

Good morning, Mr. Chairman and members of the committee. I am Matt Linneman, Deputy Director for Engineering at the North Dakota Department of Transportation (NDDOT). I am here today to provide oppositional testimony on Senate Bill 2325.

The bill proposes a new section to Chapter 47-05 concerning easements granted to a nonfederal party within a wetland. My testimony today will be focused on impacts regarding the NDDOT wetland mitigation banking program. Almost all the NDDOT wetland mitigation banks are secured through an easement with the landowner.

Wetland impacts resulting from NDDOT road and bridge infrastructure projects are required to be offset with compensatory mitigation through wetland mitigation banking. This is required for both state and federally funded projects, most often through the 404 permitting process from the US Army Corps of Engineers when placing fill in jurisdictional wetlands and waters of the US, but also through Executive Order 11990 by the Federal Highway Administration.

NDDOT mitigation banks restore previously drained wetlands back to natural conditions by filling the existing manmade drains with an earthen ditch block to a designed elevation. During project development, the existing drained wetlands are delineated and mapped "as is" prior to the development of the mitigation bank. The elevation of the proposed ditch block is designed to fully restore the existing drained wetlands back to the hydric soil boundary. The hydric soil boundary is the historic natural wetland extent and is determined through soil probes to map the boundary. There are also hydraulic and engineering studies that are considered when designing the mitigation bank to ensure there are no impacts to adjacent landowners. This includes analyzing upstream and downstream culvert inverts relevant to the designed top of ditch block.

SB 2325 requires the ordinary high-water mark of wetlands to be determined by the North Dakota Department of Water Resources or appropriate federal agency but is not directly applicable to wetland bank projects and pothole wetlands. If the existing "as is" drained wetlands are considered the ordinary high-water mark, every NDDOT wetland bank would restore water beyond those existing limits back to the hydric soil boundary. The NDDOT also has concerns about the retroactive language in the bill concerning the ordinary high water mark determination for all past easements prior to August 1, 2025. This would require a large effort to determine the ordinary high-water marks of past, closed-out wetland bank projects.

Additionally, federal and state permits provide approval to maintain water to the intended designed levels, so if there are unforeseen issues that develop over time, those are allowed to be remedied through maintenance.

The NDDOT is in opposition to SB 2325 as written because of the ambiguity as to what the ordinary high-water mark consists of with wetland mitigation banking, the increased time and labor to appropriately document the ordinary high-water mark for numerous pothole wetlands, and the retroactive language for past projects. The liability for damages to adjacent landowners is already implied and considered during wetland bank project development, and the proposed bill language could negatively affect the willingness of landowner participation with enrolling in the NDDOT wetland mitigation program.

This concludes my testimony. I would be happy to answer any questions. Thank you.