

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

NATURAL RESOURCES COMMITTEE

Tuesday, September 6, 2011
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Chuck Damschen, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Chuck Damschen, Dick Anderson, Michael D. Brandenburg, Duane DeKrey, David Drovdal, Lyle Hanson, Bob Hunsakor, Scot Kelsh, Mike Nathe, David S. Rust, Vicky Steiner; Senators Bill Bowman, Randy Burckhard, Robert Erbele, Layton Freborg, Connie Triplett

Members absent: Representative Curt Hofstad; Senators Oley Larson, Philip M. Murphy

Others present: See [Appendix A](#)

At the request of Chairman Damschen, committee counsel reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#).

PRIMACY STUDY

At the request of Chairman Damschen, committee counsel presented a background memorandum entitled [Primacy Agreements with the Environmental Protection Agency - Background Memorandum](#).

Mr. David Glatt, Chief, Environmental Health Section, State Department of Health, presented written testimony ([Appendix B](#)) on primacy agreements with the State Department of Health. He said each federal environmental protection Act includes requirements that the Environmental Protection Agency (EPA) establish and enforce standards. These standards are designed to maintain or improve environmental quality and to protect public health. In some cases, he said, implementation of federal programs may be delegated to states through formal agreements. These agreements are referred to as primacy or programs delegation agreements. To receive primacy or programs delegation, a state must petition the EPA expressing interest in the program implementation and must demonstrate that the state has the capacity to implement the program. He said the program benefits both federal and state agencies. He said the benefits include:

- Program implementation costs less at the state level.
- More immediate and timely response.
- Increased access to the regulatory process.
- Increased acknowledgement of local conditions.
- A more immediate say by the state into how rules are implemented.

Mr. Glatt said if a state chooses not to seek primacy, the program requirements will be conducted by the EPA or its contractors. Not all EPA programs may be delegated to a state.

Mr. Glatt said the number of primacy agreements between the EPA and the department may vary from time to time. At the present time, the department has primacy agreements for major programs under the Clean Air Act, the Safe Drinking Water Act, the Clean Water Act, and the Resource Conservation and Recovery Act. He said the department receives approximately \$3.5 million per year of federal funds for program implementation. In addition, the department receives approximately \$22 million to implement the drinking water and clean water state revolving loan funds.

Mr. Glatt said the state and EPA relationship has been strained. He said the EPA would prefer a stronger federal presence while the state would like local, social, economic, and environmental conditions to play a more direct role in program decisions.

Mr. Glatt said there should be deference to the state in program implementation decisions. He said the department believes Congress intended the EPA to establish environmental standards, but left implementation methods up to the states. He said the regional haze controversy is about which technology to use. He said the state technology, which is proven, provides a 50 percent reduction in harmful gasses. He said the technology supported by the EPA provides for a 90 percent reduction, but that technology is not proven to work. He said the cost of the state technology is \$50 million per facility, and the cost of the federal technology is \$300 million to \$400 million per plant. He said the different use of technology will not make a difference as to haze.

Mr. Glatt said the department and the EPA are concerned that future budget cuts may require the turnback of some delegated programs. Program turnbacks could result in decreased environmental protection, increased costs to local and federal partners, higher penalties, the potential for increased permit fees, and the delay of getting permits approved.

In response to a question from Representative Brandenburg, Mr. Glatt said the reduction in sulfur dioxide, nitrogen oxide, and particulate emissions with the state technology will result in a 50 percent reduction. Mr. Glatt said the cost for all facilities--two--would be \$100 million. He said the

federal technology will remove 90+ percent and the cost for both facilities will be \$700 million. He said this will result in an increased cost to consumers. He said the department wants money for environmental protection to be spent wisely.

In response to a question from Representative Nathe, Mr. Glatt said the ozone rules of the EPA were recently set aside. He said this does not affect this state. He said there is a limited amount of money, and the money should be focused on core issues of the region.

In response to a question from Representative Drovdal, Mr. Glatt said the EPA has used modeling as the basis for rules while this state has actual monitoring for the last 25 years.

In response to a question from Representative Drovdal, Mr. Glatt said this state would not meet regional haze standards of the EPA even if there were no power plants in this state under the modeling.

In response to a question from Representative Damschen, Mr. Glatt said the EPA has been pressured by Congress to show results, so the EPA treats all states the same. He said the biggest problem is getting people from Washington, D.C. out to North Dakota to see the differences between North Dakota and the East Coast.

In response to a question from Representative Brandenburg, Mr. Glatt said one of the benefits of primacy is that the state controls the data and gets the data first. He said primacy will become more of a challenge as federal budgets get smaller and the rules do not change. He said the state can challenge the EPA on regional haze because of the data.

In response to a question from Senator Triplett, Mr. Glatt said the oilfield expansion has stressed the resources of the State Department of Health.

In response to a question from Representative Rust, Mr. Glatt said dust is an issue on a local level as a result of truck activity. He said the State Department of Health is looking at oilfield brines for dust control. He said roads may be an issue with regional haze and if that were the case, dust from combines and tractors would be an issue as well.

In response to a question from Senator Bowman, Mr. Glatt said if brines that are now being placed down a saltwater disposal well can be used for dust control, it is a win-win proposition.

In response to a question from Representative Anderson, Mr. Glatt said brines contain sodium chloride and trace metals, including arsenic and ammonia. He said the department is trying to find the right brine with a high sodium level but with a low trace metals.

Mr. Doug Goehring, Commissioner, Department of Agriculture, presented written testimony ([Appendix C](#)) on primacy agreements in the department and the EPA. He said the federal Insecticide, Fungicide, and Rodenticide Act provides the EPA with authority to regulate the production, distribution, sale, use, and disposal of pesticides. He said the EPA can delegate enforcement primacy to a state if the EPA verifies that

the state laws and rules have equal or greater stringency than the federal law. He said the EPA has determined that North Dakota Century Code (NDCC) Chapters 4-35 and 19-18 are equal to or more stringent than those found in federal law. He said North Dakota is enforcing federal law through the adoption of state law. He said in exchange for accepting federal funds, the department agrees to implement certain pesticide programs, engage in specific activities, and conduct a minimum number of different types of inspections and investigations. He said the federal funds typically require an 85 percent federal/15 percent state cost-share. He said several base pesticide programs are fully or partially funded through the EPA grant. He said these include:

- The base pesticide enforcement program;
- The worker safety and the worker protection standard;
- The pesticides in water program;
- The endangered species protection program;
- The health care initiative; and
- The integrated pest management in schools program.

Mr. Goehring said the Department of Agriculture works with the EPA through a performance partnership grant because:

- The department is already performing many of the regulatory functions that the EPA would be doing if they were enforcing the law.
- It helps ensure that any regulatory actions are fair and reasonable.
- Persons with regulatory questions or concerns can contact a state agency instead of EPA staff members out of state.
- State regulators have interaction with the pesticide industry on a daily basis and have a level of understanding of the pesticide use, practices, and issues in the state that the EPA does not have.

Mr. Goehring said working with the EPA under the primacy agreement has some challenges. He said there is work with preparing the grant request package, and quarterly and end-of-year reports can be significant. He said the federal funding varies from year to year. He said this makes it difficult to develop and implement long-term, multiyear projects. He said the high reliance on federal funds reduces flexibility. He said the EPA controls a significant portion of the pesticide budget, and the EPA controls regulatory priorities.

In response to a question from Representative Damschen, Mr. Goehring said the EPA would be doing the regulation if the state did not. He said the federal regulations must be followed regardless of state action. He said the state has more compliance than any other state in Region 8.

In response to a question from Representative Drovdal, Mr. Goehring said if there is a reduction in federal funding, the state will have to do more with less.

In response to a question from Representative Nathe, Mr. Goehring said the state may need more funding if federal funding is reduced.

In response to a question from Representative Nathe, Mr. Goehring said although it would be nice not to answer to the EPA, the department can live with the federal funds and the federal pressure at present.

In response to a question from Representative Brandenburg, Mr. Goehring said the EPA does not understand agriculture as well as it should.

Mr. Lynn Helms, Director, Department of Mineral Resources, gave a presentation ([Appendix D](#)) on primacy issues with the EPA under the Safe Drinking Water Act. He said there are six types of wells and the Department of Mineral Resources is involved with Class II, Class III, and Class VI wells. He said Class II wells are saltwater disposal and enhanced oil recovery wells. He said Class III wells are subsurface mining wells. He said Class VI wells are for carbon dioxide sequestration.

Mr. Helms said the Industrial Commission through the Oil and Gas Division has authority to regulate Class II injection wells. He said these wells are regulated under North Dakota Administrative Code (NDAC) Chapter 43-02-05. He said the program costs approximately \$400,000 per biennium, and the EPA funds approximately one-third the cost. He said in 1983 during the primacy application, the EPA indicated that the Class II grants would cover approximately 75 percent of the cost. He said the Geological Survey, a division of the Industrial Commission, Department of Mineral Resources, has authority to regulate Class III injection wells. He said these wells are regulated under NDCC Chapter 38-12 and NDAC Chapter 43-02-02.1.

Mr. Helms said the Industrial Commission through the Oil and Gas Division is currently revising rules relating to Class VI injection wells. He said NDAC Chapter 43-05-01 relating to geologic storage of carbon dioxide must be amended to meet the stringency of the EPA rules and regulations. He said this is a requirement to qualify for Class VI primacy. He said the state has 300 saltwater handling facilities now and 1,500 are expected in 17 years to 20 years. He said this number results in three disposal wells in every township. He said these facilities are not a great neighbor because they run 24 hours a day 7 days a week with trucks dumping saltwater. He said his division needs funding for field inspectors. He said primacy may be priceless, but it is a big policy decision.

Mr. Helms said carbon capture and storage may be essential for energy development in this state, especially for coal. He said the technology is used and is available; however, there are problems with public acceptance. He said carbon dioxide sequestration is funded with a one cent per ton fee for administration and a five cent per ton fee for a trust fund to oversee the wells once they are closed down. He said \$532,000 was appropriated into the administrative fund last legislative session. He said

the state adopted rules on carbon dioxide sequestration before the EPA adopted rules. He said the state rules are not compatible with the federal rules. He said Region 8 compared the state rules to the federal rules and found 200 pages of differences before there can be state primacy. He said the EPA rules change all the time and there are over 900 pages of guidance for the federal rules. He said his division is in the act of reconciling the state and federal rules. He said the state has over 1,000 years of carbon dioxide capacity and only 800+ years of coal.

In response to a question from Senator Bowman, Mr. Helms said the state comments on federal rules through national groups to which it belongs. He said there are 10 EPA regions in the United States, and the EPA top-down driven regulation does not fit in all regions.

In response to a question from Senator Burckhard, Mr. Helms said fracturing geology in Pennsylvania is much different from that in North Dakota. He said the Appalachian Basin does not have a Dakota Formation. He said there is no disposal of saltwater underground in Pennsylvania. He said the water must be cleaned and disposed of on the surface. He said geologic column is saturated with natural gas in Pennsylvania.

In response to a question from Representative DeKrey, Mr. Helms said Wyoming and Montana took the stance of not entering primacy agreements but recanted. He said the problem was that industry could not get permits in a timely manner from the EPA. He said permits from the EPA would take over a year and can be received in this state within six weeks. He said industry could not grow and prosper with EPA regulating instead of the state.

In response to a question from Representative Kelsh, Mr. Helms said saltwater in a truck is regulated by the State Department of Health through a permitting process. He said pipelines are regulated by the Oil and Gas Division. He said 75 percent of saltwater is being transported by semitruck. He said if the State Department of Health license is violated, the saltwater hauler can lose the license and be out of a job.

In response to a question from Representative Drovdal, Mr. Helms said saltwater disposal wells are regulated by the Oil and Gas Division, but dust creation and safety on the highway as a result of a facility is not within the power of the division. He said the Legislative Assembly should review the policy of facility location. He said he is a proponent of local control through zoning. He said the facility and well do not need to be located next to each other.

In response to a question from Representative Drovdal, Mr. Helms said NDCC Chapter 38-22 authorizes the Industrial Commission to set a fee for the trust fund and administration fee for carbon dioxide storage.

In response to a question from Senator Anderson, Mr. Helms said the corrosiveness of saltwater varies,

but generally is very corrosive. He said normal saltwater pipelines are made of fiberglass. He said high pressure lines are steel with plastic lining. He said leaks are caused when a rock is next to fiberglass and causes a break.

In response to a question from Senator Anderson, Mr. Helms said semitrucks haul saltwater in stainless steel tanks. He said they also haul freshwater in the same tank.

In response to a question from Representative Kelsh, Mr. Helms said the truck can haul crude oil as well. He said there is a shortage of tanker trucks and the tanks are frequently washed and used in different service.

In response to a question from Representative Damschen, Mr. Helms said the EPA regulates more frequently from suggestions made by a scientific advisory board that comes from academia. He said academia has a certain fear of interacting with industry so that it maintains independence. He said this results in regulation that is not practical or implementable. He said if the EPA were to run Class VI carbon sequestration wells, there will be no carbon storage in North Dakota.

In response to a question from Representative Damschen, Mr. Helms said the ozone rule was tabled because the general public learned that lots of jobs would be lost. He said the Legislative Assembly needs to be aggressive with informing the public and Congress of the state's position.

In response to a question from Representative Brandenburg, Mr. Helms said there is no substitute for persistence. He said the state has been persistent in hydraulic fracturing and there would have been regulation of hydraulic fracturing if not for this persistence.

Senator Triplett said if maintaining primacy is priceless, there may be no purpose of this study.

Representative Damschen said the study can be informational and can be used to influence regulation in a positive way.

Representative Brandenburg said the public is affected by the gas pump, grocery store prices, and utility prices. He said the committee should look at the cost to consumers and share the cost with the public.

Senator Triplett said sharing information with consumers is different from a study of primacy. She said she does not know if the committee had the authority to go in this direction.

Representative Damschen said he would consult with the chairman of the Legislative Management.

Representative Rust said the committee should decide whether to return regulation to the EPA or keep primacy. He said the committee should weigh the benefits and costs of each.

Representative Damschen said some Legislative Management discussion was to whether the EPA should be uncontested in regulation of the states. He said EPA regulations are one size fits all, and the committee should look for a better solution.

Senator Triplett said state agencies have the authority to challenge EPA regulations at present.

Representative Damschen said part of the study is what the committee is doing today by learning what the agencies' experiences are with the EPA.

Representative Drovdal said the committee should study if there is duplication of regulation by the EPA and the state.

Representative Damschen said if people feel the pain, regulations are dropped. He said the committee should look at burdensome regulations.

FEDERAL DESIGNATIONS

At the request of Chairman Damschen, committee counsel presented a background memorandum entitled [Federal Designations - Background Memorandum](#).

Ms. Sandy Clark, Public Policy Director, North Dakota Farm Bureau, provided written testimony ([Appendix E](#)) on federal designations. She said the Farm Bureau is frustrated with the federal government and wants private landowners to have control of the land. She said the state should keep state-owned land from being in national designations. She said the Dakota Grasslands Conservation Area identified purchasing perpetual easements on 24,000 acres of wetlands and 1.7 million acres of grasslands for migratory bird habitat at the cost of \$588 million over 25 years. She said the United States Fish and Wildlife Service does not have the financial resources so it will be using alternative funding sources, like the land and water conservation fund. She said these fund grants are awarded to states and other entities to support the acquisition and development of parks, recreational facilities, and habitat. She said North Dakota state grants should not be used to purchase these federal perpetual easements. She said easements should be for 20 years or one generation. She said there is concern that the Little Missouri in the Badlands will be designated a wild and scenic river. She said the National Grasslands is composed of federal land, but private property is commingled. She said roadless areas restrict private property owners in use of their property. She said the Legislative Assembly prohibited the use of state money to be used for federal matching dollars for the Northern Plains National Heritage Area. She said this was wise.

In response to a question from Senator Bowman, Ms. Clark said communication is important with federal agencies, including the Bureau of Land Management.

Senator Anderson said perpetual easements are wrong and devalue the land. He said wetland easements cause flooding because water cannot be drained in the fall.

Representative DeKrey said the United States Fish and Wildlife Service can stretch an easement. He said the service is claiming that water under a wetland is part of the easement and is regulating wells. He

said the Army Corps of Engineers has mismanaged the Missouri River.

Representative Brandenburg said the Army Corps of Engineers promised certain grazing and access to ranchers around Lake Oahe and then changed the rules.

Senator Margaret Sitte provided testimony on the study and a handout ([Appendix F](#)) on the crown jewels program that creates permanent protection from development of certain land. She said she was the primary sponsor of the bill that became the study. She said the supremacy clause is limited by the rest of the Constitution, including the 10th Amendment which protects the people and states from the federal government.

Representative Drovdal requested more information on the Northern Plains Heritage Foundation.

Senator Triplett said the Northern Plains Heritage Foundation does not manage land and only gives grants. She said the Army Corps of Engineers controls all the navigable waters in the state and should be considered when considering federal designations.

POTASH STUDY

At the request of Chairman Damschen, committee counsel presented a background memorandum entitled [Potash Mining and Taxation - Background Memorandum](#).

Mr. Helms made a presentation ([Appendix G](#)) on potash mining and regulation. He said the Geological Survey has authority to regulate Class III injection wells. He said the survey has the authority to regulate subsurface mineral exploration, development, and production under NDCC Chapter 38-12 and NDAC Chapter 43-02-02. He said the state has received program implementation primacy in 1984 over Class III injection wells. He said the Legislative Assembly in 2011 authorized one full-time geologist position to supervise the subsurface mineral program. He said the position has been advertised and the hiring process is underway. He said that person will need to modernize NDAC Chapters 43-02-02 and 43-02-02.1. He said these were last updated in the mid-1980s. He said potash is mined through solution mining in which potassium chloride and sodium chloride are dissolved in water. He said the water is heated and the potassium chloride or potash falls out and the salts stay in the water. He said it is expected that oilfield brine will be used in North Dakota and the sodium chloride will be left in the ground. He said there will not be a salt pile. He provided information on the Mosaic Potash Plant in Belle Plaine, Saskatchewan, that has a salt pile and brine ponds. He said this is not how it will be done in North Dakota. He gave an example of a modern mine of the Mosaic Potash Plant in Hershey, Michigan. He said there is one exploration well in this state and two more planned. He said it will be two more years before there is pilot mining and five years before there is

actual mining. He said the rules need to be redone before there is potash mining.

In response to a question from Senator Burckhard, Mr. Helms said salt pile can be a serious problem with surrounding farmers. He said the mine in Canada was agreed upon because in the 1960s, Saskatchewan needed the jobs and did not have any money.

In response to a question from Representative Hunskor, Mr. Helms said his agency enforces saltwater pipeline regulations and will hire another technician in Minot, a technician in Williston, and a technician in Dickinson. He said there is a proposed rule that will require remote shutdown devices to prevent the accident that happened in Bottineau County. He said it is not impossible to reclaim land on which saltwater is spilled.

Representative Hunskor said the spill in Bottineau County was the result of one bad actor, and the spill made 23 acres sterile.

In response to a question from Representative Nathe, Mr. Helms said the Hershey mine has lasted approximately 20 years and is nearing the end of the deposit. He said the Belle Plaine mine has run for 50 years and expects to run for another 50 years. He said a mine in North Dakota is expected to run 50 years to 70 years.

In response to a question from Representative Nathe, Mr. Helms said 2015 to 2016 is the earliest there will be a mine. He said there will be a pilot project in 2013 or 2014.

In response to a question from Representative Damschen, Mr. Helms said there are 20 billion to 50 billion tons of potash in North Dakota that can be mined by a plant. He said the plant output value is \$6 trillion to \$15 trillion. He said potash sells for approximately \$450 a ton.

In response to a question from Representative Nathe, Mr. Helms said the plant would expect to process one million tons per year.

In response to a question from Representative Damschen, Mr. Helms said potash would be shipped to Asia and mixed with nitrates and phosphates to make fertilizer.

Mr. J. T. Starzecki, Senior Manager, Business Development, Sirius Minerals, PLC, gave a presentation ([Appendix H](#)) on planned potash mining in North Dakota by Dakota Salts. He said the earliest production will be in 2016.

In response to a question from Senator Anderson, Mr. Starzecki said the operating cost for potash is \$180 per ton after capital expenditures.

In response to a question from Representative Hunskor, Mr. Starzecki said the interest in North Dakota has come about because of the advancement of drilling techniques. He said it is now possible to go deeper and horizontally drill for potash. He said it has not been feasible to go down 12,000 feet until the last 10 years. He said the Saskatchewan potash is shallower, in the 3,500-foot to 5,000-foot level. He

said the farther south you go, the deeper the potash in the Williston Basin.

In response to a question from Representative Nathe, Mr. Starzecki said the majority of potash will be shipped by rail. He said there will most likely be a spur built to the plant, and the potash will be shipped in crystallized pellet.

In response to a question from Representative Nathe, Mr. Starzecki said another company would have to make a fertilizer processing plant in this state. He said his company would be open to a joint venture with another company. He said the chance of this happening is not as good as one would hope. He said it is very expensive and has not happened historically.

Senator Bowman said that the tax collected first has to meet the impact caused by the industry. He said the committee needs to figure out what the impact of the plant will be, then figure out the tax.

No further business appearing, Chairman Damschen adjourned the meeting at 2:10 p.m.

Timothy J. Dawson
Committee Counsel

ATTACH:8