

**2019 HOUSE JUDICIARY**

**HB 1489**

# 2019 HOUSE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Prairie Room, State Capitol

HB 1489  
1/22/2019  
31243 (0:00-43:30)

- Subcommittee  
 Conference Committee

Committee Clerk: DeLores D. Shimek by Donna Whetham

## **Explanation or reason for introduction of bill/resolution:**

Relating to the jurisdiction of administrative agencies and other executive branch entities.

## **Minutes:**

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**Chairman Koppelman:** Opened the hearing on HB 1489.

**Rep. Kaiser, District 47:** Introduced this bill. In the financial institutions they oversee and regulate all financial regulations. This simply deals with the issue of double jeopardy. We have many regulatory agencies in the state and they do a fine job. If there is a violation by an agency and some was cited for it can other agencies come in and say we will cite fir this violation also. It seems like we are exposing people to double jeopardy although there may be very legitimate areas that may document and demonstrate to you that would create a problem for them. In the financial institutions they massively oversee and regulate all financial license holders in our state and if there is a violation according to their regulations they can take action by taking a license away or charge a penalty. If that happens for a financial issue can the insurance department if they are also an insurance agent, licensed by the insurance Department can the insurance department just take your license away? Financial regulators have the authority and right to protect the citizens of North Dakota and to revoke that license. However, if they are also an insurance agent, should that automatically result in the loss of your insurance license? That would be double jeopardy unless the cause of the revoking was a true insurance violation. We should discuss this and see if there is an issue of double jeopardy.

**Rep. Paur:** Would this affect Department of Transportation suspensions for DUI? A lot of times DOT suspends the license without a trial or proof of guilt. I think when the arresting officer requests it they will just suspend it? We have a hearing process, would this affect that process?

**Rep. Kaiser:** From my perspective it would not effect that. The first action by a regulatory agency is not affected here. It is the action by a second regulatory agency based on the same issue that created double jeopardy.

**Rep. Paur:** We might need an amendment, in this same section 28-32-07 any rule change must be adopted and filed with the Legislative Council. I imagine Legislative Management was never changed, but I am not sure.

**Chairman K. Koppelman:** I think that has to do with administrative rules which do go through the Legislative Council. They compile the Administrative Code as well as the Century Code. So it may be Legislative Council.

**Representative Jones:** On lines 10 and 11 it is talking about and imposition of a penalty for an alleged violation has been issued by an administrative agency, would you be agreeable to changing that to for "the alleged violation and another administrative agency" to help clarify that it is the same violation, because I read that three times to exactly figure out what it was saying.

**Rep. Kaiser:** I am not opposed to any amendment to this bill, if it clarifies it. I think when you check with Legislative Council they are going to say this language does exactly what you wanted it to do. This is a drafting issue not policy.

**Rep. Simons:** Could you give me an example to help clarify what you are trying to do here?

**Rep. Kaiser:** I have some people following me to testify that has been affected by this and will give you examples.

**Chairman K. Koppelman:** We had another bill this morning that we amended it and it had to do with administrative rules not being allowed to impose a criminal penalty. They can impose fines and other sanctions but lose of liberty. The amendment we attached said unless otherwise authorized by law. The example was the board of Pharmacy where we have authorized them to impose some penalties for some emergency rules they have to draft for designer drugs and things like that. Are you aware of situations where maybe in the century code we actually authorized an agency, if you do this, that is an automatic cause for loss of licensure?

**Rep. Kaiser:** It may exist. I am not aware of it, when talking with the financial institutions, the comment was made if we take action then the department can automatically do some things. It may well be in statute in specific situations but I cannot cite those.

**Ron Ness, President of the North Dakota Petroleum Counsel:** We are in support of this bill. It is really the concept of double jeopardy issue. Gave an example of how this would work. If Rep Jones owned a saltwater disposal business and created a spill on or off his treatment facility pad. There are multiple overlapping jurisdictions. We have created a lot of different rules in the state. Those agencies usually work together very well and cooperate on the investigation. But at the end of the day he will get a penalty, if Department A gives a penalty and also Department B with jurisdiction would be expected to proceed with a penalty. Then we might have triple jeopardy because if it involves water you would have a Federal agency in there with a penalty. I don't know all the ramifications in the DOT and into insurance and banking and finance but in regards to regulatory agencies this still allows them to work together. It becomes an expectation that one might out do the other in the fines. To really to ensure an entity is only assessed one true penalty allowing agencies to work

together is good. Should not be subject to multiple fines. Agencies could work this out themselves but it seems like an issue that should come via the Legislature. We encourage you to adopt those things that make sense. 13:16

**Rep. Roers Jones:** Who determines who gets to levy the fine and will there be a fight about who gets to do the fine, where do the fines typically go, back to those agencies?

**Ron Ness:** I don't have the answer for that. Different agencies have different value of fines. Somehow they seem to work it out except if there is overlapping. That primary jurisdiction of that issue is really what's at stake here. What we have done legislatively over the past sessions is we have cross walked some of those jurisdictions because there have been new issues that have risen. It used to be fairly cut and dried, now we have more regulations and some changing regulatory authority.

**Chairman K. Koppelman:** In the situations you describe is there typically one agency who does the fact finding work and the other agencies piling on or do they cooperate and help each other?

**Ron Ness:** The federal government is very good at just following the process you described because they have a very clear line on who is in charge. The state agencies come out and say is this one yours or mine. Obviously the first focus is to address the issue.

**Chairman K. Koppelman:** Further testimony in support of HB 1489?

**Arik Spencer, President and CEO of Greater North Dakota Chamber:** In support of HB 1489. We like this concept and think it deserves your consideration. 16:10

Chairman K. Koppelman: Is this the type of thing your members encounter?

**Arik Spencer:** We have encountered this from time to time but they are rare. There is a larger potential for this now.

**Chairman K. Koppelman:** Any further support? Seeing none.

**Opposition to HB 1489:**

**David Glatt, Environmental Health Section Chief for North Dakota Department of Health:** In opposition to HB 1489. (Attachment #1) stopped 21:36

**Rep. Vetter:** Who would take the lead would it be the first person there?

**David Glatt:** That depends on the circumstances. I would use a pipeline break as an example. It could be due to construction issues and could result into a stream where it could impact the aquatic life for months or years. Typically, we work with mineral resources oil and gas and decide at that time who would take the lead on that action. So we are not double dipping. We do cooperate though.

**Rep. Roers Jones:** Tell us the current process. What is the process where you have a pipeline spill? Are they all charging penalties or fines for the same portion of the incident or are they charging fines for different elements of the action.

**David Glatt:** Typically for different elements of an action, we recently had a tanker truck that was discharging waste water illegally onto a road. That company had two penalties, one we enforced. They had not licensed their trucks for several years. They are required to permit their facility so we know who is hauling the waste and where, and how they are hauling it to avoid any issue. They got another fine from Oil and Gas that related to the illegal discharge onto a road. That is one event dealing with separate issues. 24:25

**Chairman K. Koppelman:** I don't think the intent of the bill is that this is a get out of jail free card. Looking at the wording of the bill in line 9 it talks about an activity maybe that is too vague and it should say violation and then violation is repeated on line 10. Maybe that would make it clear that you are talking about a specific facet of an incident. Is there a way to better phrase this?

**David Glatt:** Yes I am sure there probably is. I am not an attorney. My concern if we are precluded from implementing the Clean Water Act at the state level we could lose clemency and then EPA would run the show. There is concern about jeopardy with EPA, if we take enforcement action our typical move is to tell EPA to back off, it is done. We would tell them we have taken care of this issue and sometimes they are not happy but they have then backed off.

**Chairman K. Koppelman:** Is there a joint investigatory process or does one simply do it and the others simply buy in to what the first one did?

**David Glatt:** We simply decide on which one is taking the lead at the time it is happening. We don't have unlimited staff time to all investigate.

**Chairman K. Koppelman:** If you investigate something and you say our finding is this company was guilty of a spill and Oil and Gas has some overlapping jurisdiction, they say you found there is liability there and they assume what you found is correct and then assess their consequence. Is that what occurs or do they take a fresh look at the incident?

**David Glatt:** Typically it is just one agency.

**Chairman K. Koppelman:** In cases where there might be more than one penalty for a specific action does each entity take a fresh look at the incident and determine if there is guilt or do they accept they findings of the first agency? Or do they find for their purpose there might not be a violation for a different agency. Does that occur?

**David Glatt:** No it does not. We look at it holistically. 31:24

**Chairman K. Koppelman:** To follow your example do they say we assume the pipe was broken because the Department of Health made this finding or do they look if the pipe was actually broken?

**David Glatt:** Typically they take our recommendation on who takes the lead on the investigation and then they accept our findings. To answer the question on where the penalties go to, they go to the general fund. So there is nothing we gain from that.

**Rep. Magrum:** What is the issue that happened to have this bill come about?

**David Glatt:** I do think it was related to the Black Tail Trucking incident. There were two major incidents hauling waste water that basically discharged his water on the road. It was an illegal discharge. We could have taken action on the illegal discharge but we took action on the lack of licensing. Oil and gas took action on what was released from the tank. One event and two different violations.

**Chairman K. Koppelman:** Are there incidents where your agency finds multiple violations or do you usually settle on one and pursue that?

**David Glatt:** Typically, when we get into it there are a few violations. We can take action on most of those but we look at the most severe infraction. How it impacts us is how we administrate the penalties and if it violates the Clean air and Water act.

**Chairman K. Koppelman:** There might be authorizations in law that specifically say you can do what this bill is trying to prevent. If there were an amendment to the bill that said “unless otherwise provided by law”, would that alleviate a lot of the concerns?

**David Glatt:** We would have to take a look at that. I am concerned that if it impacts how we implement the Clean Water act and Clean Air act and our Waste laws at all We could run in jeopardy of turning back programs to the EPA saying we are not fully implementing our program. That is my basic concern. We want compliance.

**Rep. Rick Becker:** Do the penalties go into the general fund?

**David Glatt:** Yes in the general fund. Are we trying to fix something that really isn't an issue.?

Opposition:

**Karen Tyler, North Dakota Securities Commissioner:** I am in opposition of this bill as it is currently drafted and take us back to the financial industries issue. Financial services professionals commonly hold a security license which allows them to sell investments and they may hold an insurance license. It is not uncommon in the course of an investigation when we issue an order against a financial services professional to take away their securities license it is not uncommon for it to warrant a revocation of the insurance license as well. When you have a financial services employee stealing money or financial fraud you can make a reasonable case that they should not be working in the financial services industry. Gave example of securities ponzi scheme. 39:00 Discussed how fraud works and how this bill would affect what they do now. To the question of is there something in law right now to help with this. Yes, there is. In the Securities Act, we have language that points to an action by the insurance commissioner as being grounds for revocation of a securities license. In

the insurance law there is language that talks about an action by the insurance commissioner not preempting an action by another regulator. So there is that kind of language out there.

**Chairman K. Koppelman:** So those safe guards in statute, if we had an addition that recognized that and said unless otherwise authorized by law, would negate the concern with the bill then?

**Karen Tyler:** We would have to take a close look at that but that would be a possibility.

**Rep. McWilliams:** What is an administrative proceeding in your department? Would it be the execution of a warrant or if the issuance of a fine or penalty would be?

**Karen Tyler:** An administrative proceeding would be an initiated upon the issuance of an order. An order coming from the Security commissioner might be a cease and desist order against the respondent engaging in the conduct, or an order to suspend the license, or order for penalty. There are many types of orders that would be considered a beginning of an administrative proceeding.

**Chairman K. Koppelman:** Any further opposition? Seeing none. Hearing closed. (43:29)

# 2019 HOUSE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Prairie Room, State Capitol

HB 1489  
2/12/2019  
32574

- Subcommittee  
 Conference Committee

Committee Clerk: DeLores D. Shimek

## **Explanation or reason for introduction of bill/resolution:**

Relating to the jurisdiction of administrative agencies and other executive branch entities.

## **Minutes:**

**Chairman Koppelman:** Opened the meeting on HB 1489. This is Rep. Kaiser's bill. I think the intent of the bill is good, but I am not sure how to fix it.

## **Do Not Pass Motion Made by Rep. Rick Becker; Seconded by Rep. Hanson**

Discussion:

**Roll Call Vote: 14 Yes 0 No 0 Absent Carrier: Rep. Roers Jones**

Closed.

2019 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 1489

House Judiciary Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

- Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Place on Consent Calendar  
 Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Burke Seconded By Hanson

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman	✓		Rep. Buffalo	✓	
Vice Chairman Karls	✓		Rep. Karla Rose Hanson	✓	
Rep. Becker	✓				
Rep. Terry Jones	✓				
Rep. Magrum	✓				
Rep. McWilliams	✓				
Rep. B. Paulson	✓				
Rep. Paur	✓				
Rep. Roers Jones	✓				
Rep. Satrom	✓				
Rep. Simons	✓				
Rep. Vetter	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Roers Jones

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1489: Judiciary Committee (Rep. K. Koppelman, Chairman)** recommends **DO NOT PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1489 was placed on the Eleventh order on the calendar.

**2019 TESTIMONY**

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**Testimony**  
**House Bill 1489**  
**House Judiciary Committee**  
**January 22, 2019, 3:30 pm**  
**North Dakota Department of Health - Environmental Health Section**

Good afternoon Chairman Koppelman and members of the Judiciary Committee. My name is David Glatt, Environmental Health Section Chief for the North Dakota Department of Health, soon to be the North Dakota Department of Environmental Quality. I am here today to testify in opposition to HB 1489.

In brief, the passage of HB 1489 could prohibit our agency from the proper implementation and full enforcement of environmental statutes designed to protect public and environmental health. Our concerns regarding HB 1489 are as follows:

- Experience has shown that a single event can violate several statutes from various agencies. Some are related to public safety, some environmental health, and others may be due to implementation of appropriate code or construction requirements. Under this bill, it is conceivable that a party violating multiple statutes could go “shopping” for the quickest and least costly penalty to avoid full responsibility for its actions. Once a violation settlement and fine were finalized, all other important statutes would be prohibited from being fully enforced and implemented.

To illustrate, imagine a tanker truck not permitted to haul waste, parked illegally on a bridge, not operated by a licensed individual and discharging highly mineralized waste into a creek. Could a citation with a fine for illegal parking preclude all other enforcement actions by the state? Our point is the responsible party could seek protection from serious violations by paying a parking ticket.

- Due to the complexity and technical nature of violations and the fact that violations may sometimes be ongoing for days or months, the department may need months or longer to gather appropriate environmental damage information before initiating an enforcement action. At times, the department’s investigations identify not only environmental damage but also negligence or willful conduct. Because some types of violations imposed by other agencies may take less time to prove and be at lower enforcement penalties, the responsible party may seek to pay those first to preempt all other enforcement.

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- The department's penalties generally accumulate on a per-day basis. This incentivizes a responsible party to contain and remediate environmental hazards quickly. The faster the responsible party initiates response actions to limit environmental damage, the lower the assessed penalty. If the department was not allowed to initiate enforcement action and assess appropriate penalties, the incentive to act quickly and responsibly would be diminished.
- If adopted, this bill could prohibit the department from enforcing elements of the Clean Water Act, Clean Air Act, Safe Drinking Water Act, or Resource Conservation and Recovery Act—all federal programs implemented through state primacy agreements with the U.S. Environmental Protection Agency. The bill could also prohibit the department from enforcing radioactive materials laws, as required through an agreement with the Nuclear Regulatory Agency. Failure by the state to fully implement and enforce regulations could put the federal/state primacy agreements in jeopardy. The result would be loss of the total program or, at a minimum, certain enforcement portions of the programs, effectively turning them back to the federal government for implementation.

It is important to note that the department does cooperate with other agencies to ensure the proper use of limited enforcement resources and appropriate enforcement of environmental programs.

This concludes my testimony, and I am happy to answer any questions you may have regarding HB 1489.