

**2019 SENATE AGRICULTURE**

**SB 2335**

# 2019 SENATE STANDING COMMITTEE MINUTES

**Agriculture Committee**  
Roosevelt Park Room, State Capitol

SB 2335  
2/7/2019  
Job #32399

- Subcommittee  
 Conference Committee

Committee Clerk: Alicia Larsgaard
-----------------------------------

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

A BILL for an Act to amend and reenact section 4.1-33-18 of the North Dakota Century Code, relating to pesticide application.

## Minutes:

Attachments: 2
----------------

**Chairman Luick:** Called the hearing to order on SB 2335.

**Senator Mathern:** See attachment #1 for testimony in support of SB 2335. Senator Mathern read his testimony to the committee.

**Glen Philbrick:** See attachment #2 for testimony in support of SB 2335. If I see someone spray, and even if there is no damage for 10 days, I should know the day it was sprayed. In some cases, it may take even longer for the damage to show up. It may be even months. Continued reading from testimony. While I was driving, I was listening to Prairie Public Radio. This story aired in Nebraska and Missouri regarding the extend brand of soybeans. The extend variety is a product that is resistant to Dicamba. I imagine that we are all familiar with agent orange. That contains the oxen. That was band. 24-D also contains the oxen as well as Dicamba. They form a gas which can move quite far. In those two states, if you get these extend read Dicamba resistant soybeans, you do not need to worry about drift from your neighbors because your soybeans are resistant to it. This is a big ethical issue. The market is drastically moving towards this one type of soybeans because of that. Ag Week Publication submitted several states that had significant drift issues. In 2018, compared to 2017, the amount of drift incidents with Dicamba were down. This is posing another problem. In light of that information, for those who are at risk of experienced drift, we need to have something in place to make a wider window to file a civil claim. Thank you for your time. I will stand for questions.

**Chairman Luick:** What your amendment does is to assure that the letter gets to your neighbor; what does this bill do? I am just confused as to how this changes the 28 days.

**David Keagle, Attorney, Braaten Law:** Testified in favor of the bill. As the law is written right now, you have this 28 jurisdictional bar that says if you haven't sent out this letter, a court can't hear your action. This amendment tries to fix the situation where you know it has

been damaged but you do not know who did it. You still have 28 days to send out the letter but if you do not know who did it, that is impossible. All this amendment does it being the ticking of the clock once you have figured out who the guilty party will be. It is a small change but it means the difference of someone being able to find relief and let the courts evaluate the damages. Without this amendment, there are certain situations where the doors of the court would be closed regardless of how grievous the action was. There would be no end of the dispute basically because no one knew who to send the certified letter to. This would allow the dispute to be solved through the normal process. Rules of evidence would still apply. The person who was alleging the fault of the applicator would still have to prove they were at fault. It wouldn't change anything except allowing actions to proceed as long as a letter was sent within 28 days of them finding out who was at fault.

**Chairman Luick:** So the damage is done and the applicator is your neighbor. Your amendment is asking to make sure that letter is sent to your neighbor correct? I am looking at this and I am thinking, "How does this change the 28-day window?"

**David Keagle:** This would address the issue of, for example, an applicator goes out and sprays the wrong section. They end up spraying your quarter, when they were supposed to spray two quarters over. You did not contract with that person. You have no idea who the applicator was; in this case, your clock starts ticking 28 days after you have discovered who did it. Without this amendment, the clock starts ticking right away. With this amendment, you have 28 days to find out who the individual who came onto your land and sprayed was, or who sprayed a section to yours causing a drift.

**Senator Klein:** The word reasonably is in the bill. What are the perimeters of that term in this bill?

**David Keagle:** The word reasonably generally means that the finder of fact ultimately makes a judgement. For instance, if an applicator had put up a sign on the quarter section that they sprayed, you would be reasonably able to determine who sprayed. It might even go further if you know that your neighbor typically uses a certain individual to spray. That can help determine who the guilty party is. Once you reasonably determine who the applicator is, at that point, your clock would start for the 28 days.

**Senator Klein:** Where does that clock start? You can be reasonably uncertain and then all of a sudden you are not. Who knows that?

**David Keagle:** I believe that in this case, the 28-day bar would be asserted by the defendant as defense. Let us say, hypothetically, I sue you. You claim you did not receive a letter until 30 days after the person told you I was doing this. In the initial action, defenses are raised. The operative thing to do would be to establish when the letter was sent and then establish when the spraying happened and when someone ascertained that you were probably the guilty party.

**Chairman Luick:** Mr. Philbrick had mentioned that there was a problem with the 28 days. In some cases, liability issues can be another source of insurance claims which can go up to two years. Why are you not talking about expanding this into a wider window to make that claim or damage?

**(18:15) David Keagle:** I support that. I think that you would receive some pushback from applicators. One of the issues would be regarding them garnering evidence to make their case. If you wait a couple years, that evidence might no longer be in the soil or in the plants. I think the concern would be allowing them onsite. I think that is what section #2 of the current statute is; permitting the guilty party permission to go onto the land and gather their own evidence.

**Senator Hogan:** Have you worked many of these cases?

**David Keagle:** Not directly. I have done some consultations. I know that Dicamba became an issue last year. I believe the Ag Dept. developed some policies.

**Senator Hogan:** How many times do these cases happen?

**David Keagle:** I do not believe it is something that occurs in the majority of cases. Even if it occurs a small percentage of the time, that is a small percentage of people who have been wronged and do not have any relief.

**Senator Hogan:** You do not have a way of knowing how big of a problem this is.

**David Keagle:** I believe the Ag department would have data on that. That may be a useful point as to that 28-day bar. I have consulted on issues before. The Ag Department has administrative means of investigating pesticide drift cases. I know an alleged drift can occur during the growing season. It can be months until an alleged violator is reached. It usually even takes them longer than 28 days to make a finding. North Dakota has larger populations now. It is not as simple as everyone meeting at the corner section and getting their spray records together. Something like that could be done within 28 days but now you have landowner farmers that do not keep a home place on their farms.

**Chairman Luick:** Any further testimony in favor? Any testimony in opposition?

**(21:35) Pete Hanebutt, NDFB:** Testified in opposition of the bill. I am sure there are good intentions with this bill but it makes us nervous for a number of reasons. Open-endedness is one of our concerns. One of the benefits of being a national organization is that you hear many stories from other state affiliates. Ohio or Missouri have many Dicamba issues. I will give an example of a person who knows he has damage and regardless of the 28 days, in the fall, his yield was higher. What are we going to open the can of worms with if we are alleging damage but in reality, the yields were higher? We have an assortment of problems with this one. I do not think we need to leave things almost open-ended for claims of damage. I would resist this bill and hope you give it a Do Not Pass.

**Chairman Luick:** Do you know what they have in other states?

**Pete Hanebutt:** I do not know. I do not want to speak for their laws.

**Gary Knutson, Executive Director, ND Agriculture Association:** Forgive me, but I have read this 25 times and still cannot figure out what it does. I would like to see more clarity. I

feel sorry for the regulators in terms of their role in this situation. It looks like a black hole. How far does this situation sit up in the air? When do we solve it? When is there a complaint filed? I would think you are not only talking about the number of days because you still have the harvest feature. They still need to comply and after harvesting 20%, they need to report damage to someone. That is still an issue of this aspect that needs to be looked at. I would agree with Pete. A plant could be drifted on and look damages but then later grow out of it and produce high yields. I feel like we need more clarity before we can analyze what this would do.

**Dan Wogsland, Executive Director, ND Grain Growers:** We are in opposition, and would echo the concerns stated by previous speakers. We like the law as it is. I would be open to questions.

**Chairman Luick:** Any further testimony in opposition? Any neutral testimony?

**Eric Delzer, Director, Pesticide Program for Department of Agriculture:** We are neutral on this bill as it does not affect us in our operations. The role of the department is to investigate pesticide misuse. So when someone calls in a drift complaint, we are going out and conducting an investigation to determine whether there was a violation of the ND Pesticide Act. Our investigations have no bearing on insurance pay outs or damage cases. They are confidential and sealed. Being that this bill deals with civil damage recoupment, we are not going to weigh in on it. However, I do have some thoughts on it that I am willing to share. I see good and bad with the language. The intent is somewhat good for people that have been damaged. One good thing that this would do would be that applicators would not be able to use this section of law as a defense, stating that they were not notified within 28 days and they do not have to pay. Therefore, they would be exempt from having to pay. The intent of this section of law is to add some added due process for applicators that have something alleged against them. When it comes to a drift complaint, depending on the chemical, the crop, and the amount that was damaged, it is also prudent that they be notified right away so they can look at the crop and have their insurance adjuster come look at the crop and determine the extent of the damage. That is why it is imperative that they are notified as soon as possible. You do not necessarily need to know who is responsible for the damage. Say your field was damaged and it most likely came from any one of the surrounding fields. You could send a letter to your neighbors saying that your field was damaged and you are looking into it and want to work with them to find out who caused it and who's insurance you will file it under. It is simply a notification of damage so we can begin the process. Timeliness is important.

**Vice Chair Myrdal:** Do you know why the current language has 28 days?

**Eric Delzer:** I do not. I am not sure what session that would be inserted under for 28 days. It is understandable where you might need a little more time. However, there should be some sort of cap on it.

**Chairman Luick:** As a farmer, I can see a problem with openness of the 28 days. I believe the 28 days is too short. How would 60 days fit in here?

**Eric Delzer:** It would help that parties that are damage and give them extra time to do what is required of them. At the same time, there has been a lot of Dicamba use in the last two

years. Dicamba is in the oxen family of chemicals. It is a growth regulator so it only effects new growth. By the time your crops are damaged, you probably won't see the affects for a good two weeks. When you first notice the damage, it is imperative that you notify us at once so we can be there to collect samples. A lot of the time, all traces of the chemical are metabolized out of the chemical already. That applies to the applicator as well. Their insurance company is doing their own investigating. The plants also tend to grow out of it. Depending on how they were damaged, they could completely grow out of it in less than a month later. If you are not given a notification until two months after the damage was first noticed, you may go look at the crops yourself and see there is no longer any damage. I understand the intent of trying to get extra time but it is very open ended as well.

**Chairman Luick:** We have been talking about Dicamba as the only example here. I look at others where they are spraying a small grain crop next to your beans and they are killing the beans. I would think that 60 days would give you the chance to see whether it is dead or damaged or not. Dicamba has even cause crops to be as good or even better than what was not sprayed.

**Senator Klein:** Back you the Dicamba, there are a lot of new rules that apply to it. There is a certain date they have to have it on. Is July 1 the date?

**Eric Delzer:** No applications could be made from July 1 on. It really addresses it in the new federal label that just came out this fall. Applicators are allowed to apply through June 30<sup>th</sup>. That is the cutoff date. No applications can be made after that point.

**Senator Hogan:** You talked about an investigation versus a civil action. You have separate investigation procedures within the Department of Agriculture that would in some ways parallel a civil action, correct?

**Eric Delzer:** Yes. A lot of times when people notice damage, they are going to try to recoup damages. That is not something we can help them with. They are also notifying us about pesticide misuse that caused this. That is our rule to determine if there was a violation of the ND Pesticide Act. We will go out, do an investigation, collect samples, interview the parties, and look at records. Turnaround time at the lab can be a couple weeks or even months. There are times where we can turnaround a drift investigation within 90 days. There are others that take up to 6 months. We still have some open cases from June of last year that still are wrapping up.

**Senator Hogan:** Could you get us a copy of those records of how many complaints you get? Do you get a lot? How many of them parallel civil action? Do you have any comparison?

**Eric Delzer:** I have no idea of those types of numbers. We do not track that since we are not involved in the civil side of things. We are only enforcing administrative law. We have no idea how many of these wind up in civil action. As far as the number of cases, last year we had a total of 102 drift cases and 47 of those were Dicamba related:

**Senator Klein:** You are notified on every case. So every case in the state goes through you?

**Eric Delzer:** Not every case is notified to us. A lot of times, neighbors try and work it out. That is what we recommend to people especially since our cases do not help their civil cases.

We point that out right away in the beginning. If you are seeking damages, doing an investigation with us will not help their cause. Those records can only be released through court order. We encourage farmers to work it out amongst themselves. At the end of the day, whether we lay a civil penalty or some sort of enforcement action against that applicator, it isn't going to help or be relevant on the civil side of things and recouping damage. That is not a rule to a system in that process. If it looks like there is clear misuse of the product, that is where we need to be involved. We will do the investigation and follow up with an enforcement action.

**Senator Klein:** You are notified when someone or the producer believe the applicator did something wrong. The neighbor or whoever provided the application sprayed when the temperature was above 85 degrees. You are only involved when a complaint of misuse is involved, correct?

**Eric Delzer:** That is correct. When the complainer has damage, they will turn it over to us. We will then determine if there was a violation present or not. A lot of times, you have cases where they have a great relationship with their neighbors. I get calls from guys that do not what do go on record and do a formal complaint against their neighbor. I have had a lot of guys tell me they have damage but they do not want to do anything against their neighbor. They claim they still followed the rules and did everything right but it still managed to roll over and damage his stuff. There are also neighbors out there that are like the Hatfield's and McCoy's. If we have on leaf curled up, we are getting a call that their neighbor killed their crops again. We deal with it on both ends of the spectrum.

**Senator Hogan:** The fact that your investigations are all confidential unless your court ordered in a civil action; how often does that happen?

**Eric Delzer:** That does not happen often in my experience. It has happened before. The last three or four years have not seen a case like that.

**Senator Larsen:** There was some research about the b-colony collapse. They thought that fungicide drift was part of that. Was there any research or thoughts about that?

**Eric Delzer:** There has been an ongoing robust debate on that topic. In the last 10-15 years, we have seen colony collapse disorder. The question is if it is related to pesticides or not. Usually they are specifically referring to the neonicotinoid class or pesticides the effect the nervous systems of insects. It has been inconclusive. I do know that in the last few years, they have identified about 28 new viruses inside honey bees that were previously unknown, that do have an effect in this cause. There has been some research trying to link it to roundup. As far as I know, the jury is still out on it. It doesn't look like there will be any clear insight brought forward anytime soon.

**Senator Larsen:** There is no fungicide?

**Eric Delzer:** I believe fungicides have been looked at but compared to the other pesticides that are more widely challenged, I do not know much about them.

**Chairman Luick:** Any further testimony on this bill? Hearing none, we will close the hearing on SB 2335.

# 2019 SENATE STANDING COMMITTEE MINUTES

**Agriculture Committee**  
Roosevelt Park Room, State Capitol

SB 2335  
2/7/2019  
Job #32418

- Subcommittee  
 Conference Committee

Committee Clerk: Alicia Larsgaard
-----------------------------------

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

A BILL for an Act to amend and reenact section 4.1-33-18 of the North Dakota Century Code, relating to pesticide application.

**Minutes:**

Attachments: 0
----------------

**Chairman Luick:** Called the committee to order on SB 2335.

**The recording was started late so some speaking was missed.**

**Eric Delzer:** They could be calling later on into the fall through harvest. We have had people call and say their neighbor told them their yields are down from the damage that their personal application did. That was the first notification I received of it. He has already combined the field. I cannot go look at it. My insurance company can't either. Those are situations where that section of law came from. It is important that they do it in a timely manner:

**Senator Luick:** I agree that the open-endedness of what is being proposed here is not in my interest. Is there a benefit to leaving that open for another month?

**Eric Delzer:** I guess there could be a benefit.

**Senator Luick:** Does it hurt anything?

**Eric Delzer:** In a scenario I laid out earlier, the crop could be coming off the field.

**Senator Klein:** I would suggest the proponents of this bill would have changed that number. We do bills because someone has been wronged. That is how we come up with a rule or a law. In the 28 days, they stayed away because they understand the value of the 28 days. Their concern is that they didn't know who it was and they ask for a few days to figure that out. I do not know if that happens a lot. Maybe you could fill us it. Obviously it happened one time and it was someone who knew someone who was a legislature and asked them to fix it for them. Can you respond to that? Does it rise a lot where we can't find known applicators to the person?

**Eric Delzer:** People call us to complain a lot. This is one of the things we do not hear that often. Of the cases in my time at the program, no one has raised a fuss like the gentleman who testified first. It sounds like they used it as a defense to get out of giving him payments. I was not involved in his case when it happened. I understand his perspective. At the same time, 28 days is pretty reasonable.

**Senator Hogan:** In his case, he tried twice because the certified letter had been received and then sent back. He knew who he was sending to. Has this been an issue that has been studied in an interim study? Could we turn this into a study resolution?

**Chairman Luick:** We could but I do not know if it will go anywhere.

**Senator Hogan:** Why not? At least it is acknowledging because I do not know if it has ever been studied.

**Senator Osland:** You talked about people complaining. I would imagine if you took a board, you will have a group that does a lot of complaining and then a group that does very little complaining. We farm many different spots. We probably had a little damage but we never turned it in to anyone. We do not hear about this stuff in our area. Are we chasing a problem that happens one in a lifetime?

**Eric Delzer:** I do not think this is a huge issue. I was thinking about the situation the first gentleman testified upon. It was refused and sent back multiple times. You can document that it was refused. You are showing you are making the attempt. If they took that insurance company to court and he had documented that properly and showed he even went to the sheriff's department, I think that would even hold up. I do not think they would be able to get off on the defense that they didn't receive the notification within 28 days. I also tell people that the letter is supposed to be a simple notification.

**Senator Myrdal:** Regarding the 60 days, I think 28 days was put in there out of wisdom. As a producer I think that is fair. I agree with Osland. This isn't as hard as it was presented. There is an avenue that is clear in the law. There are two people to protect here equally; the complainant and the applicant. We hear stories and tend to lean one way or the other. There is the whole other side of the applicant that has to have equal defense in the law. I do not think this is necessary.

Senator Klein: The gentleman that was wrong knew who he was sending the certified letter to. He had reasonably ascertained who it was. I do not know where the issue was at.

**Senator Myrdal: Moved a Do Not Pass.**

**Senator Osland: Seconded.**

**Chairman Luick: Any Discussion?**

**A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent.**

Senate Agriculture Committee

SB 2335

February 7, 2019

Page 3

**Senator Myrdal will carry the bill.**

**2019 SENATE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. SB 2335**

Senate Agriculture 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 Senator Myrdal    Seconded By Senator Osland

Senators	Yes	No	Senators	Yes	No
Senator Luick-Chairman	X		Senator Hogan	X	
Senator Myrdal- Vice Chair	X				
Senator Klein	X				
Senator Larsen	X				
Senator Osland	X				

Total    (Yes) 6    No 0

Absent 0

Floor Assignment Vice Chair Myrdal

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

**REPORT OF STANDING COMMITTEE**

**SB 2335: Agriculture Committee (Sen. Luick, Chairman) recommends DO NOT PASS**  
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2335 was placed on the  
Eleventh order on the calendar.

**2019 TESTIMONY**

**SB 2335**

Senate Agriculture Committee

February 7, 2019 Senator Tim Mathern

Chairman Luick and Members of the Agriculture Committee

My name is Tim Mathern. I am sponsor of SB 2335.

This bill seeks to permit more time for an aggrieved party to file a civil action seeking reimbursement for property damage stemming from the application of a pesticide. I introduced the bill at the request of a farmer in District 8. I took an interest in the topic as I serve on the board of Prairie Roots Food Co-op. This grocery store business in Fargo often deals with questions of the chemical content of groceries sold.

I also asked the citizens involved to get bill sponsorship from their local legislators which they did which you will see from the sponsorship noted on the bill.

There are other people here who are directly involved in the farming aspect of food to testify so I will be brief.

Chemicals are a common use in today's agricultural practices. We need to be fair and practical in having laws that serve all parties involved.

I believe SB 2335 serves that end.

Thank you for the attention you will be giving to the presenters coming after me. I ask for your Do Pass recommendation to the full Senate.

Thank you for your consideration.

2/7 SB 2335 #2 pg. 1

Senate Agriculture Committee

February 7, 2019

Chairman Luick and Members of the Agriculture Committee, my name is Glen Philbrick. I am a farmer in District 8 near Turtle Lake.

As a farmer who has experienced pesticide drift and suffered bodily injury and property damage, I ask you to give SB 2335 a Do Pass recommendation for the full ND Senate.

The current 28 day limit is difficult for those seeking reimbursement for property damage on several levels. The current statute assumes a point in time when the property owner "out to know" about a drift incident. This can include the day the property owner saw a neighbor spray. Depending on the type of chemical used, damage may not appear until several days later. If 10 days pass before plants show symptoms of damage, and an applicator is sent a certified letter and refuse the letter, the property owner will have to send a certified letter again. The USPS holds a letter 10 days. If the property owner sends the letter again and it refused, another ten days will have passed. The next option is have the sheriff's option serve the letter which takes at least another 5 days. This scenario happened to a farmer in my community. 32 days passed before the letter could be served by the sheriff and was unable to collect at that point.

Some chemicals have a residual effect that will not show up until a different crop is planted. Chemicals can stay in the soil for months or even years. Current statute does not address this situation.

For those who suffer bodily injury, their priority will be their health and may be physically unable to serve someone with a civil claim via certified mail. I know this from experience.

In cases where damage is present, the applicator is unknown, and the chemicals used are unknown, lab tests are needed to verify the chemicals used. Lab tests take more than six weeks or longer. It is impossible to get results in the 28 day limit. The following labs can verify that. The labs include:

South Dakota Agricultural Laboratories (605) 692-7325

Brookside Laboratories, Inc. in Ohio (419) 977-2766

Minnesota Valley Testing Lab 1-800-782-3557

The phone numbers are included to verify what I am telling you. Please keep in mind testing for pesticides is generally done during the growing season which creates a backlog.

The current 28 day limit is unpractical when compared to other limitations for bringing a civil claim for property damage in ND. I do not know of another type of civil action that is limited to 28 days. As far as I know, whether the damage is done to a car, home, business, or personal property, the owner has a few years to file a claim. I ask you to consider if this 28 day limit is

2/7 SB 2335 #2 pg 2

practical and common sense. What if a 28 day limit placed on all forms of property damage? If someone suffered a hit and run accident, should they be limited to 28 days?

The current statute treats applicators very favorably. I visited with a couple members of the legislature who told me they have constituents who would not support this change because of their own liability concerns. This is unethical and unacceptable. No one should be allowed to avoid liability.

Chemicals are commonly used in agriculture in ND. If used correctly, chemicals can improve a farmer's bottom line. If used incorrectly, chemicals can wipe out a farmer's entire income and livelihood. No applicator should be allowed to avoid liability. SB 2335 applies a common sense and a fair approach to civil claims involving pesticide drift. I ask you for a Do Pass recommendation to the full ND Senate.

Thank you for your time and consideration.

Glen Philbrick  
glen.philbrick@gmail.com  
(701) 214-8958