



NORTH DAKOTA
PETROLEUM
C O U N C I L

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Senate Bill 2228
Testimony of Ron Ness
Senate Energy and Natural Resources Committee
January 27, 2023

Chairman Patten and members of the Committee, my name is Ron Ness, President of the North Dakota Petroleum Council. The North Dakota Petroleum Council represents more than 600 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota. I appear before you today in opposition of Senate Bill 2228.

In 2009, the North Dakota Legislature enacted Chapter 38-22 of the North Dakota Century Code. That enactment granted authority to the North Dakota Industrial Commission (“Commission”) to regulate carbon dioxide sequestration in the State. As originally enacted, the Commission could not create and establish a carbon dioxide storage facility unless 60 percent of the surface owners within the proposed storage facility area voluntarily leased their pore space to the storage facility operator. Pursuant to North Dakota law, title to pore space is vested in the owner of the overlying surface estate. Under NDCC Chapter 38-22, as currently in effect, the Commission has created and established three carbon dioxide sequestration storage facilities – the Red Trail Ethanol Plant Storage Facility, the Minnkota Milton R. Young Storage Facility, and the Dakota Gasification Company Storage Facility.

Senate Bill 2228, if adopted, would change the percentage of approval needed for the Commission to establish a carbon dioxide storage facility from 60 percent to 100 percent. In other words, without approval of all surface owners within the proposed storage facility area, the

Commission could not create and establish the storage facility. If the provision of Senate Bill 2228 had been in effect prior to the Commission's approval of the Red Trail Storage Facility, the Minnkota Milton R. Young Storage Facility, and the Dakota Gasification Company Storage Facility, it is certain that none of these storage facilities would have been established. If the provisions of Senate Bill 2228 are enacted by the Legislative Assembly, it is certain no additional storage facilities will be created and established by the Commission. For example, in any application to the Commission for the creation and establishment of a carbon dioxide storage facility, those who might oppose the project need do nothing more than purchase one acre or less of land within the proposed storage facility area and refuse to sign a pore space lease. By doing so, that single owner can prevent the hundreds of other owners who might own thousands of acres from receiving the monetary benefits of carbon dioxide sequestration on their lands.

Some might argue that Senate Bill 2228 is good policy because it prevents the unauthorized taking of private property rights from those who may choose not to lease their pore space for carbon dioxide sequestration. As you are likely aware, both the United States Constitution and the North Dakota Constitution prohibit the taking of private property without compensation. Recognizing that pore space is a valuable property right, Chapter 38-22 specifically requires that all non-consenting pore space owners within a storage facility be compensated for the use and occupation of their pore space. Accordingly, the authority of the Commission to amalgamate or "unitize" the pore space of non-consenting pore space owners to allow for the injection and sequestration of carbon dioxide is an authorized taking under both the federal and state constitutions.

Similar arguments have been made with regard to oil and gas development in the United States. These arguments, however, have uniformly been rejected by the courts. Just as a number

of courts have held that a small number of mineral owners should not be granted the authority to prevent other mineral owners from developing their mineral interests, a single surface owner should not be granted the authority to prevent other surface owners from leasing and developing their pore space.

If Senate Bill 2228 is enacted, it is likely that carbon dioxide sequestration activities in the State of North Dakota will end. Farmers and ranchers who would otherwise have an opportunity to supplement their farming and ranching income would lose that opportunity because one person with a very small interest within a storage facility area could prevent the storage facility from being created by the Commission. Providing that sort of power and authority to one person, while denying an opportunity to the majority is not only unfair, it is bad policy.

The North Dakota legislature, in setting forth the policy of the State in Section 38-22-01 of the Century Code, recognized that “[o]btaining consent from all owners may not be feasible, requiring procedures that promote, in a manner fair to all interests, cooperative management, thereby ensuring the maximum use of natural resources.” Accordingly, the legislature chose a consent threshold of 60 percent for pore space amalgamation. This number recognizes that a majority of owners must decide, but also provides additional assurance of more widespread support amongst the owners for the project.

If you believe that energy development is important to North Dakota, defeat this bill. Senate Bill 2317 is a mirror image of Senate Bill 2228 except Senate Bill 2317 uses 85 percent as its consent threshold for pore space amalgamation. This is equally as bad as 100 percent. The North Dakota Petroleum Council strongly opposes Senate Bill 2228 and urges a **Do Not Pass Recommendation**.