

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

**AGRICULTURE COMMITTEE**

Thursday, April 12, 2018  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Representative Dennis Johnson, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Dennis Johnson, Kathy Hogan, Michael Howe, Craig A. Johnson, Kathy Skroch; Senators Jim Dotzenrod, Joan Heckaman, Larry Luick, Janne Myrdal

**Members absent:** Representative Dwight Kiefert; Senator Bill L. Bowman

**Others present:** See [Appendix A](#)

**It was moved by Representative Hogan, seconded by Senator Myrdal, and carried on a voice vote that the minutes of the December 19, 2017, meeting be approved as distributed.**

**NORTH DAKOTA STATE SOIL CONSERVATION COMMITTEE STUDY**

At the request of Chairman Johnson, the Legislative Council staff presented information ([Appendix B](#)) from a 50-state survey regarding the structure, service, and funding of conservation entities as provided by the National Association of State Conservation Agencies.

In response to a question from Representative Hogan, Mr. Bruce Schmidt, Program Coordinator, Watershed and Soil Conservation Leadership Development, North Dakota State University Extension Service, said the document provided by the National Association of State Conservation Agencies contains useful information for soil conservation districts and officials to use as a resource. He said some states that did not respond to the survey do not have a structure in place for soil conservation districts.

**North Dakota State University Extension Service**

Chairman Johnson called on Mr. Schmidt, for a presentation (Appendices [C](#), [D](#), [E](#), and [F](#)) regarding updated information on the roles, responsibilities, and potential reform of the State Soil Conservation Committee. Mr. Schmidt said he took the questions he received from the committee at the last meeting seriously. He said he took it as an opportunity to take a hard look at the State Soil Conservation Committee and how the committee is operating, and to make some proactive reforms and changes. He said he would like to propose an amendment to North Dakota Century Code Section 4.1-20-19 because the section makes it extremely difficult to provide additional supervisor training once an individual has gone through the initial supervisor training. He said it would be beneficial for soil conservation district supervisors to attend ongoing training. He said he would like the language of the last sentence of the section amended to read "Thereafter, an individual elected or appointed to serve as a soil conservation district supervisor shall attend annual training as recommended and approved by the State Soil Conservation Committee."

Mr. Kelly Klosterman, Vice Chair, State Soil Conservation Committee, said the possibility of losing the State Soil Conservation Committee is concerning to many people. He said Mr. Schmidt has done a great job since taking his position 6 months ago. He said this study has given the committee the opportunity to create needed reform in some areas and clarify the role and necessity of the committee in providing vital conservation efforts in the state.

In response to questions from Representative Hogan, Mr. Schmidt said having Ms. Nicole Wardner help with the revitalization of the committee website and online training is part of the agreement and statutory directives between the committee and the North Dakota State University Extension Service. He said Section 4.1-20-06 requires the extension service to assist the committee in performing duties, within legislative appropriations. He said the committee has been utilized as a support entity for local conservation districts. He said the committee also is taking steps to add accountability measures at the local level. He said the accountability measures will include additional training requirements and reporting requirements regarding how the assistance funding is being utilized and how it is benefiting local conservation districts.

In response to a question from Senator Myrdal, Mr. Schmidt said part of the supervisor training consists of reviewing roles and responsibilities as determined under Century Code. He said the committee is working with extension service personnel and the State Department of Health to develop a district plan to provide clarification and guidance to district personnel of duties beyond simply planting trees.

In response to a question from Senator Heckaman, Mr. Schmidt said the committee has discussed the number of minimum annual training hours they would like to see supervisors receive. He said they have not come to an agreement on the amount. He said the committee would like to see the annual hours requirement remain broad and at the discretion of the committee if the statutory provision is amended.

Senator Heckaman said she thinks the requirement needs to be a reasonable amount and may need to have parameters regarding minimum or maximum hours.

In response to a question from Chairman Johnson, Mr. Schmidt said there has been no resistance from district supervisors regarding the potential addition of annual training requirements.

In response to a question from Representative Skroch, Mr. Schmidt said the committee is envisioning including training in events the district supervisors already attend annually. He said if the committee is able to add training opportunities to existing events, there would be minimal additional costs to provide the training.

### **Interested Persons and Committee Discussion**

Ms. Mary Podoll, State Conservationist, Natural Resources Conservation Service, United States Department of Agriculture, said the changes being made by Mr. Schmidt and the committee are improving communication, transparency, and relationship building.

Senator Luick said the focus on soil health has improved over recent years and decades. He said farming techniques also are evolving and changing. He said the techniques need to improve further to combat ongoing issues, such as soil erosion in the Red River Valley.

Senator Myrdal said agricultural education is lacking in K-12. She said agriculture is the backbone of the state and there needs to be more focus on educating children on agriculture and the issues related to agriculture.

In response to a question from Senator Dotzenrod, Ms. Podoll said there is a GIS database that helps show the federal programs in place for conservation efforts. She said the information could be used to help soil conservation districts gather and relay data regarding soil health issues.

### **DESIRABILITY AND FEASIBILITY OF CREATING A STATE WETLANDS BANK STUDY**

At the request of Chairman Johnson, the Legislative Council staff presented a background memorandum entitled [Agriculture Committee - Wetlands Bank Background Memorandum](#).

In response to a question from Senator Luick, the Legislative Council staff said he did not reach out to the State Engineer to determine if that office had records related to the state wetlands bank that previously existed in Century Code.

Senator Dotzenrod said a lot of the trouble in the state related to wetlands is a result of the Food Security Act of 1985. He said the Act was good in theory as it related to the preservation of wetlands for migratory birds, but in practice it has been frustrating. He said workable farmland that may be at a slightly lower elevation and contains water for several days in the spring is being protected as wetlands. He said he thinks this has been taken to the extreme to include areas that were never actually wetlands and which contain water for no more than a few days of the year.

### **Department of Agriculture**

Chairman Johnson called on Mr. Doug Goehring, Agriculture Commissioner, for a presentation ([Appendix G](#)) regarding the funding, purpose, eligibility, and payment rates of the Department of Agriculture waterbank program.

In response to a question from Chairman Johnson, Mr. Goehring said some of the considerations for whether potential acres qualify for mitigation include whether the proposed area can hold water and become a new or revitalized wetland, whether mitigation would need to occur on a one-to-one scale or greater to equal the value of the wetland acreage being converted to cropland, and if the supply of acres is available to allow for mitigation. He said the price for mitigation acres depends on what part of the state you are in, and the price ranges of a willing buyer and seller. He said he has heard of prices anywhere between \$3,500 to \$14,000 being paid to mitigate an acre.

In response to a question from Senator Luick, Mr. Goehring said during mitigation one of the things that occurs is delineation, which is the determination of the exact boundaries of the wetland. He said the soil composition and the present vegetation can affect the delineated boundaries of a wetland.

### **United States Department of Agriculture - Natural Resources Conservation Service**

Chairman Johnson called on Ms. Podoll for a presentation ([Appendix H](#)) regarding federal wetland mitigation rules and regulations. Ms. Podoll said the requirements for agricultural wetland mitigation come primarily from the Food Security Act of 1985. She said participation in United States Department of Agriculture programs requires compliance with the wetland "swampbuster" law that was a part of the Act. She said there is a federal waterbank program similar to the state waterbank program. She said the federal program is under Public Law 91-559. She said the program has provided \$4 million of federal funding annually in the past 5 years. She said the money primarily has been directed to the Devils Lake Basin area to help 294 producers combat excess water on 45,000 acres of property. She said the federal law would allow for a program similar to what is already in place under the Agriculture Commissioner. She said the federal program would allow for 10-year renewable agreements with landowners, which is more agreeable to most landowners than perpetual easements.

In response to a question from Senator Luick, Ms. Podoll said under the federal law, if you mitigate wetlands and place the wetlands in a new area, maintenance is required on the new wetland area to ensure it properly functions as a wetland. She said maintenance can include ensuring invasive species do not invade the wetland. She said if using a wetland bank, the bank is responsible for maintaining the wetland under the law. She said once a landowner purchases credits from a bank to mitigate a wetland on property, the landowner can walk away. She said the landowner has no maintenance obligation because the obligation transfers to the bank.

In response to a question from Senator Myrdal, Ms. Podoll said the landowner has an obligation to maintain a new wetland area if it is an agreement between two neighboring landowners for one landowner to mitigate a wetland on that landowners' property by agreeing to create a new wetland on the property of the neighbor.

In response to a question from Representative Skroch, Ms. Podoll said developing wetland mitigation for agriculture utilizing state-owned property, rather than privately owned land, is an option if state agencies that own or control the land are willing to participate.

In response to a question from Senator Luick, Ms. Podoll said she is not sure how many acres of land the state owns or controls which potentially could be used for wetlands mitigation.

In response to a question from Representative Skroch, Ms. Podoll said creating a new wetland is more expensive than restoring or enhancing an existing wetland.

In response to a question from Senator Dotzenrod, Ms. Podoll said her role as the state conservationist through the Natural Resources Conservation Service is for North Dakota only. She said she talks and works with surrounding states on the topic of wetlands, as well as the definitions and processes each state utilizes.

### **Ducks Unlimited**

Chairman Johnson called on Ms. Carmen Miller, Director of Public Policy, Great Plains Region, Ducks Unlimited, for a presentation ([Appendix I](#)) regarding private wetland mitigation efforts, structure, and process.

In response to a question from Senator Dotzenrod, Ms. Miller said putting together a state system in compliance with all federal regulations under the federal Clean Water Act and the United States Department of Agriculture-Natural Resources Conservation Service (USDA-NRCS) would be complicated and challenging. She said the idea of agricultural mitigation is relatively new. She said the grant program to establish funding for agricultural mitigation was enacted under the most recent federal farm bill. She said the standards developed by the NRCS for agricultural mitigation may be different than the standards developed by the United States Army Corps of Engineers for developmental mitigation under the Clean Water Act.

In response to a question from Representative Skroch, Ms. Miller said because Ducks Unlimited is not allowed under North Dakota law to purchase land, Ducks Unlimited works with landowners on easements. She said the determination of the type and size of wetland which must be mitigated is made on a site-by-site basis using complicated formulas to assess the functions and values of the wetland site.

### **South Dakota Farm Bureau**

Chairman Johnson called on Mr. Wayne Smith, Wetlands Specialist, South Dakota Farm Bureau; and Mr. Matt Retka, Soil Scientist and Technical Consultant, Wenck, for a presentation ([Appendix J](#)) regarding wetland mitigation

efforts by the state of South Dakota. Mr. Smith said wetland mitigation in South Dakota was nonexistent from 1996 to around 2012. He said the state created a subcommittee to address and increase wetland mitigation and provide a framework to meet the regulatory criteria in place under the NRCS rules, and to provide a plan to conduct mitigation. He said prior to taking these actions, attempts to do wetland mitigation in South Dakota by individuals was a struggle. He said one of the responsibilities of the South Dakota Farm Bureau is to contract with professional service providers for the technical work related to wetland mitigation. He said the bureau contracts with Wenck, an engineering and environmental consulting firm that works on wetland mitigation.

Mr. Retka explained the slides pertaining to process-site selection, technical information, and engineering requirements for wetland mitigation in South Dakota. He said the firm has done wetland mitigation contracting work in North Dakota, South Dakota, and Minnesota through the USDA-NRCS. He said monitoring of a site for 3 to 5 years means ensuring the site meets the requirements of the mitigation plan approved by the NRCS for the stated time frame.

In response to a question from Senator Luick, Mr. Retka said the NRCS may be open to moving the location of a wetland mitigation easement if it is determined the location is not suitable after the establishment of the wetland. He said he does not know of a mitigated wetland being moved after the fact.

Mr. Smith said the USDA does not hold easements for wetland mitigation in South Dakota. He said the South Dakota Farm Bureau holds the easements. He said the USDA is the enforcer of the easements if any legal action needs to be taken. He said the landowner continues to pay the taxes on the land. When the program was implemented, he said, they were informed by the NRCS legal counsel that perpetual easements had to be used to conduct wetland mitigation, and the South Dakota Farm Bureau had no choice in the matter.

In response to a question from Representative Skroch, Mr. Smith said he is not aware of a process for reversal of a perpetual easement for wetland mitigation under the USDA-NRCS rules. He said the perpetual easements attach to the land and move to subsequent owners if the land is sold.

In response to a question from Senator Dotzenrod, Mr. Smith said consultant fees and mitigation project costs are determined on a site-by-site basis. He said once a site is selected, the consultant firm puts together a projected price for completing the project based on the time, man power, and construction costs of the site. He said the cost information is given to the landowner of the site before the project begins or is agreed upon. He said, surprisingly, the supply of available wetland sites is outpacing the demand of landowners looking to mitigate.

In response to a question from Representative Skroch, Mr. Smith said under the program, there are 30 acres ready to go this spring. He said there will be around another 120 acres released later this summer. He said the program has been in progress since approximately 2013-14, and they finally will have credits for sale this year.

In response to a question from Senator Luick, Mr. Smith said he is unsure how the credit sale is perceived from an income tax standpoint. He said he is not sure if it would be considered a capital gain.

In response to a question from Senator Dotzenrod, Mr. Smith said the majority of the first releases this spring and summer will be for restoration of prior converted wetlands.

Mr. Retka said there are only a couple sites for the creation of new wetlands.

Mr. Smith said based on the time and the costs incurred, it would be difficult to start a program without grant money or other sources of funding upfront. He said the numbers add up and the South Dakota program will be able to sustain itself from the money generated from credit sales once the federal grant money expires. He said the program is authorized to operate only within South Dakota. He said a farmer in North Dakota could not participate in the program.

### **Game and Fish Department**

Chairman Johnson called on Mr. Greg Link, Conservation and Communications Division Chief, Game and Fish Department, for a presentation ([Appendix K](#)) regarding the management of wildlife management areas by the department and the relation to wetland mitigation efforts.

In response to a question from Chairman Johnson, Mr. Link said whether land near Devils Lake would qualify as "wetlands" when the lake rises or falls would be a question more suitable for the State Water Commission.

### State Engineer's Office

Chairman Johnson called on Mr. Jerry Heiser, Sovereign Land Manager, State Engineer's office, for a presentation ([Appendix L](#)) regarding the role of the State Engineer and the State Water Commission in wetland mitigation through the management of sovereign land in the state.

In response to a question from Chairman Johnson, Mr. Heiser said if the water levels of Devils Lake drop, the title to the land returns to the landowner of record. He said the state takes title only to the ordinary high-water mark. He said a landowner might gain or lose title from year to year depending on the water levels of a lake and the natural channel movement of a river. He said he does not know if newly reacquired land could be used for wetland mitigation purposes when the water level drops.

### Interested Persons

Mr. Aaron Carranza, Director, Regulatory Division, State Engineer's office, said in the 1980s and 1990s, pursuant to statutory provisions at the time, the State Engineer oversaw a state wetlands bank that has been statutorily repealed. He said during the program's existence there were approximately 760 debits taken out of the bank, and 6,900 credits added to the bank. He said it is his understanding the federal Food Security Act of 1985 was the driving force behind the implementation of the state wetlands bank, which implies the bank was agriculturally focused.

In response to a question from Senator Dotzenrod, Mr. Carranza said his understanding is the credits added to the bank were available to be purchased, but based on the information still available, only 760 out of 6,900 available credits were purchased. He said he is not sure how the bank was administered, but the land related to the credits not purchased likely reverted to the landowner of record when the program was repealed.

### Committee Discussion and Staff Directives for the Wetlands Bank Study

Mr. Link submitted a copy of the "Interagency Guidance for Mitigation Bank Sponsors" ([Appendix M](#)).

Senator Dotzenrod said it appears South Dakota is several years ahead of where North Dakota might be if the state attempted to implement a state wetlands bank. He said South Dakota has an added advantage of federal grant money for its program. He said it would require several years and a considerable amount of money to get a state-administered program off the ground, which would be difficult to accomplish. He said he is not sure the state has an organization in place to take the lead on administering a program like South Dakota does with the farm bureau. He said it probably would not be appropriate for the state to attempt to implement a state wetlands bank at this time. He said it may be more appropriate to try to implement a joint state effort in the future.

Representative Skroch said the Department of Trust Lands was considered as a source of potential mitigation sites when the bill was being considered during the previous legislative session. She said she is curious why they did not testify today, and if they could provide information at a future meeting as to their potential role in this process.

The Legislative Council staff said Mr. Michael Humann, Director, Surface Management Division, Department of Trust Lands, who testified on behalf of the department at the hearings for this bill last legislative session was invited to attend the meeting and speak on the topic. He said he did not formally request the department to be on the agenda because under the state constitution, lands granted to the state by the federal government and under the control and management of the department are required to be used solely for the benefit of schools and educational purposes. He said he was not sure utilizing the lands for wetland mitigation would qualify as a permitted purpose or use of the lands under the constitution.

Senator Luick said it may be worth the committee's time to hear from the Department of Trust Lands at the next meeting to receive testimony regarding the lands held and managed by the department, and to clarify whether those lands are eligible to be used for wetland mitigation purposes.

Senator Dotzenrod said it appears South Dakota has successfully implemented their state-administered wetlands bank program, which shows it can be accomplished.

### Interested Persons, Committee Discussion, and Staff Directives for Previous Studies

Representative Howe said he has had discussions with Mr. Dan Wogsland and the North Dakota Grain Growers Association. He said Mr. Wogsland may have contact information of a grain breeder at North Dakota State University Research. He said he would like that individual to testify at the next meeting regarding genetics and developing disease-resistant grains.

Chairman Johnson requested the Legislative Council staff work with Mr. Schmidt on a bill draft to amend Section 4.1-20-19 to require district supervisors to attend annual ongoing training.

Senator Heckaman said she has concerns leaving the number of required annual training hours in the bill draft open to the discretion of the State Soil Conservation Committee, but she is fine with drafting the bill as Mr. Schmidt recommends and discussing potential changes at the next meeting.

Mr. Mike Ell, Director, Division of Water Quality, State Department of Health, said he has been working to develop the nutrient reduction strategy for the state. He said a new draft of the nutrient reduction strategy has been released since discussion of the study took place at a previous committee meeting. He said the draft is available on the State Department of Health's website. He said the department will take public comment on the draft until June 1. He said there will also be two stakeholder meetings to get additional input on the strategy.

In response to a question from Representative Skroch, Mr. Ell said the department will be issuing a news release to notify the public of the stakeholder meetings.

In response to a question from Senator Dotzenrod, Mr. Ell said he will send an email to the committee members with information regarding home testing kits for tile drain water quality.

The Legislative Council staff said the committee has received all required reports.

No further business appearing, Chairman Johnson adjourned the meeting at 3:00 p.m.

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Dustin Assel  
Counsel

ATTACH:13