NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

AGRICULTURE COMMITTEE

Tuesday, April 15, 2014
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Jim Schmidt, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Jim Schmidt, Bill Amerman, Tracy Boe, Chuck Damschen, Bob Hunskor, Dennis Johnson, Dwight Kiefert, Diane Larson, David S. Rust, Wayne Trottier, John Wall; Senators Bill L. Bowman, Jim Dotzenrod, Robert Erbele, Larry Luick

Member absent: Senator Joe Miller

Others present: See Appendix A

It was moved by Representative Larson, seconded by Senator Erbele, and carried on a voice vote that the minutes of the January 14, 2014, meeting be approved as distributed.

APIARIES

Chairman Schmidt said at the meeting on January 14, 2014, the committee heard testimony regarding bees and the beekeeping industry in this state. He said since that time the Legislative Council staff prepared a bill draft to rewrite the bee chapter. He said committee members were sent the bill draft electronically several weeks ago.

At the request of Chairman Schmidt, Committee Counsel presented a bill draft [15.0032.02000] relating to a rewrite of the apiary laws.

Committee Counsel said this bill draft is still configured in a manner that amends existing law. She said based upon the committee's recommendations today, the next bill draft will be configured as new legislation.

Amendment of North Dakota Century Code Section 4-12.2-01

Committee Counsel said this is the definition section. She said the definition of a beekeeper has been changed slightly. She said because beekeepers have to be licensed under this chapter, it was necessary to ensure that the statute clearly identified the party who was legally responsible for bees that are located in or placed in this state. She said that responsibility comes by virtue of ownership or by virtue of a contract, such as a lease.

Committee Counsel said the current definition of a bee indicates it includes Africanized honeybees. She said because the genus Apis includes Africanized honeybees, it is not necessary to statutorily reiterate that fact.

Committee Counsel said current law references a certificate of health. She said in actuality, the document that is prepared is a certificate of inspection. She said that change has been made.

Committee Counsel said the rewrite removes definitions of certified breeder queens, production queens, and queen cells because, as the various sections were reworked, those terms were no longer used. She said if a term is not used in the chapter, there is no need to define it.

Committee Counsel said one of the challenges in undertaking a statutory rewrite is the need to distinguish between that which is accurate terminology and that which is often widely used colloquial terminology. She said the words "hive" and "colony" fall under this category. She said essentially, a colony is a social group and a hive is the manmade structure in which the colony resides.

Committee Counsel said the remainder of the definition section was focused on removing unnecessary and self-evident terminology. She said just because one can define a term does not mean that one needs to define a term.

Amendment of Section 4-12.2-02

Committee Counsel said this section sets forth the rulemaking authority of the Agriculture Commissioner. She said the Commissioner has rulemaking authority under Chapter 28-32, the Administrative Agencies Practice Act. Therefore, she said, there is no need to repeat that authority in this chapter.

Amendment of Section 4-12.2-03

Committee Counsel said this section pertains to the licensing of beekeepers. She said under current law, a beekeeper has to be licensed and has to apply for that license on or before March 1. She said there is no indication as to what happens on March 2. She said the rewrite borrows language from other agricultural licensing sections and provides that before one may act as a beekeeper in this state, one must be licensed. She said this was discussed during the previous interim with respect to livestock dealer licenses. She said it was likened to fishing licenses. She said one does not need to be licensed on opening day if one is not going to be fishing on opening day. However, she said, one does need to be licensed prior to the first time one puts a line in the water.

Committee Counsel said current law requires that the beekeeper state on his or her licensure application the total number of colonies that are to be maintained in this state. She said because beekeepers often do not have an exact count, the suggested language asks for the maximum number of colonies that will be maintained. She said the number provided in the application is the basis for the colony fee.

Committee Counsel said the fee for a beekeeper's license remains at $5 and the colony fee is still 15 cents. She said in prior rewrites, the interim committee has taken the position that fee increases, if desired, should be introduced in a separate bill and considered on their own. She said based on this history, fee increases were not a point of discussion.

Amendment of Section 4-12.2-04.1

Committee Counsel said this section pertains to beekeeping licenses for minors. She said the verbiage was cleaned up but not changed substantively.

Amendment of Section 4-12.2-07

Committee Counsel said under current law, a beekeeper is to register all apiaries at the time the beekeeper files the license application. She said this includes providing the Agriculture Commissioner with the location of each apiary, to the nearest quarter section, and the name of the person who owns or leases the land on which the apiary is to be located. She said if the beekeeper is not the property owner, the beekeeper must provide to the Commissioner a copy of the written lease or other document wherein the property owner grants permission for the apiary to be located on the land.

Committee Counsel said if the land is leased, the lessee might be perfectly fine with the beekeeper placing an apiary there, but permission for a land use generally must come from the landowner. She said if the landowner is a 95-year-old nursing home resident in another state, that written consent is often hard to obtain.

Committee Counsel said as the section was being worked on, there was an attempt to clarify what the interest of the state is and what the role of the Agriculture Commissioner should therefore be. She said the state does not have to determine the sufficiency of private contracts, i.e., of agreements between landowners and beekeepers. She said what the state needs to know is simply whose bees are where.

Committee Counsel said the rewrite, therefore, suggests a number of changes. She said the rewrite moves away from the concept of registration and removes the requirement that private contracts be provided to the Agriculture Commissioner, as verification of permission to place an apiary on certain land. She said the rewrite requires an applicant to notify the Agriculture Commissioner of the location of each apiary, by the same legal description as currently required, or by global positioning system (GPS) coordinates. She said it also requires the name of the property owner or lessee, and it states that this information can be provided in written or in electronic format.

Amendment of Section 4-12.2-08

Committee Counsel said under current law, the property owner could revoke a beekeeper's right to place an apiary on the property by notifying the beekeeper and the Agriculture Commissioner. She said because the prior section took the Commissioner out of this private contract arrangement, it was not necessary to have the landowner notify the Commissioner that permission for placement had been revoked.

Amendment of Section 4-12.2-08.1

Committee Counsel said under current law, this section states that the Agriculture Commissioner may cancel the registration of an apiary when the bees located on the site are causing a nuisance. She said suggesting that this section be removed has caused some concern in the Department of Agriculture.

Committee Counsel said currently, apiaries are "registered" with the Agriculture Commissioner. She said as the chapter was being reworked, "registration" was no longer an appropriate word. She said what beekeepers are really being asked to do is to let the Commissioner know where they will be placing their apiaries, i.e., beekeepers are providing "notice" to the Commissioner.

Committee Counsel said current law allows the Agriculture Commissioner to cancel the registration of an apiary if the bees are causing a nuisance, as defined in Chapter 42-01. She said that chapter addresses private nuisances and public nuisances and it provides for abatement by removal or destruction, as well as criminal sanctions. She said Chapter 42-01 defines a nuisance as any act or omission that annoys, injures, or endangers the comfort, repose, health, or safety of others; offends decency; unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, basin, public park, square, street, or highway; or in any way renders other persons insecure in life or in the use of property.

Committee Counsel said currently, the Agriculture Commissioner may cancel a registration if the bees are causing a nuisance. She said the statute does not indicate whether the Commissioner's determination can be based on a phone call or a neighbor's complaint. She said the statute does not indicate whether a hearing must be held. She said the statute does not indicate what happens to existing pollination contracts or what should be done when such a call impacts individual economic circumstances and livelihoods.

Committee Counsel said this section puts an Agriculture Commissioner in the untenable position of having to explain to a constituent that while the law says the Commissioner can do something about bees that are a nuisance in the eyes of a constituent, in reality, the Commissioner cannot exercise this section without encountering some serious legal concerns. Practically, she said, the Commissioner cannot just go and revoke a registration.

Therefore, Committee Counsel said it is recommended that the nuisance law, as set forth in Chapter 42-01, be allowed to govern those circumstances in which bees meet the statutory definition of a nuisance.

Amendment of Section 4-12.2-14

Committee Counsel said since this section was drafted, Department of Agriculture personnel have opted for a few changes. She said under current law, each beekeeper is to post, at or near the main entrance of each apiary or on a hive, a board or weatherproof placard bearing the beekeeper's name, address, and telephone number. She said the placard is to be an 8x11. She said the lettering must be at least one-half inch high. She said the Agriculture Commissioner is given the authority to approve alternative sign or lettering dimensions.

Committee Counsel said as proposed in the bill draft, a beekeeper would identify his apiary using his three digit beekeeper's license number. She said the thought was, rather than dealing with a placard getting blown away, a beekeeper could simply acquire some spray paint, in a contrasting color, select a hive that can be seen when entering the apiary, and spray paint it with the three digits, ensuring that the digits are large enough to be seen from 20 feet away. She said if the beekeeper would prefer another method of apiary identification, the beekeeper could ask the Agriculture Commissioner for approval.

Committee Counsel said the latest suggestion from Department of Agriculture personnel was that each apiary must be identified with a number assigned by the Agriculture Commissioner. She said this would still be the three digit license number, possibly with ND in front, to distinguish the identification from that required by other states. She said the number must be displayed on at least one hive in the apiary and visible upon approaching the apiary's main entrance. She said the numbers must be at least three inches high. Ergo, she said, they would be visible at 20 feet. In addition, she said, it was suggested that the statute not contain any reference to requests for alternative forms of identification. She said Department of Agriculture personnel wanted to keep it simple and standardized.

Committee Counsel said if the committee is accepting of this suggestion, it would be reflected in the next draft.

Amendment of Section 4-12.2-15

Committee Counsel said current law requires that the Agriculture Commissioner hire a qualified person to serve as the State Bee Inspector. She said at times the current law clouds the issue of who works for whom. She said as an example, the statute provides that on the recommendation of the State Bee Inspector, the Commissioner "shall" appoint and dismiss deputy inspectors. She said in preparing the bill draft, this was addressed by using a "may" rather than a "shall." She said Department of Agriculture personnel have suggested a different approach. She said that would be to eliminate references to a State Bee Inspector entirely and statutorily require that the Agriculture Commissioner be responsible for the duties. She said if the committee accepts this suggestion, it can very easily be done. She said there are no statutory references to a State Bee Inspector, other than those in this chapter.

Amendment of Section 4-12.2-16

Committee Counsel said current law contains a mixture of duties and powers. She said in preparing the bill draft, an effort was put forth to separate that which must be done from that which could be done. She said this is the mandatory section, i.e., the duties.

Committee Counsel said the State Bee Inspector's first duty is to inspect apiaries for the purpose of issuing a certificate of inspection or other official document. She said this is done at the request of a beekeeper.

Committee Counsel said the second duty is to facilitate the interstate movement of bees. She said Department of Agriculture personnel have suggested that this be deleted because they do not know what this really requires of them and they do not undertake any activity that would seem to fall under this directive.

Committee Counsel said the third duty is a directive to work with public and private entities to advance research and education regarding apicultural practices. She said current law references working with institutions of higher education to promote the apiary industry. She said there are actually three issues here. She said first, one can discuss whether the Department of Agriculture should have a role in promoting an industry that it regulates. Second, she said, institutions of higher education may be one set of entities that get involved in bee research, but they are not the only set. She said chemical companies, for instance, might be involved. She said that is why the bill draft references public and private entities. Third, she said, the committee may want to address whether there is in fact a need to list this as a statutory duty.

New Section

Committee Counsel said this section tries to consolidate the State Bee Inspector's current powers. She said current law directs the State Bee Inspector to provide inspection services to beekeepers. She said if a beekeeper requires an inspection for the interstate transport of bees, that arguably is an important or necessary governmental function. On the other hand, she said, if a hobbyist is seeking an inspection for purposes of advice and suggestions, that is arguably a lesser priority. She said in the duties section, the rewrite requires the State Bee Inspector to inspect apiaries for the purpose of issuing a certificate of inspection or other official document. She said in this powers section, the rewrite states that the State Bee Inspector may provide inspection services for any purpose other than the issuance of a certificate of inspection or other official document. She said the State Bee Inspector does not charge for "official" inspections, but could charge a fee to cover the cost of the "nonofficial" inspections.

Committee Counsel said current law requires the State Bee Inspector to provide assistance in the location of bee colonies for pollination purposes. She said this could mean anything from sharing information regarding interested parties to doing actual physical labor. She said the rewrite, therefore, clarifies that the State Bee Inspector is authorized to "assist farmers in identifying beekeepers who provide pollination services."

Committee Counsel said current law provides that if the State Bee Inspector or a deputy bee inspector receives a complaint from a beekeeper, from an aerial sprayer, or from a farmer, the inspector may enter private property during reasonable hours to make an external inspection for the purpose of identifying a colony. She said taken literally, if the complaint comes from any other source, e.g., law enforcement, a rancher, a neighbor, a real estate agent, etc., there is no authority for the State Bee Inspector to enter upon private land. She said this may or may not have been thought about initially.

Committee Counsel said second, the authority to enter upon private land currently exists only for the purpose of making an external inspection to identify a "colony [sic]," i.e., to identify an apiary. She said if there is a need to remove hives, is there the authority to enter upon private land?

Committee Counsel said for the committee's consideration, the rewrite proposes language that would authorize the State Bee Inspector to enter upon private land during daylight hours for the purpose of enforcing this chapter. She said the committee may wish to examine the phrase "during daylight hours." She said the reference to daylight hours is preferred because it is less subjective than the currently used phrase "during reasonable hours."

Amendment of Section 4-12.2-18

Committee Counsel said this section pertains to certificates of inspection for purposes of interstate transport. She said it was addressed in the duties of the State Bee Inspector and so this verbiage can be removed.

Amendment of Section 4-12.2-18.1

Committee Counsel said this section pertains to Africanized honeybees. She said the current law is rather nebulous. She said current law provides that if a swarm is captured--and there is no indication as to who would be doing the capturing--and if the swarm is positively identified as being Africanized and determined to be present as a result of natural migration--and there is no indication as to who would be doing the determining, then the

Agriculture Commissioner can designate a limited area as an Africanized honeybee area and allow managed colonies to be moved in and out of the area for three months. She said after the end of that time period, special requirements apply for requeening. She said the final sentence states that beekeepers cannot use Africanized honeybees in their beekeeping operations.

Committee Counsel said in discussions with Department of Agriculture personnel, it became evident that what they really needed was the ability to impose a quarantine, if one was necessary for the eradication or control of disease, insects, or pests, within the apicultural industry. She said this would include controlling for Africanized bees.

Committee Counsel said the rewrite, therefore, provides for notice and a public hearing and requires that if the Agriculture Commissioner imposes a quarantine, the Commissioner must state in the order the date by which, or the circumstances under which, the order will be lifted. She said if there is an emergency, the Commissioner can impose a quarantine for up to 14 days. She said during that period, the Commissioner must provide notice and hold a hearing, and then determine whether a regular quarantine order should be imposed. She said a violation of the quarantine order would come under the general penalty of the chapter, i.e., a Class A misdemeanor.

Amendment of Section 4-12.2-18.2

Committee Counsel said this section requires the Agriculture Commissioner to develop a voluntary certification plan that is consistent with the model state Africanized honeybee management plan developed at a meeting of the United States Department of Agriculture and the National Association of State Departments of Agriculture in St. Louis, 23 years ago. She said this has never been done and because it calls for a voluntary plan, it is recommended that this section be deleted.

Amendment of Section 4-12.2-20

Committee Counsel said this section provides that any person who transports bees into this state must first obtain an entrance permit from the State Bee Inspector. She said apparently, this is not being done and therefore the section is recommended for deletion.

Amendment of Section 4-12.2-21

Committee Counsel said under current law, any apiary, equipment, or bees that are not regularly maintained and attended or that comprise a hazard or threat to the industry may be considered abandoned and subject to seizure.

Similarly, Committee Counsel said bees that are not properly hived and hives and equipment that are not properly stored may be considered abandoned. She said if one is trying to provide due notice of the law, it would be helpful to have more definitive parameters. She said bees are often dropped off in the spring and not picked up until the fall. She said is that a failure to regularly maintain and attend? She said sometimes bees are over-wintered. She said does that qualify under this section? She said there are no statutory standards for properly storing hives and equipment.

Committee Counsel said in discussions with Department of Agriculture personnel, it seemed that the focus needed to be placed on unidentified apiaries. She said if hives are placed on or found on someone's land and there is no indication as to whose they are, and if the State Bee Inspector, after making a reasonable effort cannot locate the responsible party, this section would become applicable.

Committee Counsel said the State Bee Inspector is to publish notice in the official newspaper of the county in which the apiary is located, indicating that, at a time certain, all of the paraphernalia will be seized, and sold or destroyed, unless it is claimed by the beekeeper or other responsible person. She said as in current law, there is a five-day window between the publication of the notice and any seizure.

Amendment of Section 4-12.2-22

Committee Counsel said current law provides that a person violating this chapter or any rules adopted under this chapter is guilty of a Class A misdemeanor. She said rules pertaining to this chapter are minimal and in fact have not been amended since 1992. She said if the current language regarding a Class A misdemeanor is retained, that will be the penalty applicable to any violations of rules that might be implemented in the future. Generally, she said, legislators have been very sensitive to the imposition of criminal penalties for rule violations. She said this committee might wish to determine whether the criminal penalty should apply to violations of rules as well as to violations of statutory sections. She said current law imposes a civil penalty for violations of this chapter, as well as violations of its rules. She said that penalty is a maximum of $5,000 per violation.

Amendment of Section 4-12.2-23

Committee Counsel said whereas the amendment of Section 4-12.2-21 dealt with "abandoned" bees, hives, and equipment, this section deals with bees, hives, and equipment that are "being transported or maintained" in violation of this chapter. She said this section allows for confiscation and disposal pursuant to a court order or an administrative order.

Committee Counsel said under current law, the State Bee Inspector or a county sheriff is given the authority to confiscate the bees, hives, and equipment. She said the rewrite references the State Bee Inspector or any law enforcement officer. She said a violation may not always involve a county sheriff.

Amendment of Section 4-12.2-24

Committee Counsel said this section is merely a rewording of existing law. She said it provides that if neither the beekeeper nor the beekeeper's agent can be located for the purpose of serving process, one can serve the Agriculture Commissioner.

Amendment of Section 4-12.2-25

Committee Counsel said this section repeats current law. She said it states that beekeeping is an agricultural enterprise for all purposes under the laws of this state. She said the implications of that statement are unknown.

Committee Counsel said beekeeping laws have been in existence since the 1923 legislative session. She said this section was added in 1983, through an interim bill resulting from a study of the beekeeping laws. She said there is no mention of its purpose in the interim records or in the 1983 legislative history.

Committee Counsel said the only statutory reference to an "agricultural enterprise" is found in Chapter 4-36, which is known as the Agricultural Development Act, and pertains to agricultural loan financing. She said Section 4-36-03 provides that agriculture or agricultural enterprise includes "the real and personal property constituting farms, ranches, and other agricultural commodity producers; agriculturally related businesses; agriculturally related sewage, liquid and solid waste collection, disposal, treatment, and drainage services, and facilities; agriculturally related antipollution and air, water, ground, and subsurface pollution abatement and control facilities and services; agriculturally related permanent soil and water conservation projects . . .." She said Chapter 42-04, which addresses nuisances, specifically provides that the phrase "agricultural operations" includes bees. She said the committee may wish to discuss the implications of this section and whether or not it should be maintained.

In response to a question from Senator Bowman, Ms. Samantha Brunner, State Bee Inspector, Department of Agriculture, said a committee of nine beekeepers was appointed to work through legislative changes to the bee chapter. She said a few additional beekeepers would show up as well. She said the group provided comments and feedback on the bill draft. She said the committee will meet again as the revisions become available.

Mr. Thomas Bodine, Deputy Commissioner, Department of Agriculture, said the Agriculture Commissioner would like to maintain the authority to require that hives be moved. He said the Agriculture Commissioner is very sensitive to private property rights and to the private interactions of beekeepers and landowners. He said sometimes the legal right to place hives in a certain location does not translate to that being the best location. He said sometimes the location might be across the street from a residence. He said in the past, the Agriculture Commissioner has asked that bees be moved. He said if Section 4-12.2-08.1 is removed, the Agriculture Commissioner would lose his current ability to revoke a registration and in effect require that hives be relocated.

In response to a question from Chairman Schmidt, Committee Counsel said the Agriculture Commissioner can always ask a beekeeper, out of good will, to relocate hives. She said whether or not the Commissioner can require a beekeeper to relocate hives is the legal issue that had been raised.

Senator Bowman said he wonders if the Agriculture Commissioner could have the authority to require that hives be moved to another portion of the quarter section, if there is a complaint.

In response to a question from Senator Bowman, Mr. Bodine said he would hate to have language that would impede a beekeeper from operating his or her business. He said he does not know exactly how such a concept would be worded.

In response to a question from Chairman Schmidt, Committee Counsel said it appears that what is being suggested is having the Agriculture Commissioner function in a mediator's role. She said language to that effect can be drafted. She said the question for the committee is whether that is in fact what the members wish to recommend.

Representative Larson said some people are allergic to bees and do not want bees anywhere close to their property or they want to jog down a country road and do not want to go past bees because a sting could be life-threatening. She said there are also the beekeepers who want to be able to maintain their livelihood. She said there may be specialized cases in which choices do have to be made.

Senator Dotzenrod said if we take out the ability of the Agriculture Commissioner to relocate bees, the other legal remedy would be under the nuisance chapter. He said if a person needs to use Chapter 42-01, there would be a drawn-out legal process, whereas leaving the current language allowing the Commissioner to require the relocation of bees would result in solving a problem immediately.

Committee Counsel said in both instances, it comes down to the willingness of the beekeeper to move his or her operation. She said Chapter 42-01 provides civil and criminal remedies, and those can be time-consuming. On the other hand, she said, if the Agriculture Commissioner directs a beekeeper to relocate hives and the beekeeper is not inclined to do so, there will be a drawn-out legal process as well.

Senator Bowman said when colonies are first sited, there might not be any indication of what problems might be encountered. He said he would like to see some commonsense flexibility in relocating the hives.

Committee Counsel said she can work with the Department of Agriculture to look at alternatives that might involve education and efforts to be good neighbors.

Senator Bowman said he would like a mechanism by which the Agriculture Commissioner could require some movement of colonies within the boundaries of a landowner's property.

Ms. Brunner said the Agriculture Commissioner has developed best management practices through the *North Dakota Pollinator Plan*. She said the plan does remind beekeepers to work with landowners in order to find the best location, while being cognizant of adjacent landowners. However, she said, there are times when beekeepers like the location of their apiaries and would not willingly move the apiaries unless there was legal authority requiring the action.

Chairman Schmidt said he would take comments on sections and if there are no comments, he will assume that the language or the proposed language is acceptable to the committee.

In response to a question from Committee Counsel, Chairman Schmidt said the committee is supportive of eliminating references to the State Bee Inspector, beginning with Section 4-12.2-15, and making the Agriculture Commissioner responsible for the duties.

In response to a question from Chairman Schmidt, Representative Larson said the committee needs to further discuss the directive to facilitate the interstate movement of bees and various other issues that were raised in Section 4-12.2-16.

In response to a question from Representative Amerman, Committee Counsel said the landowner gives up certain privacy rights when he allows a beekeeper to place an apiary on his land. She said the agreement is made with the understanding that a representative of the Agriculture Commissioner might be coming onto the land for inspection purposes.

In response to a question from Representative Amerman, Ms. Brunner said she has a state identification. However, she said, because the deputy bee inspectors are temporary employees, they do not have state identification.

In response to a question from Chairman Schmidt, Ms. Brunner said Department of Agriculture personnel do not enter private property other than when the beekeeper asks to have an inspection performed. She said when such is requested, Department of Agriculture personnel enter the land under the assumption that the landowner is aware that their presence has been requested.

Representative Rust said the chapter should require that notice be given to the landowner or lessee before Department of Agriculture personnel enter private property for inspection purposes.

In response to a question from Representative Boe, Committee Counsel said that the proposed language would allow entrance onto private property only for the purpose of enforcing the chapter.

Senator Dotzenrod said if there is some urgency for the State Bee Inspector to enter private property, he would not want that held up while permission to enter was being sought. He said he believes that the State Bee Inspector should have to put forth a reasonable effort to notify the landowner or lessee. But, he said, if the landowner or lessee is not readily available, we do not want to prohibit entrance for the purpose of doing the work that needs to be done.

FEDERAL MILK MARKETING ORDERS

Chairman Schmidt said as directed by this committee at its January meeting, Committee Counsel began reviewing the milk marketing chapter--Chapter 4-18.1. He said the chapter was enacted in 1967 and amended in 1969. He said not much has been done to it since. He said Committee Counsel prepared a first draft that suggests some stylistic changes and points out some statutory requirements that are quite broad. He said the bill draft has been included in the members' packets and made available to interested parties. He said the committee will not review the bill draft today, but will at the next meeting.

Chairman Schmidt said when the committee met in January, presentations were given by Ms. Shirley Gummer, Chairman, North Dakota Milk Marketing Board, and by Mr. John Weisgerber, Executive Director, North Dakota Milk Marketing Board. Today, he said, the committee will hear from the Assistant Marketing Director of the Upper Midwest Federal Milk Order and an agricultural economist. He said they have been invited to help the committee understand federal milk marketing orders and how they do and could impact this state.

Chairman Schmidt said since the legislative session, there have been comments ranging from "do not touch the Milk Marketing Board" to "get rid of the Milk Marketing Board." He said he would ask the committee members to keep in mind that the Milk Marketing Board functions in accordance with those statutory directives that were enacted by the Legislative Assembly. He said it is this committee's role to examine those statutory directives and determine if they are still relevant to the manner in which business is conducted today.

Chairman Schmidt said this is a very large topic and we want to make certain that our understanding is both full and complete. He said he would like to schedule another meeting in the next three weeks to four weeks for the purpose of looking carefully at the bill draft, getting a thorough understanding of what is and is not in there, and hearing the perspectives of producers, processors, distributors, and consumers.

At the request of Chairman Schmidt, Mr. Victor Halverson, Assistant Market Administrator, Upper Midwest Federal Milk Order, and Dr. Corey Freije, Agricultural Economist, Upper Midwest Federal Milk Order, presented testimony (Appendix B) regarding milk marketing within Federal Order No. 30.

Mr. Halverson said a federal milk order places certain requirements on the handling of Grade A milk in a region. He said federal orders are put into place at the request of local dairy farmers and their cooperatives. He said the orders are funded by the milk handlers. He said no tax dollars go to support the orders.

Mr. Halverson said a federal milk order provides a classified pricing plan and provides blend prices to farmers. He said it defines terms of trade between buyers and sellers, enforces minimum prices for farmers, enforces timely payments, and provides auditing functions. He said a federal milk order does not prevent the payment of prices that are higher than the required minimum. He said it does not determine from whom milk is purchased or to whom it is sold, and it does not restrict new product development.

Mr. Halverson said a federal milk order does not regulate trade practices at the wholesale-to-retail level or at the retail level. He said it does not regulate producers or control production, and it does not guarantee a market or a buyer for any product.

Dr. Freije said in 2004, North Dakota produced 465 million pounds of milk. He said after hitting a high of 470 million pounds in 2006, North Dakota milk production fell to 342 million pounds in 2013. He said 226 million pounds are pooled under Federal Order No. 30. He said North Dakota milk makes up only 0.7 percent of the total milk pooled under the order.

Dr. Freije said pooling is the process by which the total classified value of milk for the market is "pooled," thereby allowing for a producer price differential to be determined. He said the differential allows all dairy farmers in the pool to share equally in the market utilization. He said this allows a farmer who delivers only to a cheese plant to receive a pro rata share of the higher-valued Class I sales. He said Class I milk is used for bottling, Class II milk is used for creams and soft manufactured products, Class III milk is used for cheese, and Class IV milk is used for butter and powder.

In response to a question from Senator Erbele, Dr. Freije said there are no handlers that produce exclusively for the fluid milk market. He said all are involved in producing milk for cheese or milk for classes other than Class I.

In response to a question from Representative Kiefert, Dr. Freije said the Class I reward serves as an incentive to producers to convert to the Grade A level. He said the participation is voluntary.

Mr. Halverson said the investment to convert to a Grade A dairy is minimal today compared to the olden days. He said the difference in Minnesota and Wisconsin is two inspections per year instead of one. He said most of the Grade B farms in the Midwest are owned or operated by individuals who for faith-based reasons do not have electricity on their farms, so they cannot cool their milk quickly enough. He said their decision to remain Class B is based on reasons other than economics. He said that milk cannot go into the bottle. He said it represents approximately one-tenth of 1 percent of the product produced in the area covered by Federal Order No. 30.

In response to a question from Representative Rust, Dr. Freije said if someone buys a pound of cheese that comes from Europe, that cheese is not covered by the pricing program. He said foreign producers may not participate in the pool.

In response to a question from Senator Bowman, Dr. Freije said the cost of production is difficult to pin down. He said the United States Department of Agriculture does have a figure for that but it is not addressed in the Federal Order No. 30 pricing. He said the order tries to arrive at a pricing number that is palatable to both the producers and the processors.

In response to a question from Chairman Schmidt, Mr. Halverson said a federal order does not license distributors or retailers. He said if the Legislative Assembly would repeal the state's milk marketing chapter, those would not be covered under an expansion of Federal Order No. 30. He said an expansion of the order would result in the Bismarck plant becoming fully regulated and the revenue from that plant would be shared with all the producers in the market.

In response to a question from Chairman Schmidt, Mr. Halverson said the producers would still have price protection. He said whether that protection would be better or worse than what they have now, he does not know.

Chairman Schmidt said he would like to have a better understanding of the overlap between the regulatory authority of the North Dakota Milk Marketing Board and the regulatory authority of Federal Order No. 30.

In response to a question from Chairman Schmidt, Mr. Weisgerber said if the milk produced in the western two-thirds of North Dakota came under the jurisdiction of Federal Order No. 30, that money would be pooled. He said if a dairy farmer produced about a million pounds per month and if that milk were purchased and paid for under Federal Order No. 30, rather than in accordance with North Dakota's individual handler pool pricing, a producer would lose about $277,000 per year in income. He said that plant in Bismark would still be paying the dollars, but that money would go into the order pool and would be shared among 13,000 producers. He said North Dakota producers would lose millions of dollars by being under Federal Order No. 30.

Mr. Weisgerber said when the law was passed in 1967, North Dakota producers did not want marketwide pooling. He said they wanted individual handler pools. He said in basic terms, that means that each plant calculates its own blend price.

Chairman Schmidt said if, according to Mr. Weisgerber, those dairy farmers who are not now under Federal Order No. 30 would lose money in the event they came under the order, he wondered if those farmers in the eastern portion of this state who are under the order are losing money.

Mr. Weisgerber said he does not know what the utilization is at the Fargo plant. He said if the Fargo plant is primarily a bottling plant, theoretically, their utilization would be higher than the 10 percent. He said he does not know whether they are drawing money out of the pool. He said it would take a vote of the producers to remove themselves from Federal Order No. 30. He said the problem is that if there are 13,000 producers in Federal Order No. 30 and about 105 to 110 North Dakota producers, the North Dakota producers are not going to out vote the 13,000 non-North Dakota producers.

Mr. Weisgerber said in 1985, the dairy producers came to the Legislative Assembly and sought a resolution asking the Governor and the Congressional Delegation to help them get out of Federal Order No. 30. He said at the time, about $885,000 was going from North Dakota to the order.

Representative Boe said 20 years ago there was a significant number of dairies in his district. He said they all sold milk to the cheese plant in Towner. He said they all are now out of business.

With the permission of Chairman Schmidt, Mr. Andrew Holle, Dairy Farmer, presented testimony regarding the marketing of milk. He said he resides south of Mandan, and he milks about 600 cows three times a day. He said he sells his milk to Dean Foods in Bismarck. He said if he had been under Federal Order No. 30 last year, it would have cost his farm $330,000. He said he supplies about one-fifth of the plant's milk. He said if one multiplies that number out, Federal Order No. 30 would have ensured that approximately $1.6 million would not have been spent in the Bismarck-Mandan area or in the state of North Dakota, but would have gone into Federal Order No. 30 and been divided among 13,000 producers. He said the money is not being changed, it is just being reallocated to others. He said he believes that the North Dakota Milk Marketing Board does a great job. He said the board checks up to see that he is being paid correctly. He said the board also ensures that the citizens of North Dakota can get milk.

Mr. Holle said if the Legislative Assembly does away with the North Dakota Milk Marketing Board, it would be opening up the state to free enterprise and free trade. He said there are companies that will come in and cherry-pick the large stops and drop milk off there. He said that will push our smaller distributors out because they can no longer afford to do business. He said a lot of day cares, churches, and small communities will not receive milk anymore because while the smaller distributors servicing them today do not make money on every stop, they still make money on their routes. He said if the large companies do not make money at a stop, they will not stop there and that will keep a lot of our smaller communities from growing and expanding because they will not be able to get milk, unless they meet a quota or pay a service-stop fee to the larger companies.

In response to a question from Senator Luick, Mr. Holle said because of the North Dakota Milk Marketing Board, North Dakotans do pay a higher price for milk in the stores. He said that stems largely from the distance that must be traveled in order to service these stores. He said states like Utah and Arizona have their large populations in basically one area. He said the milk does not have to go very far. He said they can therefore offer loss-leader products. He said the Milk Marketing Board prevents North Dakota from having price fluctuations.

Committee Counsel said there have been references to cherry-picking and to concerns about nursing homes and schools not receiving milk products. However, she said, those institutions receive other food products. She said somebody is delivering the meat and the potatoes. She said could that same entity not also deliver the milk and milk products?

Mr. Weisgerber said Federal Order No. 30 addresses the price of farm milk. He said the legislation that created the North Dakota Milk Marketing Board began with a request by the farmers. He said then others came with the argument that if farmers were going to be protected, so should others within the chain. He said the North Dakota law includes licensure and the establishment of wholesale and retail prices. He said the thought was that if the board is going to tell the creamery what to pay the farmer, the board should also tell the retailer what to pay the creamery. He said the issue is that North Dakota limits the number of distributor licenses. He said there are institutional suppliers that go out and service the convenience stores. He said there are limits and if an entity does not meet the limits, there are upcharges, surcharges, and extra charges. He said the North Dakota creameries and little distributors go out and service anybody and everybody. He said they often lose money going to the small towns and the local cafes, but hopefully they have some larger clients and can make a few dollars to pay for their routes. He said the institutional supplier may not service a client if the client does not purchase enough product or if it is a losing proposition. He said if the board grants a distributor's license, it is on the condition that the licensee shall service everyone in the particular area.

Mr. Weisgerber said the institutional suppliers are going out there and they are getting the other products but with respect to milk products, if there is not a profit margin there, they will either not haul the milk there or they will impose a significant drop charge or surcharge.

Committee Counsel said she is still not clear if there is any reason, other than the current law, that would prevent an entity, which delivers meat and potatoes, from also delivering milk and milk products.

Mr. Weisgerber said if the North Dakota Milk Marketing Board did not exist and if there was a free and open market, the entity that delivers meat and potatoes could also deliver the milk, if it chose to do so. He said if, however, it is not profitable, an entity may not haul milk to everyone who wants milk.

In response to a question from Representative Boe, Mr. Weisgerber said the current law requires a distributor to service everyone who wants service. He said both in the application and at a hearing, a person seeking a distributor's license must promise to service everyone who wants service and to provide service that is customary for the area.

Representative Boe said, as an individual, he would like to have a couple of gallons of milk delivered each week. He said he wonders if he would fall under the mandatory delivery requirement. He said 20 years ago, his milk was delivered to his garage. He said now it is not, because the distributor chose not to continue doing so. He said it was customary and it appears that Mr. Weisgerber is saying that, upon request, the distributor shall deliver the milk.

Mr. Weisgerber said Representative Boe is talking about a house-to-house route.

Representative Boe said he wonders where the "shall deliver" requirement ends.

Committee Counsel said Section 4-18.1-09 states that an applicant for a distributor's license shall provide home delivery services to any consumer residing in such community upon request.

SOIL CLASSIFICATION

Chairman Schmidt said at the last meeting, the committee heard from representatives of the State Board of Registration for Professional Soil Classifiers and from various state agencies that utilize soil classifiers, as well as from representatives of the private sector. He said he and Committee Counsel met numerous times with representatives of the board and, as directed by this committee, Committee Counsel has prepared a bill draft that streamlines and modernizes the process by which one becomes a soil classifier. He said committee members were sent a copy of this bill draft electronically, as were interested parties who appeared before the committee at the last meeting.

At the request of Chairman Schmidt, Committee Counsel presented a bill draft [15.0010.03000] relating to a rewrite of the laws pertaining to soil classifiers. She said Chapter 43-36-01 creates the State Board of Registration for Professional Soil Classifiers and charges the board with regulating the profession of soil classification. She said current law defines the practice of soil classifying and the practice of professional soil classifying, as well as a professional soil classifier, a soil classifier, soil classification, and a soil classifier-in-training. She said the law uses verbiage, such as any service or work the adequate performance of which requires education in the physical, chemical, biological, and soil sciences, training and experience in the application of the special knowledge of these sciences to soil classification, the soil classification by accepted principles and methods, investigation, evaluation, and consultation on the effect of measured, observed, and inferred soil properties upon the various uses, the preparation of soil descriptions, maps and reports and interpretive drawings, maps and reports of soil properties and the effect of soil properties upon the various uses, and the effect of the various uses upon kinds of soil, any of which embraces such service or work either public or private incidental to the practice of soil classifying. She said that is just one paragraph. She said the definition goes on from there.

Committee Counsel said the challenge is in trying to understand exactly which acts come under this definition. She said it is an important challenge because, if one guesses incorrectly, one is subject to a Class B misdemeanor, which can result in a penalty of 30 days in jail, a $1,500 fine, or both.

Committee Counsel said this is a separate study and not part of the agriculture title rewrite. She said this committee has been charged with studying this chapter, including the qualifications of soil classifiers, the required examinations, and the powers and duties of the board, and it has been charged with recommending changes to those sections of the law that are irrelevant, inconsistent, illogically arranged, or unclear in their intent and direction.

Committee Counsel said the first two sections of the bill draft reconcile changes proposed in this bill draft to sections in other chapters of the code.

Amendment of Section 43-36-01

Committee Counsel said this is one of the most important sections of the bill draft in that it proposes to define soil classification as the determination of a soil's suitability for a particular purpose through the examination of landscape and landform characteristics; the sampling or analysis, or both, of soil properties and characteristics; and the identification and description of soil profile characteristics, including soil horizons. She said the definition also states that certain activities are not considered to be soil classification. She said these include sampling and testing of soil for fertility status, sampling and testing of soil for the presence of construction materials, the practice of engineering, the practice of architecture, and the practice of landscape architecture. She said current law exempts "engineering surveys and soundings to determine soil properties influencing the design and construction of engineering and architectural projects."

Amendment of Section 43-36-02

Committee Counsel said this is the section that configures the board. She said it is being suggested that there be a shortening of the board's name from the State Board of Registration for Professional Soil Classifiers to simply the Board of Soil Classifiers. She said she is aware of only one board that had a similar reference to registration in its name.

Committee Counsel said it is also being suggested that the word "professional" be dropped from the board's name, in part because its use implies that there is an antonym--a nonprofessional or amateur classifier.

Committee Counsel said as under current law, the board continues to have five members, three of whom must be registered soil classifiers. She said the board members are appointed by the Governor and their terms are staggered. She said current law does not impose term limitations. However, she said, representatives of the board thought that three five-year terms would be sufficient and so that concept was included.

Repeal of Section 43-36-03

Committee Counsel said this section requires board members to be citizens of the United States and residents of North Dakota. She said this section is being deleted, not because there are issues with these requirements, but simply because the Century Code already requires this of governmental office holders, including members and officers of state boards.

Amendment of Section 43-36-04

Committee Counsel said members of the board are currently paid $62.50 per day. She said this section provides that they can be paid the amount established by the board, but that amount cannot exceed $135.00 per day.

Amendment of Section 43-36-05

Committee Counsel said as in current law, this section addresses the gubernatorial removal of board members for misconduct, incompetency, or neglect of duty.

Amendment of Section 43-36-06

Committee Counsel said current law directs the board to elect or appoint a chairman, a vice chairman, and a secretary. She said statutorily, the role of the chairman is important. She said because the board can appoint such other positions as it deems necessary, the rewrite just addresses the position of "chairman."

Committee Counsel said current law provides that special meetings may be held as the bylaws provide. She said because bylaws are often not readily accessible, the bill draft references the standard parameters for calling a special meeting of a board, i.e., a special meeting can be called by the chairman and must be called by the chairman if petitioned to do so by two of the five board members.

Amendment of Section 43-36-07

Committee Counsel said upon analyzing the various board powers that were addressed in current law, it was found that they could be summed up quite neatly into the standard six references that are generally used in drafting bills, i.e., the expenditure of money; the employment, bonding, and compensation of personnel; the acceptance of gifts, grants, and donations; contracting for any lawful purpose; suing and being sued; and doing all things necessary and proper to enforce the chapter. She said the notes following the section articulate in detail why some of the current language was eliminated. She said for the most part, it was either duplicative or unnecessary.

Proposed New Section

Committee Counsel said this section contains both old and new concepts. She said current law authorizes, but does not require, the board to adopt a code of ethics. She said current law also authorizes the board to take action against an individual who violates the code of ethics. Therefore, she said, the adoption of a code of ethics was considered to be a board duty--i.e. a requirement, not an option. She said that directive is set forth in subsection 1.

Committee Counsel said subsection 2 is new. She said under current law, if a person wants to become a soil classifier, that person has to, among other things, pass a practical examination and be "a graduate of a soils curriculum approved by the board as satisfactory . . . ." She said that educational requirement is not well articulated. She said an individual should not be placed in the situation of graduating from college and then being told that the courses the individual completed do not constitute a "satisfactory" program of preparation in the eyes of the board.

Committee Counsel said it was therefore suggested to the board that perhaps the board could contact those institutions in this state and in the bordering states that offer courses determined to be appropriate, and make those course lists available on the board's website, either by linking or listing them.

Amendment of Section 43-36-08

Committee Counsel said this section addresses the receipt and expenditure of funds and provides that Section 54-44-12 applies to the board. She said Section 54-44-12 actually applies to all boards and commissions. She said it allows boards and commissions to select the bank of their choice and to write checks on their accounts. She said it also provides that all the money in the accounts are appropriated to the respective board or commission.

Committee Counsel said at the request of the board, the references to the mandatory bonding of the secretary were removed. She said in Section 9, under the board's powers, the proposed language authorizes the board to employ, bond, and compensate necessary personnel. Therefore, she said, a reiteration in this section is not needed.

Amendment of Section 43-36-09

Committee Counsel said this section pertains to records that the board must keep. She said like current law, it sets forth the basic requirements. She said the board is not precluded from keeping additional information. However, she said, it is not necessary to take up room in the Century Code by requiring that the board keep a record of an applicant's age and address.

Committee Counsel said on page 10 of the bill draft, lines 14 through 16 are overstruck. She said this language directs the board to provide an annual report to the Governor, together with a complete statement of the board's receipts and expenditures. She said this must be sworn to by the chairman and the secretary. She said it is suggested that Section 54-10-27 applies to the board as well. She said that section requires boards to undergo an audit every two years. She said if a board's receipts are less than $50,000, the board can simply submit an annual report to the State Auditor.

Proposed New Section

Committee Counsel said while one would not normally include language that in effect directs a board to provide for a review of its books under Section 54-10-27, in this case it was deemed to serve as a good reminder of statutory expectations.

Proposed New Section

Committee Counsel said this one-sentence section is the crux of the chapter. Simply stated, she said, it provides that if one is going to transact business as a soil classifier, one must be registered. She said in later drafts, sections will be moved around to provide for a more orderly and logical flow. Generally, she said, a chapter should provide that one must be registered and immediately thereafter indicate the exemptions to the requirement for registration.

Amendment of Section 43-36-10

Committee Counsel said under current law, there are soil classifiers-in-training and soil classifiers. She said soil classifiers-in-training have to pass a fundamentals of soil science examination, but the statute is not clear with respect to their scope of practice, or even if there is one. She said it appears as if the soil classifier-in-training title connotes a holding pattern that lasts until one can acquire the requisite years of experience and become an actual soil classifier. She said the rewrite therefore proposes to remove the concept of a soil classifier-in-training. Thereafter, she said, the rewrite addresses how one becomes a soil classifier.

Committee Counsel said in order to become a soil classifier, one must obtain and complete an application. She said one must obtain at least three references. She said one of the references must be an individual registered with the board, i.e., a North Dakota soil classifier. She said this individual must have personal knowledge of the applicant's activities. She said the committee might wish to discuss whether an individual moving into this state would practically be able to find one among a limited number of soil classifiers who would have personal knowledge of the applicant's activities.

Committee Counsel said in order to become a soil classifier, one must provide a transcript showing that the applicant holds at least a baccalaureate degree in a science-related field and that at least 15 of the credits constituting the applicant's degree either come from the list of qualifying soil-related courses that the board has been asked to put on its website or have been otherwise approved by the board.

Committee Counsel said in order to become a soil classifier, one must submit evidence of having passed the fundamentals of soil science examination and documentation of experience in or exposure to the identification of soils, including hydric soils, soil surveys, the preparation of relevant reports, the identification of plant growth materials, septic system sitings, land reclamation, or other similar activities. Finally, she said, one must pass the practical examination.

Committee Counsel said current law provides that an applicant must have four years of experience, if the applicant is a graduate of a soils curriculum approved by the board, and eight years of experience, if the applicant is a graduate of a soils curriculum that is not approved by the board. She said that means 8 years to 12 years of schooling and experience beyond high school. By way of comparison, she said, one can become a physician after completing four years of college, four years of medical school, and three years of residency. She said those requirements total only 11 years.

Committee Counsel said, in order to try and compress the time that it takes to become a soil classifier, the bill draft suggests that one take their fundamentals of soil science examination whenever one is allowed to do that and then take the practical examination whenever one is ready, provided that there is a three-year waiting period between the two, during which it would behoove the individual to gain "experience." She said the board is given the authority to waive the three-year requirement, if the board believes doing so is justified. She said there was some discussion about whether that three-year period was too short, too long, or just right.

Repeal of Section 43-36-11

Committee Counsel said the overstruck material in this section deals with two issues. She said the first subsection is a grandfathering provision that applied to individuals who were practicing 41 years ago. She said it has not been said that anyone still needs this provision. However, she said, the board is asked to review its rolls and ensure that this can safely be removed.

Committee Counsel said the second issue in this section concerns reciprocity. She said the board felt that if a soil classifier from another state wanted to function as a soil classifier in this state, that individual should have to demonstrate competence in classifying North Dakota soils. Therefore, she said, at the recommendation of the board, the reciprocity provisions are removed. She said if there is a qualified individual from another state who wishes to practice in this state, that individual will have to take the practical examination and become duly registered.

Repeal of Section 43-36-12

Committee Counsel said this section dealt with the process for becoming a soil classifier. She said the concept has been incorporated in the proposed amendment of Section 43-36-10. Therefore, she said, this verbiage can be removed.

Repeal of Section 43-36-13

Committee Counsel said because the rewrite proposes to eliminate the soil classifier-in-training designation, this section is no longer necessary.

Amendment of Section 43-36-14

Committee Counsel said this section sets the application fee. She said currently, the application fee is established by the board and can range from $50 to $200, except that if a national test is administered, the upper limit is $500. She said the board did, however, request the authority to set fees in an amount not exceeding $500. She said because this is a freestanding study and not merely a "rewrite," it is appropriate for this committee to consider such an increase.

Amendment of Section 43-36-15

Committee Counsel said this section sets the registration fee. She said once an individual is a full-fledged soil classifier, that individual is required to pay an annual fee to the board, just like members of other professional groups. In this case, she said, the fee is set by the board. She said it may not exceed $300. She said the current range is $50 to $300.

Amendment of Section 43-36-16

Committee Counsel said this section addresses examinations. She said subsection 1 refers to the fundamentals of soil science examination. She said she believes this is a national examination, so the board is being asked to include on its website, the day, date, time, and place of the examination.

Committee Counsel said subsection 2 refers to the practical examination. She said the board is being told to offer this examination at least once each year. She said that is what is being done now. She said the board is also being directed to post the date and time of the examination. She said because this examination is a field test, the board is not being asked to post the location.

Committee Counsel said under subsection 3, if someone qualified comes to this state and wants to be examined without waiting for the next set of examinations, or for whatever other reason needs or wishes to be examined before the next regularly scheduled examination period, the board may agree to administer additional practical examinations. She said the board may charge a fee for doing this.

Committee Counsel said subsection 4 sets the passing grade at 70 percent. She said current law provides that the passing grade may not be set at less than 70 percent. She said current law leaves one with the impression that the passing grade is subject to variability.

Committee Counsel said under current law, if a candidate fails a practical examination, the candidate may pay a fee in the $25 to $50 range and apply for a reexamination. She said if the candidate fails badly, i.e., scores less than 50 percent, the candidate must wait a year to retake the examination. She said the problem encountered by the board is that this is a field examination and there are not that many locations available for testing. She said if a candidate is taken back to the same test site multiple times, the chances are pretty good that the candidate's increasing familiarity with the test site will result in an improved score.

Committee Counsel said in discussions with the board, the defined challenge was to find a way to highlight the seriousness of this endeavor and encourage applicants to get the requisite experience, study hard, and pass without having to take multiple runs at the examination.

Committee Counsel said the bill draft provides that if an individual does not receive a passing grade, that individual has to wait a year before a retake will be made available. She said the presumption is that the individual did not gain sufficient experience to function adequately as a soil classifier.

Committee Counsel said the rewrite also suggests that if the individual does not receive a passing grade after three attempts, the individual is barred from retaking the examination for a period of 10 years. She said this is a suggestion and an auctionable period of time. She said the committee will need to consider whether the concept of a waiting period is appropriate and, if so, whether the period is too long, too short, or just right.

Amendment of Section 43-36-17

Committee Counsel said like current law, if one completes all the statutory requirements, one receives a certificate indicating that one is a registered soil classifier.

Amendment of Section 43-36-18

Committee Counsel said like current law, certificates of registration expire on December 31. She said before November 1, the board is to notify individuals that it is time to renew their registration. She said current law requires the board to mail a notice to soil classifiers. She said the rewrite directs the board to send the notice electronically, unless the soil classifier requests to have it mailed. She said if individuals do not return their registrations by December 31, they will be charged a $25 late fee. She said this concept is new to the rewrite and is included for discussion purposes.

Amendment of Section 43-36-19

Committee Counsel said if one loses one's certificate of registration or if for whatever reason the certificate needs to be replaced, the board must issue another. She said under current law, the board can charge a "reasonable" fee for the inconvenience. She said the rewrite sets that reasonable fee at an amount not exceeding $25.

Amendment of Section 43-36-20

Committee Counsel said under the section setting forth the board's duties, there is the direction that the board adopt a code of ethics. In this section, she said, the board is being directed to provide an electronic or a printed copy to each individual registered as a soil classifier and to provide notification of any revision electronically, or by mail if requested by the soil classifier. Again, she said, the two referenced sections should be co-located.

Amendment of Section 43-36-21

Committee Counsel said this section, like current law, allows the board to suspend, revoke, or refuse to renew the registration of a soil classifier, if the individual violated the chapter, provided false or misleading information in connection with an application, was found guilty of negligence in the practice of soil classifying, or violated the code of ethics.

Committee Counsel said current law allows the board to take action against an individual's license if the individual committed any offense that the board determines has a direct bearing on the individual's ability to serve the public as a professional soil classifier or if the board determines that the individual, after having been convicted

of an offense, is not sufficiently rehabilitated. She said it is proposed that that language be removed because board determinations with respect to either of those situations could lead to a host of legal challenges.

Amendment of Section 43-36-22

Committee Counsel said under current law, this is a very wordy section that deals with the reasons and the manner in which complaints could be filed against a soil classifier. She said it also addresses notices, hearings, the cross-examination of witnesses, appeals, etc. She said the rewrite simplifies the section by providing that if a complaint is filed, unless the board determines that it is frivolous, the board shall hear the complaint in accordance with Chapter 28-32. She said that way, all of the procedures, time periods, due process requirements, etc., are standardized.

Amendment of Section 43-36-23

Committee Counsel said this section required that a person be registered under this chapter before practicing as a soil classifier. She said that concept was included in the newly proposed section requiring registration. Therefore, she said, this section is no longer necessary.

Amendment of Section 43-36-24

Committee Counsel said current law provides for certain exemptions from this chapter. She said the first exemption is essentially a temporary reciprocal registration. She said this is apparently not being honored, so it was suggested by the board that the language be deleted.

Committee Counsel said the second exemption is for employees or subordinates of registered soil classifiers. She said the work must be done under the direct supervision of a registered soil classifier and it must not include final soil classifying decisions. She said the bill draft could define "direct supervision." However, she said, the problem that one encounters is that it is generally difficult to verify whether there has been direct supervision. Instead, she said the rewrite proposes that there be an exemption for employees or subordinates, provided that the work and any determinations are deemed to be those of the registered soil classifier.

Committee Counsel said the third exemption under current law is for any other legally recognized profession or trade. She said this was addressed by more precisely defining soil classification in Section 3 of this bill draft and exempting several professions at that point. She said there is no need to repeat the language at this point.

Committee Counsel said the fourth exemption under current law is for any individual who is regularly employed to perform soil classifying services solely for that individual's employer or for a subsidiary or affiliated corporation, provided the service is performed in connection with the property, products, or services of that person's employer. She said because this mentions the property, products, and services of an employer, the committee is asked to ponder whether the breadth of the exemption was intended or unintended.

Committee Counsel said one thought was to remove the exemption and suggest that if an individual is performing soil classification in the state of North Dakota, that individual needs to be registered under this chapter. However, she said, that may bring up some issues with federal employees working on federal land, as well as with certain state employees. She said this will need to be addressed by the committee.

Amendment of Section 43-36-25

Committee Counsel said again, in the interest of shortening the Century Code, the rewrite proposes to condense a listing of prohibited activities into the standard phraseology, i.e., if one violates the chapter, one is guilty of a Class B misdemeanor. She said the penalty for a Class B misdemeanor is 30 days imprisonment, a $1,500 fine, or both.

Proposed New Section

Committee Counsel said this section is a new one. She said it requires the board to work with a representative of the School of Natural Resource Sciences at North Dakota State University (NDSU) and look at advances and trends in the field of soil classification and determine whether continuing education should be a part of registration renewal. She said this would not be an interim study, but something the board would do and then report its findings to an interim committee.

With the permission of Chairman Schmidt, Mr. Bob Fode, Director of the Office of Project Development, Department of Transportation, presented testimony (Appendix C) regarding the bill draft pertaining to soil classifiers. He said the Department of Transportation is required to delineate wetlands that may be impacted by transportation projects and they must avoid, minimize, or compensate for wetland impacts. He said this bill draft would require the department to use a professional soil classifier for all wetland delineations. He said department employees who conduct wetland delineations have received wetland delineation training according to the Army

Corps of Engineers procedures outlined in its *Wetland Delineation Manual* and the *Great Plains Regional Supplement*. He said the employees have received training specific to wetland hydrology, hydrophytic plant identification, and indicators of hydric soils, through a 38-hour Army Corps of Engineers wetland delineation training session.

Mr. Fode said he would ask that Department of Transportation personnel who are trained in wetland delineation be exempted from the proposed requirements of this bill draft for purposes of completing delineations required in conjunction with departmental projects. He said without such an exemption, it will take the department longer to complete its projects. Furthermore, he said, by requiring soil classifiers for wetland delineation, this bill draft is imposing a requirement that even the federal government does not now impose.

At the request of Chairman Schmidt, Ms. Kathleen Spilman, Managing Director, Keitu Engineers & Consultants, Inc., presented testimony regarding the bill draft pertaining to soil classifiers. She said her company, an environmental and regulatory affairs consulting firm, is located in Mandan. She said the bill draft before the committee is a significant improvement over the current state law.

Ms. Spilman said current law makes it improbable, impractical, and maybe even impossible for a person to enter the field of soil classification because of the severely diminishing number of practicing soil classifiers who are required to sign off and provide the oversight and experience that is required.

Ms. Spilman said while the bill draft provides an exemption for engineers, architects, and landscape architects, it should also include water well contractors. She said those individuals are licensed and are currently exempt from this chapter. She said water well contractors are required to submit to the State Water Commission soil logs as they advance the boring machine. She said they need to classify the soil through the length of the bore. She said those individuals are required to take an examination for licensure. She said if they are not exempted, they would not be able to do something that they can now do under their specific chapter.

Ms. Spilman said the bill draft exempts the practice of engineering. She said she is concerned that this might not have been intended to include the practice of environmental engineering. She said she hopes that the intent is to include within the exemption the practice of environmental engineering. She said similarly, civil engineers are often asked to look into the expansion of landfills. She said under current law, at least on commercial landfills, there is a requirement for a soil classifier to perform that assessment. She said the law needs to clearly indicate whether the engineering exemption is intended to override the requirement for a soil classifier in this example.

Ms. Spilman said her preference would be to limit contiguous terms for board members to two terms or 10 years, rather than three terms or 15 years. She said 15 years is a significant portion of one's practicing career. However, she said, she is sensitive to the fact that the number of practicing soil classifiers is such that it may be difficult to get three people to even serve on the board.

Ms. Spilman said she does appreciate the shortening of time before one can take the practical examination. She said some people learn much faster than others and have had an opportunity to be exposed to a wide variety of soils. She said they will be in a position to sit for the practical examination sooner than those who might not have the opportunity to practice under a soil classifier.

Ms. Spilman said her final comment pertains to that which in the practice of engineering is referred to as the "industry exemption." She said what is needed is an "employer's exemption." She said if the law would exempt state employees, as suggested by personnel from the Department of Transportation, there is no reason why the law should not also exempt nongovernmental employees doing the same job. She said under current law, if one works on the property of the person's employer, it is assumed that the employer has an opportunity to evaluate the competency of the individual, regardless of whether the individual has passed the requisite examinations. She said this should work for the Department of Transportation because their employees are state employees working on state-owned land. She said the same would apply to a federal employee working on federal land to perform wetland delineation or any other activity that would otherwise require a soil classifier. She said there is no reason to limit that exemption strictly to governmental employees and deny the exemption to private employers who have a piece of property that requires action. She said an employer exemption would take care of this issue. She said an employer exemption is common in the practice of engineering.

Ms. Spilman said she believes that the employer exemption was originally designed to protect people working as consultants. She said it is important for the Legislative Assembly to protect the general public from some individual who goes in and classifies soil or performs associated tasks. She said John Q. Public might have no way of knowing whether the individual is competent to serve in that role. She said that is why there is licensing in the first place. She said an exemption for a state employee working on state land would not extend to federal land.

Ms. Spilman said she has heard anecdotal comments about consulting firms working for consulting firms that are doing wetland delineation along proposed pipeline routes, without using soil classifiers. She said many firms are following the law and engaging the services of a soil classifier in such situations. She said those firms that are not doing such should be disciplined.

In response to a question from Senator Bowman, Ms. Spilman said as an engineer, she is required to practice within the areas of her formal education or experience. She said she has a degree in chemical engineering. She said it should raise eyebrows if she would attempt to perform a structural analysis for a bridge, because that activity is not within her formal education or experience. She said she has two employees on staff who are currently attending the same Army Corps of Engineers protocol program for wetland delineation as state of North Dakota employees attend. Therefore, she said, if the Legislative Assembly is going to exempt state of North Dakota employees who are trained in this manner, it should also exempt other individuals who attend the same training and go through the same protocols.

Senator Dotzenrod said he was always under the impression that regardless of who did the wetland delineation, the final product had to be submitted to the Natural Resources Conservation Service for its acceptance.

In response to a question from Senator Dotzenrod, Ms. Spilman said it is her understanding that the Natural Resources Conservation Service does not look at all wetland delineations. She said there may be certain federal projects under which the Natural Resources Conservation Service has final approval authority. She said there are various agencies that may have to approve certain delineations. She said, however, she does not believe that there is one agency that has to approve all wetland delineations.

With the permission of Chairman Schmidt, Dr. Tom DeSutter, Associate Professor, Department of Soil Science, North Dakota State University, said the department is within the School of Natural Resource Sciences. He said NDSU offers a baccalaureate degree, a master's degree, and a doctoral degree in soil science. He said currently, 21 students are pursuing minors in soil science and 10 are pursuing baccalaureate degrees in soil science. He said a baccalaureate degree requires 24 credits of soil science courses for a major and 16 credits for a minor. He said NDSU offers enough courses to meet the 15-credit requirement for soil classifiers.

Dr. DeSutter said every year for the next 10 years to 20 years, North Dakota will have 2,000 miles of pipeline installed. He said if the impact area is 20 feet, that amounts to 7.6 sections of land that will be disturbed each year. He said a lot of this land is prime farmland. He said it is important to have a soil classifier involved, as an independent entity, to ensure that the land is being properly restored to productivity.

In response to a question from Chairman Schmidt, Dr. DeSutter said the Soil Science Society of America writes the fundamentals of soil science examination. He said it would not be possible to pass the examination if one's academic experience was limited to an introductory course.

In response to a question from Chairman Schmidt, Dr. DeSutter said the Soil Science Society of America has its own professional examination and the soil classifiers have their own professional examination. He said they are two different tracks.

With the permission of Chairman Schmidt, Mr. Cornelius J. Heidt, Prairie Soil Consulting, presented testimony regarding the bill draft pertaining to soil classifiers. He said in defining soil classification, it would be helpful to add the preparation of soil survey maps, the identification of plant growth material, and the identification of hydric soils.

Mr. Heidt said with respect to the requested exemption for state and federal agencies, he understands that not having an exemption would put a burden on the state and federal agencies. However, he said, the Natural Resources Conservation Service does have a professional engineer on staff who signs off on work that the service does. He said the Department of Transportation has that as well. He said the department could have a registered soil classifier on staff as well. He said he does not, however, have strong feelings with respect to either the governmental agency exemption or the requested employer exemption.

Mr. Heidt said the final section of the bill draft, which deals with professional development, references the School of Natural Resource Science at NDSU. He said it could also involve private consultants that are actually working in the field. He said such individuals do more work related to soil classification than the university or the Natural Resources Conservation Service combined.

With the permission of Chairman Schmidt, Mr. Lawrence Edland, Edland's Soil Consulting, said the board had considered revising the examination because that which was written 40 years ago probably does not adequately cover that which is being done by soil classifiers today. He said the board decided to hold off on any final decisions in that regard, until the soil classification chapter was reviewed and rewritten.

In response to a question from Senator Dotzenrod, Mr. Edland said the employer exemption needs to be clearly specified so that there is no gray area with respect to that which it covers.

COMMITTEE DISCUSSION

In response to a question from Representative Amerman, Committee Counsel said normally, if a board makes a decision, it is appealable under Chapter 28-32. She said Chapter 28-32 is the state's Administrative Agencies Practice Act. She said the bill draft references that chapter, rather than putting its own parameters in place, because that chapter addresses all of the machinations that can and do occur with respect to administrative procedures. She said it provides a consistency across state agencies.

Senator Bowman said if the Department of Transportation has been operating without a problem, there is no need to change the manner in which it does its business.

Representative Larson said when land and especially farmland is disturbed, we need to ensure that knowledgeable individuals participate in the restoration process. Otherwise, she said, it will never be returned to its original productivity.

Senator Luick said the waiting period for retesting is a concern for him. He said the process of becoming a soil classifier is incredibly long. He said he would also like to discuss the provision that calls for a 10-year waiting period before a person who fails the examination three times is permitted to retake the examination. He said if a person fails the examination three times, that should be considered the final option.

Senator Dotzenrod said whether the Department of Transportation conducts its own wetland delineation or hires others to do so, it should have the flexibility to do what is necessary to complete its charge.

Committee Counsel said Mr. Fode indicated that Department of Transportation employees could perform wetland delineations upon completion of the 38-hour course put on by the Army Corps of Engineers. She said she wondered if there were other examples of individuals needing to perform the same task but being told that they must be registered soil classifiers because they are not "exempt" under this chapter.

Mr. Fode said there are other similar situations--including pipelines, transmission lines, etc.

In response to a question from Committee Counsel, Mr. Heidt said wetland delineation deals with vegetation and hydrology. He said hydric soils are just one aspect of the determination. He said in the Army Corps of Engineers course, one can acquire the basics necessary for making a determination regarding hydric soils. However, he said there are a lot of circumstances under which that training is insufficient. He said it is one of the most complex interpretations to make. He said if the Department of Transportation is doing it for its own use, he does not have a problem with that. However, he said, he does have a problem with others doing it for hire.

Committee Counsel said the question to be considered is if it is permissible for Department of Transportation employees to perform wetland delineations based upon a 38-hour course offered by the Army Corps of Engineers, then why is it not permissible for employees of a private entity, who have gone through the same course, to perform that same activity.

Mr. Heidt said a determination regarding hydric soil is much more complicated than what the Army Corps of Engineers can address in its 38-hour course. He said that is particularly true in this state. He said North Dakota has particularly dark soil and it can mask hydric indicators. He said it may not be as big a concern when working on road ditches, but it is a concern when working on natural landscapes. He said in that situation, one is not working on the basics as taught in the Army Corps of Engineers course, but rather interpreting the landscape. He said having only the Army Corps of Engineers course as training for delineating hydric soils is not, in his opinion, sufficient training.

Representative Johnson said we probably need to ask who the State Water Commission uses for its projects.

Chairman Schmidt said the State Department of Health and the Public Service Commission each employ registered soil classifiers. He said he wonders why those individuals could not be asked to provide soil classifying services to the Department of Transportation, unless the needs of either agency are that acute.

Mr. Fode said the Department of Transportation is inundated with projects. He said last year, the department was engaged in $878 million worth of projects. He said some of those projects were carried over into this year and another $800 million-plus has been committed for new projects this year. He said that is separate and apart from what the State Department of Health and the other agencies are doing.

Chairman Schmidt said we should check to see whether the Game and Fish Department is involved in wetland delineation. He said perhaps it too uses a biologist for wetland delineation, as does the Department of Transportation.

Senator Luick said the State Department of Health soil classification requirements for septic system design are not quite as rigorous as for wetland delineation. However, he said, that aspect should also be discussed.

Chairman Schmidt said Committee Counsel will meet with the various entities and receive their input regarding requirements, needs, and options.

Senator Dotzenrod said, if we removed the exemption, any state agency requiring work that falls within the definition of soil classification would have to hire or employ a registered soil classifier, or a contractor who employed such an individual.

Representative Rust said he understands the importance of reclamation. However, he said, he is concerned that the bill draft might be imposing requirements that could delay projects.

No further business appearing, Chairman Schmidt adjourned the meeting at 4:00 p.m.

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L. Anita Thomas
Counsel

ATTACH:3