

**2013 SENATE NATURAL RESOURCES**

**SB 2054**

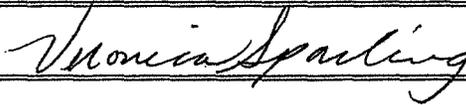
# 2013 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee  
Fort Lincoln Room, State Capitol

SB 2054  
January 17, 2013  
17348

Conference Committee

Committee Clerk Signature



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

Relating to liability of the state engineer for determinations of surface water flow and appropriate highway construction

## Minutes:

Written testimony attached

All committee members were present.

Chairman Lyson opened the hearing on SB 2054.

John Paczkowski, Chief of the Regulatory Section for the State Water Commission, stood in favor of the bill. See attached testimony #1. SB 2054 deals with ND Century Code 24-03-08. He noted there is also similar liability language in ND Century Code 24-03-06 and 24-06-26.1. He stated he would like to offer an amendment to include the state engineer language in those appropriate sentences as well.

Chairman Lyson requested the legislative intern to draft those amendments.

Senator Burckhard asked for an example of a deviation request.

John Paczkowski said deviation requests are quite rare. He cited a recent example of a township seeking approval from a Water Board engineer to put in a crossing. They were told incorrectly as to what flow should be allowed at that crossing. They put in a culvert that was smaller than what should have been called for. The township board in turn asked for a request for deviation. He stated that in the 9 years he has been with the State Water Commission he is aware of only 2 or 3 requests. Most entities quickly back away from their requests for deviation when the liability issue comes up.

Senator Murphy asked if John were referring to the incident in which Senator Murphy was involved.

John Paczkowski said he was referring to that incident.

Senator Murphy explained what had happened. A township in his district received bad advice but has no recourse at this point. All they did was try to do the right thing for

drainage, they followed procedure, they got bad advice, now they have no recourse and can't afford to fix it and don't know how to fix it and neither does the Water Board. Senator Murphy is wondering who is responsible to pay for it when the person who gave the bad advice has immunity. Who are they to turn to?

Senator Triplett questioned at what level the bad advice was given.

John Paczkowski said in this case the township approached the county water resource district with the question. The county water resource district then had an engineer that they had working for them answer the question.

Senator Triplett questioned whether that was an engineer that the county water resource district had on staff, or was it a contractual agreement with an engineer from a private firm?

John Paczkowski said that it was an engineer with a private firm. Most Water Boards don't have an engineer on staff. They generally contract with private firms.

Senator Triplett questioned whether these private firms also had no liability.

John Paczkowski said he does not know.

Senator Triplett said the case he cited didn't even seem to be a deviation. A deviation should be something that deviates from the standards, and that deviation is thereby approved, and what we have here is a situation where someone didn't meet the standards because of an error in judgment it sounds like. So now the question is to get back to the standards. You are not wanting them to have a deviation from the standards, you want them to get to a place where they are meeting the standards. Right?

John Paczkowski said that is correct. The state engineer is seeking the same protection from liability. We are not trying to stress that deviations should be sought, we are just trying to clean up the language.

Senator Triplett sought to understand the intent of the bill by asking John if while he has been with the State Water Commission he has been aware of any deviations being granted.

John Paczkowski cited another example of a deviation.

Senator Murphy questioned what happens when a mistake is made and a township has no recourse.

Chairman Lyson said that is a discussion for later, not during the hearing.

Chairman Lyson asked if there was anyone else to speak in favor of the bill.

Chairman Lyson asked if there was anyone to speak in opposition to the bill.

Arvid Winkler, a Barnes County resident and a graduate of NDSU spoke in opposition to the bill. He worked for 10 years with the federal highway administration in Colorado where he became a registered professional engineer in the state of Colorado. He returned to ND in 1973 and did not maintain his engineering registration in ND. He has been farming in those years and worked as the township assessor. He is not violently opposed to the bill but he did express concern that there seems to be no one liable when a project goes wrong. When there are problems the townships can't afford to fix the problems or to pay for legal counsel. He also questioned whether the state engineer is able to provide service to all requests.

Senator Triplett asked if John Paszkowski could clarify the relationships referred to in Mr. Winkler's testimony. Township water boards, counties, State Water Commission, etc.

John Paszkowski said the State Engineer's office comes up with the design- the amount of flow to be expected at the location in question. It is then the responsibility of the entity putting in the crossing to find someone to size the opening for that structure. That is a requirement by law. In the case here there is a lot more history behind the two townships and the engineer involved. In fact, the request that the state engineer's office got had to do with the work that was done by the other engineer to see if his suggestions made sense. I don't believe anywhere in the request there was anything that asked what the design discharge at this location was.

Senator Laffen sought to clarify the breakdown. The State Water Commission determines the flow, the owner of the road -the county, township, whoever- has or hires an engineer to design the road and the culvert system, then it gets constructed. So there are three possible opportunities there for error. It could have been built wrong, the engineer could have designed it wrong, or you could have not given them the right design data- the flow. It seems to me that each one of those has to cover their own liability. He questioned why we would relieve the state's liability if in fact they gave wrong design data. He asked for clarification whether that is what is being asked for.

John said that is not what they are asking for. He stated if the design discharge is given and it is correct, then the State Water Commission should not be liable for damage, if they are wrong, he doesn't think this amendment will absolve the state engineer from any liability.

There was discussion about how to make the bill best address the issue of liability. The desire is to make it clear that the state engineer would be among those listed as not liable.

Jennifer Verleger with the ND Attorney General's office stated she is working on a few amendments for this bill and she would be willing to work this change into the amendments she is working on.

Senator Hogue addressed a question to Jennifer, the Assistant Attorney General. He asked whether this bill would be necessary due to the discretionary function statute in ND Century Code 32-12.2. He felt that statute would cover the state engineer. He is a state employee and that statute says he has blanket immunity for all of these behaviors. Senator Hogue was wondering if this bill would be necessary.

Jennifer Verleger stated she is not there to take a policy position. She said because the State Engineer is not listed among those who are not liable, the courts could interpret that to mean he is the one who would be liable if there were problems.

Senator Hogue read from the statute he referred to, "discretionary acts includes acts, errors or omissions in the design of any public project".

There was discussion about how that may apply to this bill, and how courts may interpret the law that SB 2054 is attempting to change. They also discussed what is meant by "discretionary acts".

Vice Chairman Burckhard closed the hearing.

# 2013 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee  
Fort Lincoln Room, State Capitol

SB 2054  
January 25, 2013  
17736

Conference Committee

Committee Clerk Signature

*Veronica Spurling*

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

Relating to liability of the state engineer for determinations of surface water flow and appropriate highway construction

## Minutes:

No testimony attached

Chairman Lyson called the committee's attention to SB 2054.

Senator Triplett was interested in Senator Hogue's comment that this bill is unnecessary. She made a Do Not Pass motion.

Senator Hogue seconded the motion.

Senator Hogue commented that it is not good to be handing out immunity to our political subdivisions. There is a statute called the "discretionary function exception" that says you can't hold governmental entities liable for discretionary acts. That statute is in place already so he sees no need for this bill.

Senator Triplett also felt the bill was poorly written. Rather than rewrite it, she felt it was easier to just kill the bill and suggest they seek legal counsel in drafting a better bill.

Roll Call Vote: 7, 0, 0

Carrier: Senator Hogue

Date: 1-25-13  
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 2054

Senate Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Triplitt Seconded By Hogue

Senators	Yes	No	Senators	Yes	No
Senator Lyson	✓		Senator Triplett	✓	
Senator Burckhard	✓		Senator Murphy	✓	
Senator Hogue	✓				
Senator Laffen	✓				
Senator Unruh	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Hogue

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

**REPORT OF STANDING COMMITTEE**

**SB 2054: Natural Resources Committee (Sen. Lyson, Chairman)** recommends **DO NOT PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2054 was placed on the Eleventh order on the calendar.

**2013 TESTIMONY**

**SB 2054**

#1

## TESTIMONY ON SENATE BILL NO. 2054

### Senate Natural Resources Committee

John Paczkowski, Chief - Regulatory Section  
North Dakota State Water Commission

January 17, 2013

Mr. Chairman and members of the Natural Resources Committee, my name is John Paczkowski and I am the Chief of the Regulatory Section for the State Water Commission. On behalf of State Engineer, Todd Sando, I am here in support of Senate Bill No. 2054 which seeks to provide the state engineer with the same liability protection as the department of transportation, county, and township have when determining surface water flows for the construction of highway stream crossings.

More specifically, N.D. Admin. Code § 89-14-01-06 (below) allows deviations to stream crossing designs to be approved by the department of transportation and the state engineer. The Code currently provides liability protection for the department (of transportation), county, and township if the crossing is constructed in accordance with the standards of the department of transportation and state engineer. However, no similar liability protection is provided for the state engineer. While granting a deviation under N.D. Admin. Code § 89-14-01-06 would be rare, the state engineer currently faces heightened liability when considering deviation requests. Further, because the department of transportation, county, and township are all currently listed as having liability protection, a court could infer that the state engineer is meant to be the liable party.

Thank you for the opportunity to comment on this matter. I will be happy to answer any questions you might have.

#### N.D. Admin. Code § 89-14-01-06

Deviations. The board of county commissioners, board of township supervisors, their contractors, subcontractors, or agents, or any individual, firm, corporation, or limited liability company may deviate from the standards contained in this chapter if the deviation is approved in writing by the state engineer and the director of the department of transportation. A request to deviate from the standards must be made in writing and must set forth the reasons for the deviation. The state engineer and department of transportation may grant a deviation for good and sufficient cause after considering public safety, upstream and downstream impacts, and other relevant matters. The department of transportation may deviate from these standards if the director of the department determines it is appropriate to do so and the crossings are designed in accordance with scientific highway construction and engineering standards. The basis for the director's decision must be documented in writing. If a crossing results in less than one-half foot [15.24 centimeters] of headloss when passing the appropriate design discharge, the headwater limitations of section 89-14-01-05 do not apply.

Roads constructed as part of a surface coal mining operation for use solely as part of the mining operation are not subject to the requirements of this chapter. Roads constructed as a result of a surface coal mining operation for use by the public are bound by the requirements of this chapter, but deviations may be requested in accordance with this section.