

2019 HOUSE AGRICULTURE COMMITTEE

HB 1086

2019 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Peace Garden Room, State Capitol

HB 1086
1/18/2019
Job # 31040

- Subcommittee
 Conference Committee

Committee Clerk: ReMae Kuehn

Explanation or reason for introduction of bill/resolution:

Relating to waters of the state

Minutes:

Attachments #1-5

Garland Erbele, Engineer, State Water Commission: (Attachment #1)

Industrial water haulers in the Bakken will build a pond to store water. That is an example of private water.

(4:00)

Representative McWilliams: What is the background of the intention of this bill and what problem will be solved?

Garland Erbele: The intent of the bill is to reduce state oversight on waters of the state. "Private water, fossil byproduct water, and sheetwater" are not addressed in state code. They would be excluded from regulatory oversight.

Representative Headland: What you have listed sounds like most water. It seems like the Water Commission is trying to do the opposite of what the bill is intended to do. Why do we have this bill?

Garland Erbele: The original intent of the bill was to address private water, fossil byproduct water, and sheetwater which were not excluded from state oversight. We don't see a reason to regulate those three.

Representative Headland: Why do you have to tell us that?

Garland Erbele: The purpose of the bill is to clarify the rules in terms of what water is regulated and what is not.

Representative Skroch: This is an attempt to define what oversight waters you do not have control over? Under current Century Code, can you list those waters that you do not have oversight?

Garland Erbele: All waters are waters of the state. The ones we don't include are the three listed in the bill.

Representative Skroch: Under current law there are no exclusions at all?

Garland Erbele: Current law is not clear. This bill clarifies that.

Representative Dobervich: Is there another agency that regulates fossil byproduct water?

Garland Erbele: There are other agencies that regulate that water in regards to disposal of it. That would be the Department of Mineral Resources and the Department of Health. We handle the water rights.

Representative McWilliams: Does the department operate off of philosophy that says you have the regulatory authority. Or does the landowner own the authority until the department says you do?

Garland Erbele: The authority is given to us by the Century Code and administrative rule.

Representative McWilliams: When you say what you cannot do, it is my assumption that the department assumes that it can dictate every single thing.

Garland Erbele: Our authority follows code or rule. We don't beyond that.

Representative McWilliams: The more you try to clarify it assumes authority over others that are not yet said.

Garland Erbele: Where there is lack of clarity there is uncertainty. Our intent is to provide more certainty of what authority the state has.

Representative Skroch: Could you give a list of private waters? Examples?

Garland Erbele: All waters of the state are regulated by the state with exceptions. That was a major part of our defense in the lawsuit against the federal government on WOTUS (Waters of the US). We didn't need WOTUS. The waters of the state are already regulated. We couldn't list every example of private water. Once it is captured for private use, it becomes private water.

Representative Skroch: Examples?

Garland Erbele: The example I used earlier about industrial water in the Baaken. They build a pond off stream and pump water into the pond. Once it is in the pond, it is their private water.

Representative Skroch: How about a private individual? Will this impact ranchers? Are those all going to be exempt?

Garland Erbele: It depends on the case. Large dams for irrigation or livestock could require a water right if it is over 12.5 acre feet. You can water your garden up to five acres without a water right.

Representative Headland: It is obvious we don't understand the reason for this bill. You are trying to clarify something that apparently was obvious to the legal people that worked to defend us as a state against WOTUS.

Garland Erbele: Currently there is no exemption that allows for the three waters listed and will bring clarity to the law.

Representative Headland: The people producing the fossil byproduct water, did they ask you for clarity?

Garland Erbele: The industry did not come to us and ask to be excluded. We recognized this as a gap in the definition.

Representative Richter: Fossil byproduct water is regulated already. Is it necessary to say it doesn't belong to the state since it is so heavily regulated?

Garland Erbele: There are a lot of rules that address fossil byproduct water. A lot of that has to do with the disposal and storage.

Representative Richter: If a company wants to recycle or use that water, this is saying they can do with it what they want?

Garland Erbele: That is correct.

Representative Skroch: Then the health department would not have oversight over fossil byproduct water?

Garland Erbele: The Health Department operates on a different set of rules. That is more in regard to disposal. This is the use of the water.

Representative Skroch: How about in a spill?

Garland Erbele: Same thing.

Representative Kiefert: With new amendments landowners would be losing their property rights to manage water?

Garland Erbele: Waters of the state are already regulated. There are rules that landowners need to follow to manage water on their property through drainage or tiling. This bill doesn't change that.

(23:00)

Doug Goehring, Agriculture Commissioner: (Attachment #2)

Representative Headland: How are we impacted if we leave the law as is and don't pass the bill?

Doug Goehring: It is more about the challenges that we see. There are always activists that want to challenge. I've had calls from county commissioners that want to permit ponds, streams, etc. If we clarify, we can avoid the environmentalist challenges.

Representative Headland: You are telling us the current code leaves an open question.

Doug Goehring: There are certain situations where those challenging think multiple agencies need to be involved. This removes the extra layer of government. I am in support as amended because it is exempting.

Representative Richter: In Williston they created a drainage system that drains 35% of the town and floods a farmer's land. Does that water on the agricultural land become the property of the landowner? So he can do with it what he wants?

Doug Goehring: If he is draining it, he has to check with the local water resource board.

Representative Skroch: This bill will expand the types of water the state will exclude from their oversight?

Doug Goehring: All water is managed by the water commission. Quality of water would be the health department. This bill addresses the ability to permit sheet water, produced water and private water. It takes them off the list so no one can question if a permit was received.

(34:00)

Representative Skroch: Private land now will have a carve out that will be spelled out in code. Correct?

Doug Goehring: In my opinion, yes.

OPPOSITION:

Todd Kranda, Kelsch Ruff Kranda Nagle & Ludwig Law Firm, Representing the North Dakota Petroleum Council: (Attachment #3) The bill is confusing and I didn't have the amendments to look over. I would need to review the amendments and go back to the Petroleum Council's legislative committee. Now we can't take a formal view.

Representative McWilliams: Section 3 in the Constitution
Fossil byproduct water and sheetwater will flow into a ditch and a ditch will flow into stream. Do we need to define sheetwater and distinguish that from flowing water?

Todd Kranda: There is a sizable number of notes from different cases. What is and isn't flowing streams or natural water courses probably has been through the court system and isn't the private water or fossil byproduct or sheetwater because they don't fit into that part of the constitution. I need to do more research to say for sure.

(41:08)

Bill Ongstad, Farmer, Garrison Diversion Conservancy District, Farm Credit Services:
(Attachment #4)

My testimony has changed with the changing of the bill but am still opposed to the bill.
I don't see that the bill is necessary.

Representative Headland: You articulated what all of us are feeling. What other waters are there besides the three listed in the bill?

Bill Ongstad: If this affects how an operator manages the water on his land, and inhibits his ability to repay his loan, that is a red flag.

(43:53)

Julie Ellingson: (Attachment #5)

Dwight Wrangham, Landowners Association of North Dakota: I was amazed to find out we are passing legislation to clarify rules. My concern is if our present law aided the State Engineer in fighting WOTUS, does changing it make it harder for our State Engineer to fight WOTUS?

Pete Hanebutt, North Dakota Farm Bureau: We were involved with some of the changes to the bill. Then additional changes were made. On the side of caution return I think returning to the original code and then coming back with what everybody agrees upon is safer.
Let's start over with a new bill.

Neutral: None

Chairman Dennis Johnson: We'll look over the amendments and move on it at the next meeting.

Vice Chair Trottier: (Asking Garland Erbele) By taking out the three categories, will that put them back under the jurisdiction of WOTUS?

Garland Erbele: I would need to research that.

Chairman Dennis Johnson: Closed the hearing.

2019 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Peace Garden Room, State Capitol

HB 1086—Committee Work
1/25/2019
Job # 31528

- Subcommittee
 Conference Committee

Committee Clerk Signature ReMae Kuehn

Explanation or reason for introduction of bill/resolution:

Relating to waters of the state

Minutes:

Representative Headland: Moved Do Not Pass

Representative Schreiber-Beck: Seconded the motion

A Roll Call vote was taken: Yes 13, No 0, Absent 1.

Do Not Pass carries.

Representative Schreiber Beck will carry the bill.

REPORT OF STANDING COMMITTEE

HB 1086: Agriculture Committee (Rep. D. Johnson, Chairman) recommends **DO NOT PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1086 was placed on the Eleventh order on the calendar.

2019 TESTIMONY

HB 1086

#1
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Testimony
House Bill 1086 – State Water Commission
House Agriculture Committee
Dennis Johnson, Chairman
January 18, 2019

Chairman Johnson and members of the House Agriculture Committee, my name is Garland Erbele, the State Engineer at the State Water Commission. I am here in support of House Bill No. 1086.

In its original form, HB 1086 is a classic example of a bill that develops a life of its own way beyond the original intent.

As such, we have worked with the Department of Agriculture and Commissioner Goehring to address the concerns that were raised and are offering an amended bill this morning.

This bill, with the proposed amendment attached, seeks to modify section 61-01-01 of the Century Code with the intent to explicitly exclude private water, fossil byproduct water, and sheetwater as waters-of-the-state.

For purposes of this issue:

1. "Private water" is legally obtained water that is in the owner's control, such as water within a storage tank, rain barrel, pipeline, canal, or other off-stream storage or conveyance feature.
2. "Fossil byproduct water" is water from a non-potable aquifer obtained as a byproduct of the oil and gas extraction process.

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3. "Sheetwater" is water that flows on the surface as sheet flow from excessive precipitation or snowmelt prior to it either infiltrating or running off.

This bill eliminates the reference to diffused surface waters under sub-section 1 since "diffused surface water" is essentially a synonym of "sheetwater." Since sheetwater is explicitly excluded in the first paragraph, there is no need for it to be used in sub-section 1. Similarly, there is no need to refer to "privately owned waters" in sub-section 4.

Mr. Chairman, this concludes my testimony on House Bill 1086. If you have any questions, I will do my best to address them.

#1
1/18/19

Introduced by

Agriculture Committee

(At the request of the State Engineer)

1 A BILL for an Act to amend and reenact section 61-01-01 of the North Dakota Century Code,
2 relating to waters of the state.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 61-01-01 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **61-01-01. Waters of the state - Public waters.**

7 All waters, excluding private water, fossil byproduct water, and sheetwater, within the
8 limits of the state from the following sources of water supply belong to the public and are
9 subject to appropriation for beneficial use and the right to the use of these waters for such use
10 must be acquired pursuant to chapter 61-04:

- 11 1. Waters on the surface of the earth, ~~excluding diffused surface waters~~ but including
12 surface waters whether flowing in well-defined channels or flowing through lakes,
13 ponds, or marshes which constitute integral parts of a stream
14 system, or waters in lakes;
- 15 2. Waters under the surface of the earth, whether such waters flow in defined
16 subterranean channels or are diffused percolating underground water;
- 17 3. All residual waters resulting from beneficial use, and all waters artificially drained; and
- 18 4. All waters, ~~excluding privately owned waters,~~ in areas determined by the state
19 engineer to be noncontributing drainage areas. A noncontributing drainage area is any
20 area that does not contribute natural flowing surface water to a natural stream or
21 watercourse at an average frequency more often than once in three years over the
22 latest thirty-year period.

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PROPOSED AMENDMENTS TO HOUSE BILL NO. 1086

Page 1, line 7, remove the overstrike over "All"

Page 1, line 7, remove "Waters of the state are all"

Page 1, line 7, after "private" insert "water."

Page 1, line 7, remove "or"

Page 1, line 7, after "fossil byproduct water." insert "and sheetwater."

Page 1, line 11, remove the overstrike over "including"

Page 1, line 12, remove the overstrike over "surface waters"

Page 1, line 12, remove the overstrike over "flowing through lakes,"

Page 1, line 12, remove "in"

Page 1, line 13 remove the overstrike over "or marshes which"

Page 1, line 13 remove "sloughs, lakes that"

Page 1, line 14 remove the overstrike over "waters in lakes"

Page 1, line 14, remove "noncontributing drainage areas"

Page 1, line 16, remove "and"

Page 1, line 17, remove the overstrike over "and"

Page 1, line 18, remove the overstrike over "4. All waters,"

Page 1, line 18, remove the overstrike over "in areas determined by the state"

Page 1, line 19, remove the overstrike over "engineer to be noncontributing drainage areas. A noncontributing drainage area is any"

Page 1, line 20, remove the overstrike over "area that does not contribute natural flowing surface water to a natural stream or"

Page 1, line 21, remove the overstrike over "watercourse at an average frequency more often than once in three years over the"

Page 1, line 22, remove the overstrike over "latest thirty year period"

Renumber accordingly

COMMISSIONER
DOUG GOEHRING



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NORTH DAKOTA
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Testimony of Doug Goehring, Agriculture Commissioner
North Dakota Department of Agriculture
House Bill 1086
House Agriculture Committee
Peace Garden Room
January 18, 2019

Chairman Johnson and members of the House Agriculture Committee, I am Agriculture Commissioner Doug Goehring. Thank you for the opportunity to appear before the committee. I am here today in support of HB 1086, as amended, which would exclude private, fossil byproduct water and sheetwater from being considered under the jurisdiction of the State.

I support the removal of the first line of Waters of the State and returning original language of all waters and removal of other continuous language that created anxiety.

After consulting with the Water Commission and several agriculture industry groups, I believe that the proposed amendments will accomplish the Water Commission's purpose, without any negative side effects to North Dakota landowners.

Chairman Johnson and committee members, I urge a "do pass" on HB 1086, as amended, and I would be happy to answer any questions. Thank you.

Testimony in Opposition to
HOUSE BILL NO. 1086
House Agriculture Committee
January 18, 2019

Chairman Johnson, House Agriculture Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Ruff Kranda Nagle & Ludwig Law Firm in Mandan. I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council (NDPC) to oppose HB 1086.

NDPC represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipelines, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota, and has been representing the energy industry since 1952.

HB 1086 deals with waters of the state and public waters. The changes being made in HB involve Section 61-01-01 NDCC which has been in place for at least the past 30 years, since 1989 when modifications were part of a technical corrections act, and prior to that has remained the same for 62 years when the statute was last amended in 1957. Also, there is a cross reference made to the ND Constitution, namely Article 11 General Provisions, Section 3, which provides, as follows:

“Section 3. All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purpose.”

After several attempts to understand the changes that are being proposed, and to determine the impact and the significance of the same, it became clear that no changes should be made. HB 1086 is confusing at best and causes uncertainty. The current law in North Dakota as set forth within Section 61-01-01 NDCC is adequate. The changes as requested in HB 1086 are problematic and create a great deal of confusion.

In conclusion, NDPC urges your opposition to **HB 1086** and respectfully requests a **Do Not Pass** recommendation. Thank you and I would be happy to try to answer any questions.

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Bill Ongstad

4135 25th St. NE Harvey, ND 58341 701-341-2937 bill.ongstad@gmail.com

January 18, 2019

HB1086

Agriculture Committee Peace Garden Room
9:00 AM Thursday January 18, 2019

Dear Agriculture Committee:

I am Bill Ongstad a farmer from Harvey ND in Wells county. I took off my 44th wheat crop this year. I also serve as the elected director from Wells County on the Garrison Diversion Conservancy District and a director of Farm Credit Services of North Dakota in Minot.

In the fall of 2017 I tilled 400 acres on my farm and in the fall of 2018 I tilled 300 acres with Jeff Lavigne Drainage of Pelican Rapids MN doing the work.

HB 1086 is an unnecessary bill. We should be moving toward less regulation. The State Engineer and Water Commission plenty of work now so the bill will result in costing more money. The bill will result in higher costs for farmers, which will hinder them in loan repayment. This bill takes control of all water and that scares me. Notice it eliminates all the exemptions in the present law.

I urge the committee to recommend do not pass on HB 1086.

Sincerely yours,



#5

North Dakota Stockmen's Association
Testimony to the House Agriculture Committee on HB 1086

Jan. 18, 2019

Good morning, Chairman Johnson and House Agriculture Committee members. For the record, my name is Julie Ellingson and I represent the North Dakota Stockmen's Association, an 89-year-old beef cattle trade organization representing 3,000 North Dakota cattle-ranching families.

After analyzing HB 1086, we have some questions and concerns about the bill. It appears to be an expansion of state authority over more waters and lacks definitions for "private water," "fossil byproduct water" and "integral part of a stream system." Plus, the definition of "non-contributing drainage area," which is in existing statute, has been struck in the bill.

We recognize that there's a bit of a trade-off here. If we understand correctly, under existing law, the state engineer makes case-by-case determinations as to whether a non-contributing drainage area is regulated. While this likely reduces the areas that are regulated, it also reduces certainty for regulated stakeholders. By including non-contributing drainage areas as a category, the state is providing regulatory clarity and certainty under law by taking away those case-by-case determinations, but there could be situations where a drainage area is regulated unnecessarily. By existing definition, a non-contributing drainage area is "any area that does not contribute natural flowing surface water to a natural stream or watercourse at an average frequency more often than one in three years over the last 30-year period." That could be any dry land – not just a dry streambed in a field, the entire field. This has the potential to be an incredibly expansive catchall.

Over recent years, our organization worked hard to push back on the erroneous Waters of the United States rule. With that effort fresh on our mind, we are cautious about this revision to waters of the state, especially without some key definitions.