied to strip mining.

As to Clean Water Act jurisdiction, Ms. Tabor said Supreme Court cases make jurisdiction regarding the Clean Water Act confusing. She said the EPA wants to issue a guidance and broaden the scope of the Act to include most wet areas. She said guidances usually become rules. She said if this is the case, the jurisdiction of the EPA would be expanded.

As to the economic impact of EPA rules, Ms. Tabor said the Midwest independent system operator (MISO) has conducted an analysis. She said there have been 100 requests of retirements of plants due to rules. She said a total of 60,000 megawatts will be affected by rules. She said there will need to be retrofits for 47,000 megawatts which will cost between

\$150,000 and \$450,000 per megawatt. She said MISO is concerned about this impact on reliability. She said 60,000 megawatts is half of the energy in the MISO system.

In response to a question from Representative Damschen, Ms. Tabor said expanding mountaintop mining rules to mining in North Dakota is not the right thing to do. She said this state has strict reclamation laws. She said regional haze rules were adopted because of the Grand Canyon and parks in Appalachia. She said the only visual impact in this state is in February when there are no visitors at the park. She said dust and fires create more visual impact around the Theodore Roosevelt National Park than do coal plants.

In response to a question from Representative Damschen, Ms. Tabor said the EPA generally wants states to be engaged in the implementation of EPA standards for emissions. She said the EPA monitors the state plan and may take over the implementation if the state is not keeping federal standards.

In response to a question from Representative Damschen, Ms. Tabor said the subcategorization for lignite that was received for mercury needs to be received for carbon dioxide emissions.

In response to a question from Representative Nathe, Ms. Tabor said the proposed carbon dioxide rules will be finalized before the end of the year. She said the rules will be followed by litigation. She said regulating carbon dioxide under the Clean Air Act is not appropriate. She said Congress should create a structure that makes more sense.

In response to a question from Senator Triplett, Ms. Tabor said the Supreme Court said the EPA can regulate carbon dioxide, and the EPA went through the process to determine if the EPA should regulate carbon dioxide. She said the EPA made an endangerment finding and can regulate carbon dioxide.

Senator Triplett said the EPA is regulating carbon dioxide due to a court order. She said Congress could step in and pass a statute that fits this situation.

In response to a question from Senator Triplett, Ms. Tabor said fly ash in eastern states and western states does not show much distinction. She said the coal industries' response of arguing for the same treatment of fly ash in eastern states and western states is because the fly ash is the same, not politics.

In response to a question from Representative Damschen, Ms. Tabor said last legislative session there were well-meaning bills to force the EPA to recognize states. She said states are allowed to implement federal law, and the state power is in the implementation plan. She said there is going to be more litigation because Congress has not resolved the stalemates in environmental regulation. She said most of all, the industry needs to know the rules. She said the industry is trying to work with the EPA.

Committee Counsel presented information on the committee's activities on the study of primacy agreements with the EPA. He said the committee had

been studying agencies' experiences with the EPA and reviewing burdensome regulations.

Representative Damschen said the state working with the EPA through primacy agreements has not been an issue. He said it was more of an issue whether the state can challenge the EPA in court. He said the state has been successful in challenging the EPA in court. He said this state needs to communicate with other states and Congress on environmental issues.

Representative Rust said this state supplies energy through natural gas, oil, wind, coal, and hydroelectricity. He said making energy provides jobs. He said businesses need to remain viable while environmental problems are realistically addressed.

Representative Anderson said legislators need to educate people in other states, especially states that use power from this state. He said the problem with the expectations for environmental regulation is in other areas of the country.

Representative Drovdal said this state should have an accord with Saskatchewan so that legislative leaders from this state meet with the legislative leaders of Saskatchewan on a regular basis to discuss common issues, including regional haze, water, and flooding. He said the state of Montana has an accord with Saskatchewan.

Senator Triplett said generic legislation directing the Governor and agencies to work with other state agencies and provinces would produce better results than sending legislators.

Representative Drovdal said the legislative branch needs to exert its influence as well as the executive branch.

Representative Nathe said department heads already work with other states and provinces. He said there is an additional value for legislators to speak with legislators from Canadian provinces and other states.

## FEDERAL DESIGNATION STUDY

Committee Counsel reviewed committee activity on the federal designations study and provided information on 2011 Senate Bill No. 2204. He said the federal designations study has been focused on the Northern Plains National Heritage Area. He said the committee asked for more information on 2011 Senate Bill No. 2204, which is codified in North Dakota Century Code Section 54-01-28. He said at the last meeting, the committee received testimony that this law does not prohibit the Fort Abraham Lincoln Foundation from matching Northern Plains Heritage Foundation grants for interpretative panels for the earth lodges at Fort Lincoln. He said it was argued that the law does not completely restrict the Northern Plains Heritage Foundation money to be used on state property. He said it was argued that there were constitutional issues with the bill, and that the supremacy clause of the United States Constitution provides that the federal law takes precedence over state law.

Committee Counsel said the first sentence of Section 54-01-28 states that state funds may not be expended or transferred from state agencies to match federal money for the Northern Plains National Heritage Area or any similar or successor designated area without the approval of the Legislative Assembly. He said regardless of the effect, the first sentence prohibits the expenditure or transfer of state funds to match money for the heritage area. He said this is within the purview of the Legislative Assembly. He said the constitution of the state requires an appropriation by the Legislative Assembly for a state agency to spend money, and the Legislative Assembly sets the policy by which the executive branch agencies administer appropriated funds.

Committee Counsel said federal law provides protection for landowners and the state. He said the Omnibus Public Land Management Act of 2009 prohibits the foundation from using any federal funds to acquire any interest in real property. He said the Act was amended to prohibit the inclusion of private property in the heritage area unless the private property owner requests inclusion. In addition, he said, a private property owner already in the heritage area may be removed from the heritage area upon request. He said this is the same for state or local government property. He said this property may be removed upon request.

In short, Committee Counsel said as to being in the heritage area, a private property owner has to request inclusion. As for state or local government, proper notice to the Northern Plains Heritage Foundation removes that property from the heritage area. He said the second sentence of Section 54-01-28 states that state lands, water, property, or facilities may not be included in the designated Northern Plains National Heritage Area or any similar or successor areas without the approval of the Legislative Assembly. He said the third sentence states that no further lands, water, property, or facilities may be designated as heritage areas within this state without the approval of the Legislative Assembly. He said the second sentence of the bill, and in as much as the third sentence of the bill addresses state property, Legislative Assembly approval is needed before there is inclusion in the heritage area in those sentences. He said although stated in the converse, these sentences would appear to opt state property out of the heritage area, and legislative approval would be needed to opt back in. He said although the bill appears to take action for the state, to be absolutely clear the executive branch or Legislative Assembly may desire to clearly opt-out if that is the intent.

Committee Counsel said the third sentence in part appears to address private property that may be included in the heritage area in the future. He said Legislative Assembly approval is required. He said this would be legislative regulation of a relationship between a private landowner and the federal government. He said this raises constitutional issues under the supremacy clause. However, he said, the

private property owner would have to affirmatively opt-in.

In response to a question from Representative Damschen, Committee Counsel said the main purpose of the Northern Plains National Heritage Area is to provide grant money for tourism within the area.

Ms. Sara Otte Coleman, Director, Division of Tourism, Department of Commerce, answered questions for the committee.

In response to a question from Representative Nathe, Ms. Otte Coleman said the Division of Tourism has detailed grant agreements, and those receiving grants must report back on spending. She said this spending is well-documented. She said the Division of Tourism provides marketing grants, event grants, and infrastructure grants.

**It was moved by Senator Triplett, seconded by Senator Murphy, and carried on a voice vote that no further action be taken on the study of federal designations.**

### POTASH STUDY

Committee Counsel provided a review of the activities of the committee on the study of potash mining and taxation. He said the bill that created this study also had a section stating it was the intent of the last Legislative Assembly that the next Legislative Assembly will provide a source of up to \$2 million for loans to potash development-impacted political subdivisions. He said another section provided that the tax collected is appropriated and must be apportioned as determined by the next Legislative Assembly. He said the potash and byproducts tax is in lieu of other taxes except the land and the processing plant, mining facility, or satellite facility must be assessed and taxed as other real property within the taxing district.

Mr. J. T. Starzecki, Senior Manager, Business Development, Sirius Minerals, PLC, gave a presentation ([Appendix C](#)) on potash mining and taxation issues. He said there has not been a new potash mine in the last 40 years. He said his company plans to begin a mine in North Yorkshire, England, soon. He said his company has four projects--North Yorkshire in the United Kingdom; North Dakota; Adavale, Australia; and Canning, Australia. He said his company is looking at these projects and wants more than one project in the pipeline. He said the flagship project is in North Yorkshire. He said North Dakota includes 16,000 acres under lease mostly with private individuals. He said in December 2010 a test hole was drilled. He said the next possible steps are to investigate the carnallite value, drill additional wells, or move the exploration area.

In response to a question from Representative Anderson, Mr. Starzecki said carnallite is a form of potash. He said it has more impurities.

In response to a question from Representative Nathe, Mr. Starzecki said the timetable in North Dakota depends on the next studies.

In response to a question from Representative Nathe, Mr. Starzecki said the potash is 8,200 feet to 8,600 feet deep. He said as the formation moves south and west, it moves deeper to 12,000-feet plus. He said his company is investigating using wastewater from the oilfield.

In response to a question from Representative Drovdal, Mr. Starzecki said a detailed analysis has not been done on saltwater obtained in oil extraction.

In response to a question from Senator Bowman, Mr. Starzecki said 95 percent of potash goes to a fertilizer company and is mixed with phosphorus and nitrogen.

In response to a question from Representative Nathe, Mr. Starzecki said historically potash has been transported by railcar. He said using trucks is not as appealing because of the volume of the product. He said a pipeline is a good way to ship potash, and this method will be used in the United Kingdom. He said the pipeline is being used because the mining is being done in a national park, and a pipeline reduces the visual impact. He said North Dakota potash will be transported by railroad or pipeline.

In response to a question from Representative Rust, Mr. Starzecki said the higher the selling price of potash the higher the royalty. He said there is demand domestically for potash, but it may not provide the highest price. He said potash is needed for food in India and China. He said some potash is shipped out of country, turned into fertilizer, and is shipped back into this country.

In response to a question from Representative DeKrey, Mr. Starzecki said the price of potash is tied to the price of commodities, population growth, biofuel, land availability in foreign countries, and diets. He said these factors point to a significant demand increase in potash over the next decade.

In response to a question from Representative Drovdal, Mr. Starzecki said a potash facility in this state would most likely produce 500,000 tons to 2 million tons per year for 30 years to 70 years. He said one well can go in multiple directions for a mile around the well site. He said there is a high impact on a small area. He said the water demand depends on the ore body. He said a detailed scoping study is needed to determine the amount of water needed.

In response to a question from Representative Nathe, Mr. Starzecki said local consultants looked at the test well site, cleaned it up, and developed a reclamation plan. He said the surface owner has asked that there be a delay in reclamation. He said the description the committee received of the site was overblown. He said the site was not in disarray.

In response to a question from Representative Hunsdor, Mr. Starzecki said the United Kingdom potash facility will produce 10 million tons per year. He said this will create 4,000 to 5,000 jobs temporarily and full-time. He said in Hershey, Michigan, the mine provides 200 full-time jobs. He said a potash facility provides long-term full-time positions.

In response to a question from Representative Rust, Mr. Starzecki said his company worked with the Department of Commerce to bring the potash industry to this state. He said a potash facility would provide economic development to the area. He said his company wants to and has partnered with state government. He said nothing at present is prohibitive for developing the facility.

In response to a question from Representative Damschen, Mr. Starzecki said there are three mines in the United States--New Mexico, Utah, and Michigan. He said the only other basin is in Arizona. He said not all products are sent overseas. He said 20 percent stays in the United States for fertilizer and other uses.

In response to a question from Senator Bowman, Mr. Starzecki said his company wants to partner with local residents and legislators. He said in the United Kingdom project, his company has worked on the parish and city levels. He said his company has partnered to address infrastructure.

In response to a question from Representative Rust, Mr. Starzecki said this state's taxation is a middle-of-the-road proposal that is a good starting point. He said a taxation structure needed to be developed so there was an economic model for his company to determine whether it is viable to mine potash. He said this state's taxation is not the lowest but is not so high as to prohibit development. He said his company can function under the current law.

In response to a question from Senator Bowman, Mr. Starzecki said as his company completes studies, does more exploration, and proves out the resource, there will be good information on the impact. He said changes in taxation can change the economics. He said in Australia the tax was raised from 2 percent to 30 percent and that killed some potash development. He said if everyone is benefiting from the development, then there should not be a problem.

In response to a question from Representative Nathe, Mr. Starzecki said his company has stayed out of local tax issues because it does not want to take sides among local residents. He said allocation is not his company's issue but is for the state to decide.

Mr. Lynn Helms, Director, Department of Mineral Resources, introduced Mr. Ed Murphy, State Geologist, to provide a presentation ([Appendix D](#)) on potash in North Dakota. Mr. Helms said the Hershey, Michigan, plant is the closest plant in the United States to a plant that would be in North Dakota. He said the people complaining about the test well did not contact the operator or his agency. He said if they would have contacted either of them, the issues would have been addressed.

Mr. Murphy said most of the consumption of potash is in Asia and Latin America. He said the United States uses 6.6 million tons of potash and imports 5.5 million tons. He said potash is located below the Bakken and Three Forks Formations. He said there is an estimated 50 billion tons of potash in North Dakota. He said the potash in this state ranges

from about 6,000 feet to 12,000 feet deep. He reviewed the mines in Saskatoon, Saskatchewan; Belle Plain, Saskatchewan; Hershey, Michigan; Wendover, Utah; Moab, Utah; Carlsbad, New Mexico; and the Dead Sea, Israel. He said he spoke with the geologist that decided to locate the plant in Hershey, Michigan, instead of this state. He said that geologist said the quality in this state is better, but the potash in Michigan is shallower. He provided pictures of the test well and said it was close to a well drilled in the 1950s. He said reclamation was delayed because of the landowner and renter requesting the delay. He said to have compressed air storage from wind turbines, the cavern needs to be not below 6,500 feet deep. He said creep is not an issue in caverns created in potash mining in this state. He provided a review of subsurface mineral rules. He said these rules include potash solution mining. He said companies were concerned with the rules because they were vague and combined solution mining and surface mining in the same language. He said the rewrite of the rules includes present North Dakota, Michigan, Wyoming, New Mexico, and Utah laws. He said the allocation model is being done similar to oil and gas.

In response to a question from Senator Murphy, Mr. Murphy said creep means the sides come in slowly.

In response to a question from Representative Hanson, Mr. Murphy said although no new mine has been created in 40 years, no mines have been closed and most are trying to expand. He said potash mining is limited to less than 9,000 feet. He said potash from the United States helps balance trade. He said there is a lag time of five years after the push for mining begins before there is to be potash mining.

In response to a question from Representative Nathe, Mr. Helms said most of the royalties in North Dakota will go to private lease agreements. He said most of the leasing on state land was done through Internet auction. He said Michigan and Utah have no severance tax but have a higher royalty rate because the potash is on state land.

In response to a question from Representative Drovdal, Mr. Helms said Saskatchewan has a complicated taxation scheme to adjust for a high or low value for potash. He said this adjustment is done in this state through a corporate income tax.

Representative Rust said Burke County has a small population, and it is not a wealthy county. He said any impact from potash mining needs to be met.

Representative Damschen said the citizens should gain while the industry profits from potash mining.

In response to a question from Senator Bowman, Mr. Murphy said there is a chart in policy for bonds for mines. He said he expects the new rules to include a bond table for reclamation as it is for other mines.

In response to a question from Representative Anderson, Mr. Murphy said the rules need to be updated, and the rules are not based on the quality of potash. He said the issues of bonds and no surface salt are independent from the quality of the potash. He said the new rules will provide a better base.

Representative Damschen said the law should tie apportionment of taxes to the impact.

Senator Bowman said if measure No. 2 passes, it will affect what this committee does for impact.

Representative Drovdal said most of the money goes to the state so the state will have to address impact. He said impact funds need to arrive at the beginning of potash development when there is little tax revenue.

Representative Nathe said the test results from the test mine will be available in late August. He said the committee may desire to wait until after the primary election and the public release of the well data to have another meeting.

No further business appearing, Chairman Damschen adjourned the meeting at 2:55 p.m.

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Timothy J. Dawson  
Committee Counsel

ATTACH:4