2015 HOUSE AGRICULTURE

HB 1432

2015 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Peace Garden Room, State Capitol

HB 1432
2/5/2015
Job # 23281 (starting at 24 min.)

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Re Mae Kuehn

Explanation or reason for introduction of bill/resolution:

Relating to the environmental impact litigation fund; to provide for a continuing appropriation; and to provide for a transfer and appropriation

Minutes: Attachments #1-8

(Starting at 24 min. on Job #23281)

Representative Brandenburg: Co-Sponsor of the bill (Attachment #1a)
This bill came about from a buildup of frustration. This area of the country is mentioned in the farm bill. (Referring to Prairie Pothole Region on Attachment #1a) This is the feeding grounds where everyone trying to protect the last stronghold and yet take away the property rights of the people that own this land and farm it. There are oil interests and coal interests. Environmental groups are suing EPA and circumventing Congress by going through the rule making effect. We are dealing with the Environmental Impact Litigation Advisory Committee.

Handed out an amendment to add the ND Stockmen's Association. (Attachment #1b) They very much want to be a part of this.

Environmental groups are suing EPA circumventing congress.

Representative Blair Thoreson: Co-Sponsor of the bill
This gives us a vehicle to make sure we have a say in the process.

(30:05)
Sherry Schulz, ND Stockmen's Association: (Attachment #2)

(32:03)
Kari Cutting, Vice President ND Petroleum Council: (Attachment #3a)
Provided U.S. Chamber of Commerce report on "Sue and Settle." (Attachment #3b)

(37:53))
Dan Wogsland, Executive Director of the ND Grain Growers Association:
(Attachment #4)

(40:05)
Roger Kelley, Director of Regulatory Affairs of Continental Resources, Inc.:
(Attachment #5)
We have leases on our minerals with a time line. With delays we can lose the lease.

The endangered species act has 257 species of plants and animals listed. These have the greatest potential to limit or impinge on private land use.

This bill putting Commissioner Doug Goehring as the head of the advisory committee is a wise thing to do.

(47:30)
Chairman Dennis Johnson: Where do you vision this being in the next 30 years with the out of control EPA?

Roger Kelley: I hope the voice of reason will kick in sometime. One of the purposes of the endangered species act is to protect species from becoming extinct. They are either threatened to become extinct or in danger of becoming extinct. Every five years they are supposed to review the list and they don't do that. There are 1400 animal species listed.

Representative Craig Headland: The company you represent does this in several states. Have other states done something similar? Have they had any success?

Roger Kelley: We tried a similar bill in Texas and it passed. But the governor vetoed it for another reason. We are in session so we are trying it again this year. Texas and Oklahoma have a program to deal with this issue. Also New Mexico, Colorado, Wyoming, Utah, Idaho, Montana are working on these issues now.

(51:11)
Larry Syverson, Farmer from Traill Co., Executive Secretary of the ND Township Officers Association: Our organization represents 6,000 township officers that serve in over 1,100 dues-paying townships. At our annual meeting this last December we passed a resolution to oppose the new rules in the Clean Water Act. We ask for a favorable recommendation on HB 1432.

Bart Schott, Public Policy Committee of the ND Corn Growers Association:
(Attachment #6)

I have been following the Chesapeake Bay story for about ten years. They based the ruling on the PH level in the bay area. They assumed it was run off from the farmers' land. They made each farmer work with NRCS to model how much fertilizer can be applied. Each farmer had to have a plan how they will handle the fertilizer. After ten years the PH level in the bay has gone up.

Representative Diane Larson: My own story is that my husband and I saved to build a home along the river. When they put in the Garrison Dam it was for flood protection. We built above the 500 year flood plain. In 2011 the Corps of Engineers decided they hold back water knowing the snow pack was going to inundate. We found out later the reason we were out of our home for 18 months was because they changed their manual. So now it is endangered fish and birds that have #1 priority. Flood protection does not. This overreach diminishes all of us.

Bart Schott: Just about anybody you talk to has been impacted in some way.

Representative Kempenich: I support this bill. I know money will be a debate. It is going on nationally. North Dakota needs to participate.

Neal Fisher, Administrator, ND Wheat Commission: We are also in support.

The wheat industry numbers about 20 states. We are the #1 wheat state again. They view this as an issue of national security.

Representative Cynthia Schreiber-Beck: On a national scale, are there opportunities for the states to come together to have more voice? How do you become more of a force?

Neal Fisher: The Prairie Pothole Region is multistate. We could encourage them to participate. Other states are impacted as well.

(1:04:30)
Tyler Hamman, Director of Government Affairs for the Lignite Energy Council:
We also support this bill.

Scott Rising, ND Soybean Growers Association: Also support this bill.
The use of the rule making process is a way to develop public policy. That leaves us this option to have a voice to counteract that and that is to go through the court system. We want to give our Attorney General ammunition to do that.

Chairman Dennis Johnson: Do you have the same concerns as the last bill that it be the Soybean Growers rather than the Soybean Council as one of the groups.

Scott Rising: Yes the same concern.

Gary Knutson, ND Agriculture Association: We represent the crop production industry. We have 500 dealers/members. I think Congress will get some feedback. The legislature is the best way to go. We try to communicate with EPA. Every year we and the Grain Growers give a tour for EPA representatives. It sends a message to EPA staffers as to what we do in agriculture. We don't want to apply fertilizers wastefully. At some point will a farmer need a permit every time they apply fertilizer?

Vice Chair Wayne Trottier: In Minnesota EPA got after the farmers because the city people were concerned about river pollutions. When they did the surveys, they found that the worst abusers were the city people because they were over fertilizing their lawns. EPA backed off at that time.

Gary Knutson: City people use 400 times per square foot more on their lawns than farmers.

Chairman Dennis Johnson: I was on one of those tours. One of the girls had the opportunity to ride in a new sprayer. She didn't realize the features like auto steer and shutoff to avoid the over sprays. These are the people writing rules for us.

Gary Knutson: On the last tour the aerial applicator did an impressive job demonstrating how precise we are in application. We do have to follow labels. About 200-300 EPA staffers have been out here over the years and they carry that message back. It is going to have to be Congress that reigns in this issue.

Levi Otis, Ellingson Companies, Harwood, ND: We are the largest agriculture drainage company in the country. We operate in several states including moving into Canada.

When I travel now people are impressed. We are number 1 in everything. We need to lead. Others will follow.

Zac Weis, Marathon Oil Company, Chairman of the Regulatory Committee for the ND Petroleum Council: It's all we do is work on this type of issue. I appreciate the effort this bill takes to build a partnership with the oil and gas industry and the agriculture industry and the state. This bill also offers preventative measures to mitigate impacts with endangered species and clean water/air.

Opposition:

None

Neutral:

(1:14:56)
Wayne Stenehjem, Attorney General: There is no one that has fought harder against the EPA than what my staff and I have. We have initiated 14 lawsuits against the agency.
Provided a summary for the record (Attachment #7a)

The Governor, the Agriculture Commissioner, the Attorney General, the State Engineer, and the director of the Department of Transportation sent a letter on November 14 with regard to the Waters of the U. S. rule. The rule not only has impact on the agriculture community but also the industrial community and the rights of the state of North Dakota when we construct highways and for general citizens.
Provided a copy of the letter for the record (Attachment #7b)

What can we do to ban together with other states in the same situation? On October 8 the Attorneys General for Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota, and the Governors of Iowa, Kansas, Mississippi, Nebraska, North Carolina, and South Carolina submitted comments on the proposed WOTUS (Waters of the U.S.) rule.
Provided a copy of the conclusion that the Attorneys General reached in issuing their comment for the record (Attachment #7c)

I am well up to speed and well aware of the interests of the state of North Dakota.

A problem I have with the bill--it is a procedural one. North Dakota Law has provided for the duties of the Attorney General which are under Chapter 54-12-01, "to institute and prosecute all actions and proceedings in favor or for the use of the state which may be necessary in the execution of the duties of those state officers." Another duty is "to consult with and advise the Governor and all other state officers."

The ND Supreme Court has said in a significant case "the Attorney General is a constitutional officer. He is the law officer of the state and the head of the legal department. The legislature may not strip officers embedded in the constitution of a portion of their inherent functions. As a general rule the Attorney General has control of litigation involving the state and the procedure by which it is conducted."

The problem is not the intent to make sure we are protecting the interests of the state or the appropriation. I do object to the committee composed of the individuals that are listed whose duty it is to give litigation advice to the Agriculture Commissioner. That is a duty that is reserved by the constitution solely to one statewide elected official whose duty it is to give advice to the Agriculture Commissioner and all other state officials. This litigation meeting will be an open meeting. Change the committee from giving advice to consulting.

When we join with other states, $5 million is probably more than we would need.
It would also be wise to not limit the appropriation to litigation involving the WOTUS or the endangered species because there are plenty of problems that are coming along with the federal overreach by the EPA. The Public Service Commission has been appropriated $750,000 for coal mining reclamation litigation. They were also appropriated $900,000 for potential rail rate complaint cases. The Industrial Commission was appropriated $1 million for my office to use if there was an anti-hydraulic fracturing rule adopted by the EPA. The Department of Health is appropriated $500,000 for EPA litigation generally. That is the fund that has been used for the litigation I referred to earlier. The Industrial Commission has a Lignite Resource Litigation Fund that was used for the lawsuit against the state of Minnesota in the enactment of their Next Generation Act.

Chairman Dennis Johnson: The Clean Water Act was at the front of the radar.

Wayne Stenehjem: There are plenty of others. I don't want to appropriate money that is too restrictive on what it can be utilized.

Representative Craig Headland: Our intent with the money was to be used more than just for litigation but to help pursue expertise in a legal battle with the federal government.

Wayne Stenehjem: I would be happy to help revise this bill. Whenever there is litigation a large part of the expense involves the use of expert witnesses.

It is to the benefit to the state of ND where the Attorneys General can band together. In my office we have 33 lawyers. In Texas they have over 1,200. WOTUS is not a political issue. Both political parties feel equally the same about the importance of protecting the rights of their states especially when it comes to water.

Chairman Dennis Johnson: That is the frustration and why you see a bill like this before us. Congress lacks the ability to control the EPA. Who can control them?

Wayne Stenehjem: It is the responsibility of Congress to decide what it is they want these laws to do. Then it is their job to rein them in.

Representative Craig Headland: This is more than a battle with the EPA. This is a battle against the federal government through several agencies: the U.S. Fish and Wildlife, the EPA, the Department of Agriculture with the farm bill. I think the farm bill is more of a conservation bill. This is a big picture project. It is more than the EPA.

Wayne Stenehjem: The Corps of Engineers is another popular defendant for me.

Neutral:

Bruce Hicks, Assistant Director, Oil and Gas Division: (Audio didn't record) (Attachment #8)

Vice Chair Wayne Trottier: It almost sounds like that there doesn't need to be money in this bill.

Bruck Hicks: If we band together we can overcome with less money.

Vice Chair Wayne Trottier: I think the Attorney General said that when he has an amendment it will be addressed.

Roger Kelley, Continental Resources: What is included in this bill--the Clean Water Act and the Endangered Species Act are federal issues that the state really has no primacy over. They do have primacy of the Clean Air Act which means the state has submitted a state implementation plan to the EPA to be able to permit air sources to the Health Department or salt water injection wells. This affects private land use.

(1:34:51)
Wayne Stenehjem: It would be nice if there would be a central source of funding for environmental litigation. We had $1 million for the antifracking regulations. But they haven't come along yet. So the money is not used and is reappropriated every year. The $3 million in the Governor's budget is a good start also.

Chairman Dennis Johnson: Closed the hearing.

2015 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Peace Garden Room, State Capitol

HB 1432
2/5/2015
Job #23283

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Pe Mae Kuehn

Explanation or reason for introduction of bill/resolution:

Relating to the environmental impact litigation fund; to provide for a continuing appropriation; and to provide for a transfer and appropriation
(Committee Work)

Minutes:

Chairman Dennis Johnson: To address the Attorney General's concerns, appointed a subcommittee:
Vice Chair Wayne Trottier, Representative Diane Larson, Representative Joshua Boschee

2015 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Peace Garden Room, State Capitol

HB 1432
2/6/2015
Job #23394

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Pat Mae Kush

Explanation or reason for introduction of bill/resolution:
Environmental Impact Fund
(Committee Work)

Minutes: Attachment #1

Vice Chair Wayne Trottier: Handed out amendment 15.0961.02002 brought by subcommittee of Representative Diane Larson, Representative Joshua Boschee, and Vice Chair Wayne Trottier.

The Attorney General recommended taking "litigation" out of the original bill. The subcommittee felt to leave "litigation" in. In testimony the suggestion was to change the North Dakota Corn Utilization Council to "Growers." The same with the Soybean Growers. Also the Stockmen's Association needed to be added. We left all the litigation in.

The Attorney General wanted to be off of the committee. The Agriculture Commissioner will serve as the chairman of this committee.

Page 2, line 9, Legislative Council added after "participation", "administration or judicial matters including."

Representative Diane Larson: There is a mistake on the line with the "North Dakota Wheat Commission." On the amendment it should be page 1, line 16 and not line 6.
You don't want to replace the whole line, just replace "Commission" with "Growers Association."

Representative Craig Headland: There is no Wheat Growers.

Chairman Dennis Johnson: In testimony it was to change the Utilization Council to Growers Association on the Soybeans and Corn.

Representative Alan Fehr: Where it says "growers association", I think that is inserted onto letter "f" making it "corn growers association."

Representative Cynthia Schreiber-Beck: I have two other questions. Is the Commissioner of Agriculture aware that he is the chairman?

Answer from committee: Yes.

I had a question from Gary Knutson, ND Agriculture Association. Would they pursue litigation for one grower?

Representative Craig Headland: I think that would be a decision made by the advisory committee.

Representative Diane Larson: I agree with Representative Headland that it would the advisory committee to judge the merits. They wouldn't act for a person but would be a lawyer for a subject or against an agency that is overreaching.

Representative Cynthia Schreiber-Beck: There was a concern of the Attorney General about limiting it to just two acts. Page 2, line 10 says the Clean Water Act and further on the Endangered Species Act. He thought we wouldn't want to be so finite.

Representative Joshua Boschee: The Attorney General said this would be creating a third fund for litigation relating to these issues. We could add more but there is already in the Governor's budget $3 million set aside for any federal government overreach.
There is another $1 million in the fund for hydraulic fracturing. If this moves forward, the Attorney General and the Governor's office will work the language when it gets to appropriations to combine some of those so we create a fund that this would be deposited in for access. There are pots of money with the same intent. When we start naming, it also limits us.

(9:42)
Representative Craig Headland: We don't have to specify. The language we want is that there will be a fund. I like the language the way it is.

Vice Chair Wayne Trottier: The Attorney General did suggest we lower the amount because of the other funds that could be used. We wanted to leave the $5 million in here so it is designated to what we are talking about.

Representative Craig Headland: We are setting policy. Appropriations will take care of how is funded.

Recess until 10:30

Chairman Dennis Johnson: Page 1, line 7 remove "litigation." It is only on the naming of the committee.

Representative Diane Larson: Also on line 8

Chairman Dennis Johnson: Also on page 2, line 1 where it refers to the committee

Representative Diane Larson: Page 2, line 1 talks about litigation fund so we left that in.

Chairman Dennis Johnson: Page1, line 11 we remove the Attorney General according to his wishes.

Page 1, line 14 we remove "utilization council" and put in "grower."
Page 1, line 15 with soybean we remove "council" and put in "growers."

We'll also add the Stockmen's Association.

Representative Diane Larson: On p. 2, line 9 after "in" insert "administrative or judicial matters including."

Representative Alex Looysen: Moved the amendments

Representative Diane Larson: Seconded the motion.

Voice Vote. Motion passed.

Representative Alex Looysen: Moved Do Pass as amended and rerefer to appropriations

Representative Bert Anderson: Seconded the motion

A Roll Call vote was taken: Yes 12, No 0, Absent 1.

Do Pass as amended carries.

Representative Looysen will carry the bill.

Adopted by the Agriculture Committee

February 6, 2015

SL 2/9/15

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1432

Page 1, line 7, remove "**litigation**"

Page 1, line 8, remove "litigation"

Page 1, line 11, remove "The attorney general;"

Page 1, line 12, remove "d."

Page 1, line 13, replace "e." with "d."

Page 1, after line 13, insert:

"e. One individual appointed by the North Dakota stockmen's association"

Page 1, line 14, replace "utilization council" with "growers association"

Page 1, line 15, replace "council" with "growers association"

Page 2, line 9, after "in" insert "administrative or judicial matters, including"

Renumber accordingly

Date: 2/6/2015

Roll Call Vote #: 1

2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

House **Agriculture** Committee

☐ Subcommittee

Amendment LC# or Description: 15.0961.02003

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 Rep. Looysen Seconded By Rep. Larson

Representatives	Yes	No	Representatives	Yes	No
Chairman Dennis Johnson			Rep. Joshua Boschee		
Vice Chairman Wayne Trottier			Rep. Jessica Haak		
Rep. Bert Anderson			Rep. Alisa Mitskog		
Rep. Alan Fehr					
Rep. Craig Headland					
Rep. Tom Kading					
Rep. Dwight Kiefert					
Rep. Diane Larson					
Rep. Alex Looysen					
Rep. Cynthia Schreiber Beck					

Voice Vote
Motion passed

Total (Yes) _____ No _____

Absent _____

Floor Assignment Rep. _____

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

Date: 2/6/2015

Roll Call Vote #: 2

2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

House **Agriculture** Committee

☐ Subcommittee

Amendment LC# or Description: 15.0961.02003

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 Rep. Looysen Seconded By Rep. Bert Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Dennis Johnson	X		Rep. Joshua Boschee	X	
Vice Chairman Wayne Trottier	X		Rep. Jessica Haak	X	
Rep. Bert Anderson	X		Rep. Alisa Mitskog	X	
Rep. Alan Fehr	X				
Rep. Craig Headland	AB				
Rep. Tom Kading	X				
Rep. Dwight Kiefert	X				
Rep. Diane Larson	X				
Rep. Alex Looysen	X				
Rep. Cynthia Schreiber Beck	X				

Total (Yes) 12 No 0

Absent 1

Floor Assignment Rep. Looysen

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

REPORT OF STANDING COMMITTEE

HB 1432: Agriculture Committee (Rep. D. Johnson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1432 was placed on the Sixth order on the calendar.

Page 1, line 7, remove "**litigation**"

Page 1, line 8, remove "litigation"

Page 1, line 11, remove "The attorney general;"

Page 1, line 12, remove "d."

Page 1, line 13, replace "e." with "d."

Page 1, after line 13, insert:

"e. One individual appointed by the North Dakota stockmen's association"

Page 1, line 14, replace "utilization council" with "growers association"

Page 1, line 15, replace "council" with "growers association"

Page 2, line 9, after "in" insert "administrative or judicial matters, including"

Renumber accordingly

2015 HOUSE APPROPRIATIONS

HB 1432

2015 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

HB 1432
2/11/2015
Job #23693

☐ Subcommittee
☐ Conference Committee

Le Mae Kaeh

Explanation or reason for introduction of bill/resolution:

Relating to the environmental impact litigation fund

Minutes: Attachment #1

Representative Dennis Johnson: The bill sponsor would like to create a group that is called the Environmental Impact Litigation Advisory Committee.

Amendment #15.0961.03001 (Attachment #1) We are taking the Wheat Commission off the group of members and adding the Grain Growers.

Also on page 1, line 7 & 8 we should have left the word "litigation" after the word "impact."

The bill is asking for $5 million from the general fund to help the committee in the direction they are going with the Clean Water Act and the Endangered Species Act.

Chairman Jeff Delzer: Did the bill sponsor bring forward other places in the budget where there are litigation funds and expect them to be pulled out and placed in this fund?

Representative Dennis Johnson: Two areas that were identified are $3 million in the Governor's budget and $1 million in the Attorney General's office for fracking litigation funds that haven't been used.

Continue work when Representative Brandenburg returns.

2015 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

HB 1432
2/11/2015
23804

☐ Subcommittee
☑ Conference Committee

Explanation or reason for introduction of bill/resolution:
Relating to the environmental impact litigation fund; to provide for a continuing appropriation; and to provide for a transfer and appropriation

Minutes: Attachments #1 and #2

Chairman Jeff Delzer
Opened the hearing

Representative Brandenburg: handed out the 2 amendments; # 1 from Dept. of Mineral Resources and #2 from Repr. Dennis Johnson; drafted by Legislative Council. (15.0961.03001)

Representative Dennis Johnson, District 15, Devils Lake was there as Chairman of the Agriculture Committee (originator of the bill) (1 handout; 03001; amendment to the bill).

Chairman Jeff Delzer
The bill sponsor, did he bring forward the other places where there are litigation fund

Representative Streyle
Isn't there some in PSC as well?

Chairman Jeff Delzer
Representative Brandenburg I would suggest you get with Legislative Council and this drafted. Do you have a copy of Repr. Johnson's as well. Does anyone have a problem with what Repr. Johnson's amendment says? His were language changes.

Representative Brandenburg: refers to the language changes on the amendment: 15.0961.03001

Hearing closed.

2015 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

HB 1432
2/16/2015
Job Number 23939

☐ Subcommittee
☐ Conference Committee

Pe Mae Kreidt

Explanation or reason for introduction of bill/resolution:

Relating to the environmental impact litigation fund; to provide for a continuing appropriation; and to provide for a transfer and appropriation

Minutes: Attachment #1

Chairman Jeff Delzer: This sets up the litigation fund. The idea is to take the money out of other bills that have litigation money in them with the exception of the PSC bill because that money is not general fund money.

That attorney general budget has $3 million in it. The health department and the land department also have some money.

Representative Brandenburg: Handed out amendment .03002. (Attachment #1) These are amendments presented by oil and gas. Legislative council has put them together with the amendments from the agriculture committee. That amendment was dealing with the different members on the advisory committee. The amendment is acceptable with Lynn Helms.

Representative Brandenburg: Moved to accept the amendment.

Representative Boe: Seconded the motion

Chairman Jeff Delzer: What does the amendment do?

Representative Brandenburg: In dealing with WOTUS (Waters of the U.S) and endangered species there is some work being done and we don't have representation at the meetings of the environmentalists. We need to have a seat at the table so we have the information.

The amendment corrects the makeup of the committee. The petroleum industry also has language that they would like along with agriculture.

Chairman Jeff Delzer: On the bill you have a continuing appropriation. Isn't this a two-year appropriation? Why does it need to be continuing? A continuing appropriation removes it from the 54-44-10. I am not sure we should do that. We should come back and have another look at it to see how it is working.

Representative Boe: Would it be better if we used one-time funding with carry-over authority?

Chairman Jeff Delzer: I don't think we need the carry-over authority because the next session would be here before that time frame would hit. If we want to continue this we can do it at the next session. The carry-over would not happen until July of 2017 and you have the 2017 session to deal with it.

Vice Chairman Keith Kempenich: Couldn't we continue the appropriation with a report?

Chairman Jeff Delzer: What if we don't have the money? So you are better off taking it out and appropriating it. Then if you have to do it, you'll know that. A report doesn't do anything without putting another bill in anyway.

Vice Chairman Keith Kempenich: It triggers the conversation back in where the money is being spent.

Chairman Jeff Delzer: The thing about continuing appropriation, if there is $5 million there and you only use $1 million, it is sitting there. The next legislature should decide.

Representative Pollert: The Department of Health has a half million dollars. It is not a continuing appropriation. We have to bring it forward every two years. They have used the first $500,000. They won that case. It may go to appeal. That is why they are asking for another half million dollars. Are you expecting us to take that money out of the department of health or do we keep it in as a separate deal?

Chairman Jeff Delzer: That is a little different situation than the $3 million. If that is to continue what was going on, that's a different point. If there is any money not used for that litigation, it would go into this fund.

Representative Nelson: How many agencies do we have with a litigation fund? Didn't we pass one for the Industrial Commission as well?

Chairman Jeff Delzer: It sets up a committee to go through one litigation fund. That is better than each agency having a shot at it.

Representative Nelson: It seems there is duplication in state government.

Chairman Jeff Delzer: That is why we want to take it out of other budgets.

Vice Chairman Keith Kempenich: $3 million in the Industrial Commission and some in another budget?

Chairman Jeff Delzer: This actually has a cost of closer to 1 ½.

Representative Nelson: Should we pull that funding?

Chairman Jeff Delzer: That is a separate issue. The idea is to pull it all together. I was not aware that this is money to sustain an appeal of one that is already going on; that could make a difference. If they feel they need the $500,000, we'll leave it there with the stipulation that when the appeal is over any money that is left will go into this fund.

Representative Skarphol: What if they burn up the $500,000 and need more in the health department? Can they access this?

Chairman Jeff Delzer: They would have to come to the emergency commission and request contingency money.

Representative Skarphol: They wouldn't be able to access this?

Chairman Jeff Delzer: They would because they would fit everything. I'm not sure if the committee would approve it or not.

Representative Skarphol: The only way to continue an appropriation is if you have a revenue source that is continuing to feed that $5 million.

Representative Skarphol: Moved to take out the continuing appropriation language.

Chairman Jeff Delzer: We have a motion on the floor. Representative Brandenburg and Representative Boe agreed to remove the continuing appropriation language from their amendment.

Approved by a voice vote.

Chairman Jeff Delzer: We have the amended bill before us.

Representative Glassheim: The Lignite Council and the private sector, which is putting up $30 million for research and they want $10 million from us, have a way to meet the EPA requirements by working with CO_2 and reinjecting it and making a profit.

That showed me that sometimes government regulations which may be useful for certain purposes may impact people badly. In some ways we are treading water with so much litigation. I would like to add a further amendment, "this may also be used to investigate rules to come into compliance with the SDWA (Safe Drinking Water Act), CAA (Clean Water Act), TSCA (Toxic Substance Control Act) while also improving the economy of North Dakota.

We would do ourselves a bigger favor by working with them to see what they want and then turn what they want into money.

Representative Glassheim: Moved his amendment.

Motion received a second but name not stated.

Chairman Jeff Delzer: I will have to resist this because they are two different items. Industry and the state should look at Representative Glassheim's ideas but the litigation aspect has to be out there when the federal government, EPA, etc. starts to take over the state's rights. That is an issue for the Industrial Commission.

Representative Glassheim: I would put some of those points in the list and the commission would decide what projects to fund or litigate; it would be in the same process as the committee. I've heard on the floor a lot of talk of state's rights. If the founding fathers were like this committee there would be no United States of America. Clean air and water doesn't belong to one state. We have to have a federal authority because states are all selfish. They don't consider the impact on everyone else.

Vice Chairman Keith Kempenich: EPA (Environmental Protection Agency) was an executive act because there was a river in Ohio that started on fire. The grandfather of EPA last fall said the EPA should go away and let the states regulate their environment. This is a good bill because the state of North Dakota is saying there is a point where we are going to push back.

Chairman Jeff Delzer: One of the biggest problems with litigation is that a lot of people can bring law suits. If the EPA settles on any portion, they pay their lawyers' fees.

Voice Vote on motion to accept Representative Glassheim's motion.

Motion failed.

Representative Vigesaa: Besides the $3 million, are there any other litigation funds that could be pulled into this $5 million?

Chairman Jeff Delzer: We were thinking the Health Department.

Representative Brandenburg: There are some funds in the Attorney General's budget.

Representative Nelson: How many dollars are in the Attorney General's budget? Is he willing to give up the money? He is the chief law enforcement agent in the state. He isn't on the committee.

Representative Brandenburg: He doesn't want to be on the committee. He came to the Agriculture Committee and asked to be taken off.

Representative Nelson: Was he aware that you were taking funding from his agency for this litigation fund?

Representative Brandenburg: He knows what we are doing.

Representative Pollert: For now with the appropriation we have a double-up maybe?

Chairman Jeff Delzer: As it sits now, it would be $5 million on top of what is in the various budgets.

Brady Larson, Legislative Budget Analyst: You did remove the continuing appropriation. Would you like a special fund appropriation to the Agriculture Department from the fund? Or would you like a direct general fund appropriation to the Agriculture Department?

Chairman Jeff Delzer: This committee puts it forward to an agency to do? The Attorney General would have to do it in the end.

Brady Larson: So we'll take out the transfer and just have it as a direct general fund appropriation?

Representative Brandenburg: There are lawyers that work with this all the time in DC. It will happen in Washington DC. The committee is going to end up hiring private lawyers so we have "boots on the ground." It doesn't make sense to send somebody from North Dakota to Washington or Denver every week. Litigation is not what we wish but if we have to, we have that ability.

Chairman Jeff Delzer: We will hold this bill and get some answers

Representative Skarphol: We have to have the Attorney General direct the utilization of these funds.

Chairman Jeff Delzer: I don't think this committee can do it.

2015 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

HB 1432
2/17/2015
Job Number 24018

☐ Subcommittee
☐ Conference Committee

Pe Mae Kreidt

Explanation or reason for introduction of bill/resolution:

Relating to the environmental impact litigation fund; to provide for a continuing appropriation; and to provide for a transfer and appropriation

Minutes: Attachment #1

Chairman Jeff Delzer: Explained the amendment #15.0961.03003 (Attachment #1). It is a combination of what the chair of the policy committee asked for, concerns stated before, and takes out the continuing appropriation. It does appropriate it to OMB. After approval by the committee and the budget section, it would be transferred to which ever agency is involved in the litigation.

Representative Pollert: I have a concern with the money for the Department of Health. I feel that needs to stay there. They won the initial case which will probably go to appeal.

Chairman Jeff Delzer: I hope that if your section decides that is how you want it, that it would be written that if it is not all used it will then go to this fund. If the appeal is finished, the money remaining will go to this fund.

Representative Bellew: Instead of the Health Department's litigation fund going into this fund, I would like to see this fund going into that fund. The Health Department does most of the litigation through their environment impacts.

Chairman Jeff Delzer: The Agriculture Commissioner is just the chair of the committee. You have to have a chair of the committee. The Health Department could ask for further litigation funds on top of this.

Representative Bellew: If this were to pass, it would be general fund dollars to a new committee.

Chairman Jeff Delzer: No we are not. We are giving the money, but it is up to the budget section to decide whether to go forward with it.

Representative Bellew: The Emergency Commission too?

Chairman Jeff Delzer: Right.

Representative Bellew: When has the Emergency Commission every said "no"?

Chairman Jeff Delzer: If you put it all into one agency, then it is only that agency deciding if they want to do something. This opens it up to more people.

Representative Nelson: You have identified $3 million of the $5 million. Where is the other $2 million?

Chairman Jeff Delzer: From the general fund. That adds to our deficit. But in the end we will probably end up with a $5 million litigation fund somewhere.

Representative Nelson: I think the Health Department has a record of working through litigation funds. They have succeeded in many cases. Every situation we talked about is under the purview of the Environmental Division of the State Health Department. Why would we reinvent the wheel? They have done it with a $500,000 appropriation. If we give another $500,000, Dave Glatt would have the ability to be flexible in what litigation he would choose. He has the system in place.

We're trying to save money this half. Now it is almost like we are inventing a place to spend money.

Representative Kreidt: I would echo the same sentiments. Dave Glatt has been very successful in litigation. They have the expertise.

Chairman Jeff Delzer: I would question the fact of their expertise on the agriculture side. Their litigation so far has all been on the industry side such as air quality. They do a good job and that is why I support leaving the $500,000 in the Health Department. But there is an issue on the agriculture side as well.

Representative Skarphol: I'm not opposed to the amendment as it is. Who is going to select the attorney? I appreciate the efforts of agriculture but I think they would like to have a good attorney too. That is an issue.

Chairman Jeff Delzer: The committee would pick the attorney.

Representative Brandenburg: I am not trying to take the money from the Health Department. A lot has happened in agriculture over the last years and dealing with the new farm bill. The biggest issue is WOTUS (Waters of the U.S.). They will take about 25% or more of the land in North Dakota. It may not be farmed. This is a big move on property rights in this state. The Health Department is not set up to deal with this issue. $2 million dollars to save 25% of the land mass in this state!

Representative Boe: My vision for picking the attorney--the applicant for the funds would pick the attorney. That would be part of the process clearing the committee's approval would be the selection of the attorney. When the committee made the decision on whether or not they were going to forward the funds it would be based on the selection of a competent attorney.

Representative Pollert: I find myself defending the Department of Health. I also want to help the litigation or legislation on HB1432. They can work separately but together. There are certain issues that should stay in the Department of Health.

Chairman Jeff Delzer: We'll hold this until tomorrow? Maybe we need to consider lowering this to $3 million.

(10:55)
Representative Skarphol: I don't want to hold up the bill. I think it will come up. I support the bill.

Representative Brandenburg: There is a lot of frustration this last year dealing with the implementation of the farm bill. We are getting run over in agriculture. Problems are coming.

Chairman Jeff Delzer: How would you feel about changing the money from $5 million to $4 million for the first half?

Representative Brandenburg: Moved the amendment #15.0961.03003 and change the money to $4 million instead $5 million.

Representative Skarphol: Seconded the motion

Voice vote taken. Motion carries.

Representative Brandenburg: Moved Do Pass as amended.

Representative Thoreson: Seconded the motion.

Representative Glassheim: On page 2, line 7 where is says "moneys in the environmental impact litigation fund" add in "may be used subject to legislative appropriations."

Then in the appropriation section we say it is "subject to emergency commission and budget section approval."

Chairman Jeff Delzer: But it is appropriated to the fund and then the emergency commission/budget section approval is the same language that we do anywhere where we run it through the budget section.

Representative Glassheim: The general overall dollars are appropriated. But the specific uses are approved in the budget section? The word "used" throws me.

Chairman Jeff Delzer: Asked Brady Larson to check on the wording.

A Roll Call vote was taken for Do Pass as Amended:

Yes 17, No 5, Absent 1.

Do Pass as amended carries.

Representative Boe will carry the bill.

15.0961.03002
Title.

Prepared by the Legislative Council staff for
Representative Brandenburg
February 16, 2015

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1432

Page 1, line 7, after "**impact**" insert "**litigation**"

Page 1, line 8, after "impact" insert "litigation"

Page 1, replace lines 13 through 19 with:

"e. One individual appointed by the lignite energy council;

f. One individual appointed by the North Dakota corn growers association;

g. One individual appointed by the North Dakota grain growers association;

h. One individual appointed by the North Dakota petroleum council;

i. One individual appointed by the North Dakota soybean growers association; and

j. One individual appointed by the North Dakota stockmen's association."

Page 2, line 10, after "litigation" insert an underscored comma

Page 2, line 13, remove "and"

Page 2, line 14, after the "b." insert: "Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act of 1970, as amended, [42 U.S.C. 7401, et seq.] or any regulations implementing the Clean Air Act;

c."

Page 2, line 16, after "1973" insert ", as amended,"

Page 2, line 17, after "Act" insert: ";

d. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act, as amended, [42 U.S.C. 300f, et seq.] or any regulations implementing the Safe Drinking Water Act;

e. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act, as amended, [15 U.S.C. 2601, et seq.] or any regulations implementing the Toxic Substances Control Act; and

f. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any other federal law or tribal law, or to any regulations implementing such a law"

Renumber accordingly

15.0961.03003
Title.

Prepared by the Legislative Council staff for
Representative Brandenburg
February 16, 2015

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1432

Page 1, line 2, remove "to provide for a continuing"

Page 1, line 3, remove "appropriation; and"

Page 1, line 3, after "transfer" insert a semicolon

Page 1, line 3, after the second "and" insert "to provide an"

Page 1, line 7, after "**impact**" insert "**litigation**"

Page 1, line 8, after "impact" insert "litigation"

Page 1, replace lines 13 through 19 with:

"e. One individual appointed by the lignite energy council;

f. One individual appointed by the North Dakota corn growers association;

g. One individual appointed by the North Dakota grain growers association;

h. One individual appointed by the North Dakota petroleum council;

i. One individual appointed by the North Dakota soybean growers association; and

j. One individual appointed by the North Dakota stockmen's association."

Page 2, line 1, remove "**Continuing appropriation -** "

Page 2, line 7, remove "All moneys in the environmental impact litigation fund are appropriated on a continuing"

Page 2, line 8, replace "basis to the agriculture commissioner" with "Moneys in the environment impact litigation fund may be used, subject to legislative appropriations,"

Page 2, line 10, after "litigation" insert an underscored comma

Page 2, line 13, remove "and"

Page 2, line 14, after the underscored period insert: "Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act of 1970, as amended, [42 U.S.C. 7401, et seq.] or any regulations implementing the Clean Air Act;

c."

Page 2, line 16, after "1973" insert ", as amended,"

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d. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act, as amended, [42 U.S.C. 300f, et seq.] or any regulations implementing the Safe Drinking Water Act;

e. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act, as amended, [15 U.S.C. 2601, et seq.] or any regulations implementing the Toxic Substances Control Act; and

f. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any other federal law or tribal law, or to any regulations implementing such a law"

Page 2, after line 27, insert:

"**SECTION 4. APPROPRIATION - ENVIRONMENTAL IMPACT LITIGATION FUND - EMERGENCY COMMISSION AND BUDGET SECTION APPROVAL - TRANSFER AUTHORITY.** There is appropriated out of any moneys in the environmental impact litigation fund in the state treasury, not otherwise appropriated, the sum of $5,000,000, or so much of the sum as may be necessary, to the office of management and budget for the purpose of providing transfers to state agencies as provided in this section, for the biennium beginning July 1, 2015, and ending June 30, 2017. Subject to emergency commission and budget section approval, the office of management and budget shall transfer the funds provided in this section to state agencies for environmental impact litigation activities as recommended by the environmental impact litigation advisory committee."

Renumber accordingly

15.0961.03004
Title.04000

Prepared by the Legislative Council staff for
House Appropriations Committee
February 17, 2015

SC 2/18/15 1/8

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1432

Page 1, line 2, remove "to provide for a continuing"

Page 1, line 3, remove "appropriation; and"

Page 1, line 3, after "transfer" insert a semicolon

Page 1, line 3, after the second "and" insert "to provide an"

Page 1, line 7, after "**impact**" insert "**litigation**"

Page 1, line 8, after "impact" insert "litigation"

Page 1, replace lines 13 through 19 with:

"e. One individual appointed by the lignite energy council;

f. One individual appointed by the North Dakota corn growers association;

g. One individual appointed by the North Dakota grain growers association;

h. One individual appointed by the North Dakota petroleum council;

i. One individual appointed by the North Dakota soybean growers association; and

j. One individual appointed by the North Dakota stockmen's association."

Page 2, line 1, remove "**Continuing appropriation -** "

Page 2, line 7, remove "All moneys in the environmental impact litigation fund are appropriated on a continuing"

Page 2, line 8, replace "basis to the agriculture commissioner" with "Moneys in the environmental impact litigation fund may be used, subject to legislative appropriations,"

Page 2, line 10, after "litigation" insert an underscored comma

Page 2, line 13, remove "and"

Page 2, line 14, after the underscored period insert "Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act of 1970, as amended, [42 U.S.C. 7401, et seq.] or any regulations implementing the Clean Air Act;

c."

Page 2, line 16, after "1973" insert ", as amended,"

Page 2, line 17, after "Act" insert: ";

2/8

d. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act, as amended, [42 U.S.C. 300f, et seq.] or any regulations implementing the Safe Drinking Water Act;

e. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act, as amended, [15 U.S.C. 2601, et seq.] or any regulations implementing the Toxic Substances Control Act; and

f. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any other federal law or tribal law, or to any regulations implementing such a law"

Page 2, line 22, replace "$5,000,000" with "$4,000,000"

Page 2, after line 27, insert:

"**SECTION 4. APPROPRIATION - ENVIRONMENTAL IMPACT LITIGATION FUND - EMERGENCY COMMISSION AND BUDGET SECTION APPROVAL - TRANSFER AUTHORITY.** There is appropriated out of any moneys in the environmental impact litigation fund in the state treasury, not otherwise appropriated, the sum of $4,000,000, or so much of the sum as may be necessary, to the office of management and budget for the purpose of providing transfers to state agencies as provided in this section, for the biennium beginning July 1, 2015, and ending June 30, 2017. Subject to emergency commission and budget section approval, the office of management and budget shall transfer the funds provided in this section to state agencies for environmental impact litigation activities as recommended by the environmental impact litigation advisory committee."

Renumber accordingly

Date: 3/16/15

Roll Call Vote #: 1

2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

House **Appropriations Committee**

☐ Subcommittee

Amendment LC# or Description: #15.0961.03002 To Further Amend take out Contin. Approp.

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: Brandenberg Seconded By: Cuggisberg Boe

Representatives	Yes	No	Absent	Representatives	Yes	No	Absent	Representatives	Yes	No	Absent
Chairman Jeff Delzer				Representative Nelson				Representative Boe			
Vice Chairman Keith Kempenich				Representative Pollert				Representative Glassheim			
Representative Bellew				Representative Sanford				Representative Guggisberg			
Representative Brandenburg				Representative Schmidt				Representative Hogan			
Representative Boehning				Representative Silbernagel				Representative Holman			
Representative Dosch				Representative Skarphol							
Representative Kreidt				Representative Streyle							
Representative Martinson				Representative Thoreson							
Representative Monson				Representative Vigesaa							

Totals

(Yes)	
No	
Absent	
Grand Total	

Voice Vote Carry

Floor Assignment:

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

Date: 2/16/15

Roll Call Vote #: 2

2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

House **Appropriations Committee**

☐ Subcommittee

Amendment LC# or Description: Further Amend the Bill money into compliance

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: Glassheim Seconded By: -Name unknown-

Representatives	Yes	No	Absent	Representatives	Yes	No	Absent	Representatives	Yes	No	Absent
Chairman Jeff Delzer				Representative Nelson				Representative Boe			
Vice Chairman Keith Kempenich				Representative Pollert				Representative Glassheim			
Representative Bellew				Representative Sanford				Representative Guggisberg			
Representative Brandenburg				Representative Schmidt				Representative Hogan			
Representative Boehning				Representative Silbernagel				Representative Holman			
Representative Dosch				Representative Skarphol							
Representative Kreidt				Representative Streyle							
Representative Martinson				Representative Thoreson							
Representative Monson				Representative Vigesaa							

Totals

(Yes)	
No	
Absent	
Grand Total	

Voice Vote Did Not Pass
Motion Died

Floor Assignment:

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

Glassheim: This money may used to investig ways to come into compliance ....

Date: 2/17/15

Roll Call Vote #: 1

2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

House **Appropriations 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: Rep. Brandenburg Seconded By: Rep. Skarphol

Representatives	Yes	No	Absent	Representatives	Yes	No	Absent	Representatives	Yes	No	Absent
Chairman Jeff Delzer				Representative Nelson				Representative Boe			
Vice Chairman Keith Kempenich				Representative Pollert				Representative Glassheim			
Representative Bellew				Representative Sanford				Representative Guggisberg			
Representative Brandenburg				Representative Schmidt				Representative Hogan			
Representative Boehning				Representative Silbernagel				Representative Holman			
Representative Dosch				Representative Skarphol							
Representative Kreidt				Representative Streyle							
Representative Martinson				Representative Thoreson							
Representative Monson				Representative Vigesaa							

Totals

(Yes)	
No	
Absent	
Grand Total	

Voice Vote
Motion Carries

Floor Assignment:

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

Amend the .03003 Amendment (Page 2 Section 4)
to $4M
instead of $5M

Date: 2/17/15

Roll Call Vote #: 2

2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

House **Appropriations Committee**

☐ Subcommittee

Amendment LC# or Description: 15.0961.03004

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: Rep. Brandenburg Seconded By: Rep. Thoreson

Representatives	Yes	No	Absent	Representatives	Yes	No	Absent	Representatives	Yes	No	Absent
Chairman Jeff Delzer	✓			Representative Nelson		✓		Representative Boe	✓		
Vice Chairman Keith Kempenich	✓			Representative Pollert	✓			Representative Glassheim		✓	
Representative Bellew		✓		Representative Sanford	✓			Representative Guggisberg		✓	
Representative Brandenburg	✓			Representative Schmidt	✓			Representative Hogan		✓	
Representative Boehning	✓			Representative Silbernagel	✓			Representative Holman	✓		
Representative Dosch	✓			Representative Skarphol	✓						
Representative Kreidt	✓			Representative Streyle			—				
Representative Martinson	✓			Representative Thoreson	✓						
Representative Monson	✓			Representative Vigesaa	✓						
	8	1	0		7	1	1		2	3	0

Totals

(Yes)	17
No	5
Absent	1
Grand Total	23

Floor Assignment: Rep. Boe

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

REPORT OF STANDING COMMITTEE

HB 1432, as engrossed: Appropriations Committee (Rep. Delzer, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (17 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1432 was placed on the Sixth order on the calendar.

Page 1, line 2, remove "to provide for a continuing"

Page 1, line 3, remove "appropriation; and"

Page 1, line 3, after "transfer" insert a semicolon

Page 1, line 3, after the second "and" insert "to provide an"

Page 1, line 7, after "**impact**" insert "**litigation**"

Page 1, line 8, after "impact" insert "litigation"

Page 1, replace lines 13 through 19 with:

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Page 2, line 13, remove "and"

Page 2, line 14, after the underscored period insert "Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act of 1970, as amended, [42 U.S.C. 7401, et seq.] or any regulations implementing the Clean Air Act;

c."

Page 2, line 16, after "1973" insert ", as amended,"

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d. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act, as amended, [42 U.S.C. 300f, et seq.] or any regulations implementing the Safe Drinking Water Act;

e. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act, as amended, [15 U.S.C. 2601, et seq.] or any regulations implementing the Toxic Substances Control Act; and

f. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any other federal law or tribal law, or to any regulations implementing such a law"

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Renumber accordingly

2015 SENATE AGRICULTURE

HB 1432

2015 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

HB 1432
3/13/2015
Job #24803

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Grotberg

Explanation or reason for introduction of bill/resolution:

Relating to the environmental impact litigation fund; to provide for a continuing appropriation

Minutes: *Attachments: #1-9*

Representative Mike Brandenburg, District 28 introduced HB 1432; expressed concern over the issues the state is experiencing from federal environmental groups. He stated that farmers are the best conservationists of their land and concerns that ND has a presence in defending their rights on a national level.

Senator Warner: Litigation is based on law; why wouldn't you put the attorney general in charge of this committee instead of the agriculture commissioner?

Representative Brandenburg: In the House, the Attorney General was on the original bill but he doesn't want to be in the bill or on the committee.

Chairman Miller: Why do we need a fund? The state of ND has a lot of money and we are a state that generally would not agree with what the EPA would do.

Representative Brandenburg: It takes money to be here at these meetings. You have to have people watching and looking to see when this happens and we have similar funds in other departments and they are doing a good job. There are two funds in the health department to protect that industry and this fund is one that expands it not only for the air quality issue but also agriculture. A lot has changed with the passage of the new farm bill. He expressed concern that if the waters of the US became enforceable, 20% of ND farmland could be taken out of production.

Senator Warner expressed some question about the 4 million dollars in the bill. He asked why there were no minority members in the bill.

Representative Brandenburg stated that minority members were cosponsors of the bill.

Chairman Miller stated that there was no partisan affiliation with the commodity groups.

It was clarified that **Senator Warner** meant that the committee established by the bill made no provisions for the minority party.

Representative Brandenburg stated that the bill did not state which party the committee member had to be from but he was happy with the committee adding a member from the minority party.

Senator Klein: Would there be discussion about retaining in someone in Washington to attend those hearings or is the thought to use this money for our ND attorneys or whoever we send?

Representative Brandenburg: As I would see this happening is that we would be working with this committee and the committee is going to work with the Attorney General's office and determine what type of legal action we should take. This is about trying to represent agriculture, oil, and coal when dealing with the wetland and endangered species issues in DC.

Senator Oban: I can't help but ask: isn't this why we elected a congressional delegation to represent us in Washington with Washington issues? I fully trust the way the Attorney General's office and the Agriculture Commissioner's office works together with our congressional delegation already. I fear that sometimes we think that we have more authority as legislators than we do. I don't want to create a four million dollar program if it is something that we should be entrusting our congressional delegation to do.

Representative Brandenburg: Good question because you wonder why would anyone do that. The issue is that our congressional delegation are doing everything they can to help us deal with these issues. The problem comes in in the courts--the environmental groups have learned that if they go to sue EPA or another agency that the agency will get to a certain point where they will settle and when they settle, they settle on an agreement. By suing and settling we lose. This needs to be dealt with and that's why we're here.

Representative Headland, District 29 testified in support of HB 1432. He suggested that if someone owns private property, they should be in favor of this bill. He said that they are defending their rights as owners of private property.

Representative Kempenich, District 39 testified in support of HB 1432 and said that this bill is multiple faceted. He stated that they had a discussion a few sessions ago dealing with the railroad and this bill puts some funds up front if the occasion comes. He said that people are disconnected with ND and people question who's the better conservationist. He said that most of these agencies are trying to protect what's there but the lines are getting blurred between public and private lands. Even public lands the whole idea is multiple use. The premise of these bill is that we're serious about what's going on.

Senator Warner: (20:55) I was interested that you mentioned the railroad litigation fund, I think that was in the Attorney General's office, isn't it?

Representative Kempenich: The PSC (Public Service Commission) was the where that fund was going to originate to was the PSC office. It doesn't ban anything; if that would've went forward, I'm sure it would have went through the Attorney General's office. The PSC is the initiator if we use that money.

Senator Warner: The money hasn't actually been spent, correct?

Representative Kempenich: No, but that got to be the same argument. Funds are sitting there and the last option is the litigation. The problem is that our opponents want to go to the courts because they don't find relief in legislation because we do have congressional delegations and most parts that have common sense at the end of the day and they don't have anything that go in their favor. A lot of these groups don't base it on science but they shop around until they find a friendly court that will at least start a process and then you have to answer it. That's where the frustration comes in because they often are proved wrong, but you have to spend the money to protect yourself in the process.

Senator Warner: You mentioned that the problem is in the courts and litigation with this sue and settle mentality. Is any member of this committee that you put together authorized to represent ND in the courts?

Representative Kempenich: The members of the committee are mostly advisory. With passage of this bill, there would be a standing if this group put together and hired a legal team and it could be the Attorney General's office. The Attorney General doesn't have the expertise in a lot of these fields so they would have to hire a lawyer and if this bill passed then ND would be represented from this group.

Senator Warner: Could we hone this one more time: would anyone on this committee have the authority to spend ND money to hire an attorney.

Representative Kempenich: I think if this bill passed, they probably would.

Senator Warner: I'm pretty sure the Attorney General is the only person who can litigate in ND.

Representative Kempenich: I think you are right about the state itself, but I think with the passage of this bill there would be a cause and effect of what would happen on it because this would become state law. I think the Attorney General would become more or less forced to represent the state in this issue. This is an enabling legislation, that is why it is in front of this.

Senator Warner: I'm pretty sure the constitution will override this bill.

Senator Wanzek, District 29 testified in favor of HB 1432. He stated that a frustration exists that agriculture is getting encroached upon. He said that this bill was standing up for the agriculture industry because that encroachment has happened through the courts.

Bette Grande, former State Representative (28:30) testified in support of 1432. She stated that in her past tenure, she spent a lot of her time dealing with the water of the US

expansion and the changes in the rewrite of the endangered species act. She said that this is a tool for the state of ND to utilize to help in the fact that the admiration is taking up these particular issues that take a direct federal overreach into each and every one of the states. She said that we need to take a closer look in each one of these through the proper research and direction from the people on this committee and through the work of the research universities and have them look into how each of these things effect ND. She stated that these issues cannot be a one size fits all issue, but need to be looked at by each individual issue.
She said that the Attorney General is already involved, but this is the extra tool so we can come forward with the research that is necessary to make it effective. She said that this type of legislation is very important so the state can put together the information so the state can have authority to demonstrate how it affects ND.

Dan Wogsland, Executive Director of ND Grain Growers Association (32:20) (see attachment #1)

Distributed material for **Senator Dotzenrod** (35:00) testified in support of HB 1432 (see attachment #2)

Senator Oban: (35:35) I appreciate that you are looking out for the little guy. Someone made a comment about hoping that this fund wouldn't be spent, and I would hope that as well. In looking through the different situations that would happen that would use this fund is broad. On page 2, section F could be open to be interrupted to be spent in a week.

Dan Wogsland: I would hope that this fund is never used because then we're not in a situation where we have to fight the federal government to protect our rights and our states' rights. I don't think it is good public policy to narrow that effort. US Waters today are a small example of some of the rules and regulations that can be impacted. We can't sit here today and tell what we have coming in the future in terms of regulatory efforts. That's why you have to have this legislation necessarily broad so that you can take a look at this. You said that this could be spent in a week; if you take a look at the advisory council that's made up in this bill, it's going to take some time and you will have some reviews. I think the ND Attorney General is going to be involved in this, certainly the agriculture commissioner is going to be involved in this and not every fight is worth pursuing. I think collectively if we have legislation in place, it gives us a tool in the tool box to impact some of these things.

Senator Warner: Still no one on this committee has a standing to represent ND in a court; only the Attorney General can do that. If this money was going into the Attorney General's office and being housed there and he made the determinations as to how the research should be done, determine which consultants to hire, I frankly wouldn't have a problem with this. The idea that it is held somewhere by someone who has absolutely no constitutional standing to represent ND in any court in the land, doesn't seem right.

Dan Wogsland: In my opinion, the advisory council is there to advise whether or not litigation should take place. If litigation should take place, my sense is that obviously the Attorney General is going to be consulted. But also there will be other areas that will be consulted but in the end there will be someone found in and by this fund to have the standing necessary to go forward. I would argue that the agriculture commissioner in ND

would have standing. Regardless moving forward, if that advisory committee would say to move forward with this, they would use the legal expertise to find a necessary method to get it done.

Senator Warner: My understanding of the constitution is that only the Attorney General is a legally elected representative and is the only one who has standing to pursue litigation regarding ND standing before the federal government.

Vice Chairman Luick: I've been working with a couple different state agencies where we run into problem dealing with wetlands and mitigation. Is there a reason there are no state agencies involved with this?

Dan Wogsland: My sense is from an advisory council standpoint, they would use the expertise available to them. If there were questions that needed to be addressed by a certain department, my sense is that those questions would be addressed using all the expertise necessary.

Representative Belter, District 22 testified in support of HB 1432. He stated that one of the issues discussed over the years has been the need to the ability of a state to litigate various groups to protect the sovereignty of the state of ND: whether it is dealing with agriculture issues, oil, coal or the various issues that confront us all the time with the environment.
I think this is a very important piece of legislation and it is set up with a committee that is going to try and pick and choose where the litigation takes place. All of these funds are subject to the emergency commission as well as a budget section approval so there are three levels of process that needs to be gone through before litigation takes place. When you are talking about litigating against environmental groups or the EPA, it is going to take expert legal firms to handle that. In order to get things working, you are going to have to hire expert legal firms to handle this. I think ultimately if you are going to succeed in court, you are going to have to hire outside experts to litigate.

Senator Warner: I can't get past this constitutional issue; if this is going to exist, the Attorney General is going to have to know the legal background to understand what areas of deficiency that there are within our knowledge of the law?

Representative Belter: I can't argue your point whether that is the case or not. The discussions that I've had with a firm that deals with this type of litigation, they are indicating to me that the Attorney General's probably do not have to be involved but that may be a question that needs to be resolved.

Senator Klein: You alluded to the agriculture groups that you are affiliated with. Are there any contortions of agriculture groups that are trying to form some sort of environmental litigation fund or taking a different approach rather than legislators?

Representative Belter: I'm not aware but there are organizations. I know the Farm Bureau is active in trying to be involved and I'm not sure how much litigating they've done, but as a national organization they are working on these issues. This particular bill gives us the

option to join any multi state or group. These are huge issues that we can't fight on our own.

Jeff Enger, ND Corn Growers handed out testimony by **Bart Schott, ND Corn Growers** (see attachment #3a)
Offered a picture to show the impact of wetlands (see attachment #3b)

Senator Warner: (51:45) The issue before us is in the bill is not whether there are problems with the doctrine of the waters of the US or wetlands determinations, the issue before us in this bill has to do with which agency should direct those efforts. That is the only issue I have; other than that, I'm entirely sympathetic to what you're going through.

Jeff Enger: I hope that we can resolve the issue you brought up.

Jason Bohrer, Lignite Energy Council (53:15) testified in favor of HB 1432 and talked about current litigation they are under and stated that the agriculture commissioner would not be able to initiate the lawsuit but it would be appropriate for agencies to submit amicus briefs in lawsuits whether they originate in ND or elsewhere.

Levi Otis, Ellingson Companies (55:50) testified in support of HB 1432.

Larry Syverson, NDTOA and Farmer from Mayville (57:40) testified in support of HB 1432 (see attachment #4).

Julie Ellingson, Stockman's Association (58:40) testified in support of HB 1432 (see attachment #5).

Kari Cutting, Vice President of ND Petroleum Council: (59:56) she testified in favor of HB 1432 (see attachment #6c) and gave a report of Sue and Settle in the country (see attachment #6a and #6b). She said that agencies hands become tied and they don't have the science to fight the battles on their own. She said that NDPC would like to make a couple suggestions:

1. The funding rather than be used for direct litigation may be used for scientific data to support litigation that perhaps the Attorney General would see fit to move forward.
2. The committee name could be changed from the environmental impact litigation committee to the environmental impact research committee.

She stated that the state of TX has a current committee doing similar work.

Chairman Miller: Are you saying that we don't need a litigation fund?

Kari Cutting: I'm saying that there may be more than one use for this committee and funding and that could be that there needs to be studies and supplemental information that lends credence to way ND would be putting forth litigation. That allows this committee and the funding to be looked at as more supplemental to state agencies and the elected officials.

Chairman Miller: Aren't we dealing with a lot of settled science in a lot of these issues? There are lots of people involved and we have research going on in NDSU. The point here is you hire attorneys to compile that data and then to litigate.

Kari Cutting: You are correct, there's actually more than one thing going on here. There are sue and settle cases that are already settled and the agencies have deadlines. Those are going to have to be fought with litigation. But we are looking at a laundry list of species that will have to be settled in the near future and in those cases, you still have time to stop with proper information. The Fish and Wildlife service would be the first to tell you that they do not have the facts and the scientific basis to fight a sue and settle situation. I'm saying that that is an alternate use for this committee and maybe an additional use for this committee and funding.

Roger Kelley, Continental Resources testified in favor of HB 1432 (see attachment #7)

Senator Klein: Ms. Cutting spoke about Texas creating some sort of litigation pool, can you speak to that?

Roger Kelley: Texas has an interagency taskforce on environmental issues and the have a 5 million dollar per biennium funding that goes along with it. It is used for support to litigation.

Chairman Miller: We're talking about the waters of the US here, that is a different realm than the endangered species act.

Roger Kelley: On the waters of the US, there are studies that have been done and there are various interpretations of that study and there is a lot of science still being developed on that. This bill is to represent the private land owner rights and all the members of the committee are chosen from representatives from private landowners or who have interest with private landowners. We have very capable agencies in the state that will continue to be called on in cases of litigation.

Chairman Miller: if you include all the waters in the United States including ground water, that would effectively erase all state borders would it not?

Roger Kelley: Now you're seeing the point--that is the undertone that the federal government can do it and the state can't.

Fred Helbing, ND Agriculture Coalition (1:11:52) testified in support of HB 1432 (see attachment #8)

Bruce Hicks, Assistant Director NDIC DMR Oil and Gas division (1:1:00:05) stated they were neutral on the bill but supported the concept of HB 1432. Said that they were concerned about the emergency commission in the budget section must have approval of all litigation activities and they were wondering if that is going to be timely on sue and settle situations. He suggested that one million dollars be available to hire and participate when sue and settle situations (see attachment #9).

Senator Warner: Isn't that what the Attorney General's office is for? How are you going to contract with a high power Washington law firm? The Attorney General is already doing those things. Why wouldn't that be the venue that we would bring to those kinds of battles?

Bruce Hicks: The details of it we're not all that concerned about, we are concerned that the Attorney General's office may not have the funds available to send someone to attend the meetings. I think the whole premise behind it is to have the funds available so you can get somebody there. Who you send can be decided on by this advisory committee or others, but we think the funding needs to be there so you can afford to send someone to sit at the table.

Zach Weis, Marathon Oil ND Petroleum: (1:16:16) testified in support of HB 1432. The work on the proactive side rather than the reactive side has some great benefit to the state. The team work on this committee shows what ND can do in preventing some of these potentially harmful regulations to affect the agriculture and oil and gas industry. This can be done the way it is written now.

Gary Knutson, ND Agriculture Association (1:17:35) testified in support of HB 1432. 1. My thought would be that even if the Attorney General would carry litigation, he would most likely contract expert research and advice. That would be my interpretation of what a lot of this funding would go toward. 2. In terms of multi state involvement as concerns endangered species, we're the only state that has that particular problem.

Representative Thoreson, District 44 (1:19:50) testified in support of HB 1432 and emphasized the importance of this legislation.

Scott Rising, Soybean Growers (1:19:55) testified in support of HB 1432.

Opposition

Dave Glatt Chief of the Environmental Health Section for the ND Health Department: testified in opposition to 1432. He said that he understood the need for litigation because of litigation we are in with the EPA now. He stated that as an agency, they fight the EPA more than anyone else. Mr. Glatt said he saw the need for having some funding to do litigation and the health department currently has some money for litigation.

He said that the way the committee is set up now, it starts to look industry heavy to where there is no longer an arm's length between industry and agency so you don't have that transparency where you have the appearance that you are representing everyone. Industry has a very important role but there are a lot of people that aren't on this list that could be impacted. The way the bill is set up, the committee could sue the state health department when they implement rules on the local level from the EPA. He indicated that when these rules are implemented at the local level, they are able to be conducted in a common sense way to work out for everyone.

Mr. Glatt said that the department already goes through a process that provides public input. He thought this could set up the issue where as a state agency, they may not want to pick up a portion of the clean water act because of litigation concerns. The agriculture industry was against that and by implementing it at the local level, no one heard about it.
He said in some cases, he though the EPA might like something like this because if you delay things long enough, the EPA will go along with the program and will implement it on the federal level. He made it clear that he thought money had to be set aside in an agency

budget for these types of things but it has to be a coordinating body. The Attorney General is the lead litigator, the Health Department's process is when they see the EPA doing a bad thing, they go to the Attorney General and the Governor's office to get approval and then move forward.

Mr. Glatt said he understood the sentiment but was concerned about the broad approach. He was very concerned about the portion that stated that the committee could take gifts into the fund, so industry might provide funding that taints the state agency.

Senator Klein: (1:27:00) I know you represent us in the health department; if we pumped up that $500,000 in your fund, would we have the money available to take on some of these things and how would you envision addressing all of those folks that might nag you to pursue something? My thought here would be hopefully we could have someone who is already doing this and enhance their purse.

Dave Glatt: I hate litigation and to say that you would give us more money to have the health department to do more litigation--it takes so much time but sometimes it's necessary. I can't pretend to know all info from the agriculture department, so they would have to pursue their issues at their agency level and maybe at some point we can come together and have a unified approach. I still look at the Attorney General's office as coordinating a lot of this. We want a unified approach as a state.
In our case, that $500,000 has been helpful and there may be a way to do that in the Agriculture Department. I agree about having a fund to gather data and we gather a lot of data now.

Senator Klein: I know this is complicated, but I'm think in this whole thought process is that we could work together to provide that resource and at least take action. The idea is to pump this up and get people more excited that their legislature is concerned and we need to address these issues.

Dave Glatt: I do think we need to address these issues and I think it is good to have those advisory committees and we have a lot of those advisory committees but they are not tied to litigation directly. Anytime you have those advisory committees that do not represent everyone, that begins to be looked at as a special interest that is directing an agency and you start losing the transparency and credibility as a state and governmental agency. I go back to the principle that we protect all, we represent all. I will tell you that several times a month; we get asked to join on to litigation from other states. We see some major litigation coming up for us on the clean power plan as it relates to greenhouse gases. So there is enough work to go around for everyone, but there may be a better way to do it.

Senator Warner: I found Ms. Cutting's comments constructive regarding preemptive research and collecting data. I always thought we should be collecting baseline water quality data as we develop oil in the interest of the industry to show there was or was not an affect caused by the drilling. It would have been useful to have that kind of baseline data. Could we make a policy recommendation that the appropriations committee should direct money towards your agency to accumulate that kind of data?

Dave Glatt: That will be your decision. We do collect a lot of data now and that's when we challenge EPA because we collected the data and have the science that shows actual data that says that you are wrong and that's why we go to court. We are a data gather agency in addition to a regulatory agency.

Pete Hanebutt, ND Farm Bureau: (1:34:00) stated that the EPA is a problem and the Farm Bureau has taken on a lot of litigation. He said it seems that starting a legal fund in a different state agency is only a problem waiting to happen down the road. He said the Farm Bureau believed it is a bad idea on the principle of taking one state agency's litigation job from one agency and giving it to another just because some may feel the Attorney General is not taking things on as quickly as they would like to see.

Senator Larsen: You said you guys have been in litigation, what is the cost and what are some examples?

Pete Hanebutt: Hypoxia case is one, both the Chesapeake and the Gulf of Mexico cases were millions of dollars from the Farm Bureau and other coalition. A lot of the agriculture and energy groups join together on some of those things. It still ends up being the State Attorneys General who do those things.

Senator Klein: So I'm clear, what your suggesting change "shall advise the Attorney General" rather than the "Agriculture Commissioner," then you would be in favor of the bill?

Pete Hanebutt: I think it is the Attorney General's job.

Tom Trenbeath, Chief Deputy Attorney General: I do adopt most of what Mr. Glatt said. We objected to this bill in the prior body because it was a clear violation of separation of powers under the constitution at that time. It was amended by the other body and passed. Now we aren't sure what it does and there's disparency amongst the sponsors on what they think the bill does. If you are going to go forward with this bill, I would ask that we get together and tailor something that makes sense.

Chairman Miller: Can you explain to me the original draft?

Tom Trenbeath: The Attorney General is in charge of all the law suits of ND and has been upheld several times in the Supreme Court of this state.

Chairman Miller: Explain to me where that authority comes from in terms of the Supreme Court? Because when I read the constitution, I see that the legislature has the power to assign the duties to the various executive offices.

Tom Trenbeath: The constitution defines the duties of the Attorney General and the development of the definition and the explanation of that is through the court case law.

Chairman Miller closed the hearing on HB 1432.

2015 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

HB 1432
3/19/2015
Job #25103

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Grotberg

Explanation or reason for introduction of bill/resolution:

Relating to the environmental impact litigation fund; to provide for a continuing appropriation

Minutes: *Attachments: n/a*

Chairman Miller opened the discussion on HB 1432 and said he was working on some amendments for the bill and the Attorney General is going to come speak to the committee on 3/20/15.

Senator Warner: From an appropriations perspective, one of the problems we get silos of money that are dedicated to one specific purpose and it would make a lot more sense if we just had a generalized litigation fund within the only agency which can initiate litigation which is the Attorney General's office. We have one for rail-rates in PSC, one for fracking in the industrial commission.
If we had discretionary funds in a generalized pool that the Attorney General could pull from for different types of litigation that would make a lot more sense than having individual silos of money all over the place. The only one who has constitutional authority is the Attorney General. We had a successful case lately where the state of MN tried to impose externalities on electricity generated from ND coal and we won but they used a Minneapolis law firm to do it. It took five years, cost a million dollars, but the state will get the money back because they were the winner in the litigation. I think that the amount of money talked about in this bill is astonishing amount for legal costs and probably not consistent with the nature of litigation.

Chairman Miller I think when we send this out of the committee I imagine it'll have a different number after it gets through appropriations.

Senator Warner: I think appropriations will look at it and put it in the Attorney General budget.

Senator Klein: I think we alluded to a couple of the funds we have out there. We have the PSC litigation fund and the health department has a litigation fund--and the Attorney

General is still apart of the process. Can we ask Mr. Glatt about how he is able to access that money?

David Glatt, Chief of the Environmental Health Section at ND Department of Health: The way our fund works is we've been through several different litigation actions with EPA and we currently juggling three right now. The legislature has earmarked various numbers but right now it's $500,000 in our budget for litigation against EPA. The way the process works is if we feel that with our working with EPA negotiations and we have a disagreement we pull in our attorney that is assigned by the Attorney General to us full time. If we feel like we need to go to outside council we visit with our attorney and go to the Attorney General's office to discuss that with them to see if that has merit to move forward. If it does, they hire the outside counsel and they receive the special assistant to the Attorney General designation then we work with that attorney directly to get litigation moving forward.

Senator Klein: So you think it is a good idea that you have your little pot of cash?

David Glatt: Obviously I would think so because of the immediate access. In the past, we've had to report to various committees with the legislature to update them on what we are doing with the litigation. That has worked very well for us.

Chairman Miller closed the discussion on HB 1432.

2015 SENATE STANDING COMMITTEE MINUTES

Agriculture Committee
Roosevelt Park Room, State Capitol

HB 1432
3/20/2015
Job #25174 and Job #25184

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Brotherg

Explanation or reason for introduction of bill/resolution:

Relating to the environmental impact litigation fund; to provide for a continuing appropriation

Minutes: *Attachments: #1-2*

Chairman Miller opened the discussion on HB 1432.

Vice Chairman Luick passed out amendment 15.0961.04004 prepared by **Chairman Miller**

Wayne Stenehjem, Attorney General, offered a marked up version of HB 1432 with suggested amendments (see attachment #2). He said that he initially brought his concerns about the original version of the bill to the house and they amended the bill, addressing some of his concerns but creating some problems in so doing. He said the bill was less useful because it establishes a commission made up of the people listed to give advice on how to spend money from a litigation fund. He said it would be useful for the office of the Attorney General give factual advice to the Agriculture Commissioner on the impact and detriment they see that might result from various EPA rules and then the Agriculture Commissioner bring that to the Attorney General so he can make a litigation determination.

He said that the amendments he proposed would say that the environmental impact advisory committee will give factual advice to the Agriculture Commissioner and he can go directly to the Attorney General.

Attorney General Stenehjem said that is second concern was the question of where this funding is going. The bill proposes 4 million dollars to be allocated for litigation but that it goes to the agriculture department. He stated that he thought that was improper place to place the funds because the Agriculture Commissioner is in charge of just one aspect of the concerns the state has over EPA over-regulation and other entities that have concerns are unrelated to the interest that the agriculture commission is responsible for.

He stated that it seemed to him that the proper place for the litigation funds would be the Industrial Commission because it is already composed of three people and the Agriculture Commissioner and the Governor are on the commission. The commission also oversees the Lignite Energy Research Council so the state is obligated to promote the development of the industry in ND. The commission also oversees the oil and gas division.

Attorney General Stenehjem stated that the legislature over the years has established a number of funds for litigation: the PSC has $900,000 for railroad litigation, the Industrial Commission has a million dollars for litigation that may result because of regulations of the fracking industry, the Department of Health has $500,000 for litigation, and then the Industrial Commission has had 1.5 million dollars through the Lignite Resources litigation fund for expenditures if litigation is necessary.

He stated that there are two issues: 1. Who's in the group and who do they advise? 2. Where should the funding be? I think it is improper to put it in the Agriculture Department and it needs to go to a broader group that can expend those funds. He said that his concern is that the million dollars in the fracking lawsuit fund has been rolled over and the governor recommended 3 million to be funded the way he suggested. The house took all that money out so the 4 million dollars proposed in this bill is the money from that fracking lawsuit and the 3 million dollars the governor recommended. If the committee doesn't do something with this bill, the Attorney General's office will not have any funds at all. He said they need a source of funding because there will be continued litigation; there are currently 14 lawsuits where the EPA is the defendant, and he suspected there would be more particularly if the Waters' of the US proposal gains any traction.

Senator Klein: (9:28) Have you had the opportunity to see the amendments proposed by Senator Miller?

Wayne Stenehjem: I saw them for the first time a little earlier; I suggest that the bill make clear that the committee shall advise the Agriculture Commissioner with respect to the environmental impact to ND agriculture interest caused by federal requirements. The other suggestion I have is that the appropriation go directly to the Industrial Commission and that may beyond the purview of this committee and might be one for the appropriations committee (see attachment #2).

Senator Warner: One issue on the original bill, near the top on the second page it talks about this litigation fund being able to receive gifts, grants, and donations. Can you talk about the implications of allowing gifts, grants, and donations to apparently private donors who have no standing toward litigation which may or may not be instigated by the state?

Wayne Stenehjem: They may or may not have standing; standing is a legal term which means you are the person who has a disagreement or cause and you are the person that is entitled to come before the court to be heard. We have not accepted grants or gifts from people to pursue litigation. In the case of MN, we went to some of the private companies to fund half the litigation and they became co-plaintiffs.

Chairman Miller: Do you feel that the amendments that I presented to you give you the control over the actual litigating part that you feel comfortable with?

Wayne Stenehjem: I mean this in a polite way, I don't need law to give me the authority to pursue litigation. The constitution and rulings from the Supreme Court say that the Attorney General is responsible for the litigation strategy for the state of ND and that's why I object to having a committee of layman give me legal advice on when or when not to pursue litigation. There are no other committees that come in and give advice to me although I will tell you there is no shortage of people who come in and off their thoughts and that's important. I think it is significant that people come in and I listen to them but there is no form of committee of people to give legal advice not suggestions on strategy; that's why I think that it would be useful if the Agriculture Commissioner thinks he need, that he has a group that will come in and provide him with information. So they would advise him on the facts, he's coming over to discuss the facts, and then we can discuss legally what we can do.

Chairman Miller: In this draft, it doesn't compel you or create a new attorney general.

Wayne Stenehjem: It's not clear in your amendment exactly what the committee does and with whom. The amendments I passed out say that they are to make factual recommendations and determinations to the Agriculture Commissioner, he's the Chairman and he's responsible for it, and it answers to him. Then he can sort things out and listen to those folks. If there's a litigation issue, he comes over and we talk and determine where to go.

Senator Oban: Maybe this isn't a question necessarily but I can't help but ask if we need to put into law that this committee exists. Assuming you can bring together any committee you want to give you their opinion, does the Agriculture Commissioner need us to put into law that this committee can advise him on these things?

Wayne Stenehjem: Perhaps that is not a question you should be asking me. My position is that if the Agriculture Commissioner believes that he needs a committee or finds a committee of this nature being useful to him, I have no objection from the standpoint of what my office does.

Senator Oban: Is your biggest concern that make sure that we have money available for litigation somewhere before the end of session?

Wayne Stenehjem: This is critical because we have ongoing lawsuits in addition to those that are anticipated. I am told there is a fracking rule and we are getting ready to pursue that but that money is now in this bill and not in any other bill so we absolutely have to have some kind of litigation fund.

Senator Warner: Both your budget and the Industrial Commission are on the House side, correct?

Wayne Stenehjem: Our budget is on the House side; the Industrial Commission is on the Senate side.

Senator Klein: As I look through your amendments, your notes seem to indicate that 3 million would be appropriate. My thought at this point was to leave it where it was and let appropriations make that determination.

Wayne Stenehjem: I didn't tinker with the total amount of money, if you want to leave it at 4 million that is fine. We haven't touched the fracking money which was a million dollars appropriated 6 years ago. It will sit there until we need it and then the funds continue to roll over.

Senator Klein: I was trying to compare the notes you added on line 19 versus the amendment proposed by Senator Miller and I understand you probably didn't have enough time to take a look at the Miller amendments but it seems to be kind of the same thing.

Wayne Stenehjem: The amendments I proposed make it abundantly clear.

The committee had no further questions and the Attorney General made himself available for further questions from the committee.

Job #25184

Chairman Miller stated that there was a small turf war going on and he believed his amendments addressed that in the sense that they allow the Attorney General to do what the Attorney General is supposed to do. He said the appropriation amount is up to the appropriations committee.

Senator Warner: Your amendments still direct the money towards the Agriculture Department, is that correct?

Chairman Miller: The Agriculture Commissioner will be the custodian of those dollars.

Senator Warner: So the Attorney General could not initiate litigation without the permission of the Agriculture Commissioner?

Chairman Miller: He can initiate litigation, but he wouldn't have the money to pay for it.

Senator Klein: If we put the money in the Industrial Commission, I see the potential value of that because if we are talking about fracking litigation, that is also under the purview of the Industrial Commission. A lot of the other issues and a lot of the other stakeholders who came forward are represented on the industrial commission. I'm not sure if that's just the battle you want to take on during the conference committee, I do understand that there could be those issues. I think your amendments cover what his interests and concerns are and I think your amendment is better.

Chairman Miller: Let me draw your attention to section 2 in subsection 1, it reads "if the Attorney General elects to participate in the administrative or judicial process, as recommended by the review committee... any expenses incurred by the Attorney General must be paid."

Senator Warner: It still makes it sound as though he can't access that money if they don't approve of it.

Chairman Miller: The Attorney General isn't going to do anything beyond what that committee is going to want to do. He probably would rather do less than what the committee is going to advise.

Senator Klein: How does the Health Department initiate litigation? They must see something they need help with and they have the money and they go to the Attorney General with their concern and bring their litigation funds. I'm still thinking there is a way it can be done but I'm just not sure the logistics of this. I'm wondering how accessible the funds would be. My thought is that the Appropriations Committee will have to see how that money would flow.

Chairman Miller: Other things I want to bring to the committee's attention is in Section 1, subsection 1, subsection e my amendments provide a one member minority party selected by the chairman of the legislative management.
I'm comfortable with the general structure of the amendments and I would prefer to send the bill over to appropriations and let them further refine it.

Senator Klein: As a point of procedure, I would like to get this bill on the floor. The appropriations committee is trying to get an idea of the dollar figures.

Senator Warner: I would respectfully resist the Chairman's amendments but I would support the Attorney General's amendments.

Senator Warner moved to adopt the amendments provided by the Attorney General to HB 1432.

Senator Oban seconded the motion.

Vice Chairman Luick: What are the differences of the Attorney General's draft and your amendments?

Chairman Miller: Policy wise, there are substantial differences. The Attorney General's amendments put the control of the funds with the Industrial Commission, there's less money appropriated but that probably doesn't matter. I am assuming that when this bill receives final passage it will have less than 4 million but I would rather keep it at 4. I think his amendments diminish the agriculture voice slightly by putting it in the Industrial Commission.

A Roll Call vote was taken. Yea: 2; Nay: 4; Absent: 0.

The Attorney Genera's amendments fail.

Senator Klein moved to adopt amendment 15.0961.04004, Senator Miller's amendments.

Senator Larsen seconded the motion.

Senator Klein: I would suggest that the major debate would be over the funds are in OMB verses the Industrial Commission; I think it has to be somewhere.

A Roll Call vote was taken. Yea: 5; Nay: 1; Absent: 0.

Amendment 15.0961.04004 is adopted.

Senator Klein moved Do Pass on Reengrossed HB 1432 as amendment, and rerefer to the Appropriations Committee.

Senator Larsen seconded the motion.

Senator Klein reiterated that it is important to get the bill to the Appropriations committee and that the Attorney General expressed the importance of having some money.

Senator Oban: I think this is a really terrible piece of legislation and it will be growing government because they are going to be spending money to meet in a way that the Agriculture Commissioner could already ask them too. I understand that we need to get some money into the litigation fund; I don't think this is the vehicle to do it.

Senator Warner: I still think this committee has authority to spend money on anything they want too, just not litigation. They can do research, they can hire a consultant; but to include litigation is not very well directed. It is splattering our efforts all over the place so I'm going to vote no.

A Roll Call vote was taken. Yea: 4; Nay: 2; Absent: 0.

Do Pass carries

Chairman Miller will carry the committee's recommendation to the senate floor.

VERSION 1

PROPOSED AMENDMENT TO HOUSE BILL NO. 1432

Page 1, line 2, after "the" insert "creation of the"

Page 1, line 2, after "impact" insert "advisory committee and "

Page 1, line 2, overstrike "to provide for a transfer;"

Page 1, line 7, remove "litigation "

Page 1, line 8, remove "litigation "

Page 1, line 19, overstrike "expenditures" and insert immediately thereafter "the environmental impact to North Dakota agricultural interests caused by federal requirements including the following:

a) Exempt and nonexempt activities governed by section 404 of the Clean Water Act [33 U.S.C. 1344] or by regulations implementing section 404 of the Clean Water Act;

b) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act of 1970, as amended, [42 U.S.C. 7401, et seq.] or any regulations implementing the Clean Air Act;

c) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Endangered Species Act of 1973, as amended, [16 U.S.C. 1531, et seq.] or any regulations implementing the Endangered Species Act;

d) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act, as amended, [42 U.S.C. 300f, et seq.] or any regulations implementing the Safe Drinking Water Act;

e) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act, as amended, [15 U.S.C. 2601, et.seq.] or any regulations implementing the Toxic Substances Control Act; and

f) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any other federal law or tribal law, or to any regulations implementing such a law."

Page 1, overstrike lines 20 through 22

Page 2, remove lines 1 through 31

Page 3, remove lines 1 and 2

Page 3, line 3, overstrike "AND TRANSFER"

Page 3, line 5, overstrike "4,000,000" and insert immediately thereafter "3,000,000"

Page 3, line 5, overstrike "or so much of the sum as"

Page 3, line 6, overstrike "may be necessary, which sum the office of management and budget shall transfer"

Page 3, line 7, after the second "the" insert "industrial commission"

Page 3, line 7, remove "environmental impact litigation fund"

Page 3, line 7, after "funding" insert "an"

Page 3, line 8, overstrike "and related activities" and insert immediately thereafter "fund"

Page 3, remove lines 9 through 20

Renumber accordingly

15.0961.04004
Title.05000

Prepared by the Legislative Council staff for
Senator Miller
March 19, 2015

JR 3/20/15 1 of 2

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1432

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review committee.

1. The federal environmental law impact review committee consists of:
   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and advise the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

2052

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. If the attorney general elects to participate in an administrative or judicial process, as recommended by the review committee under section 1 of this Act, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

2. For purposes of this section, "expenses" include consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Gifts - Grants - Donations.

The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

SECTION 4. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:

   a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and

   b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $4,000,000, or so much of the sum as may be necessary, which sum the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly

Date: 3/20/2015
Roll Call Vote #: 1

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

Senate Agriculture Committee

☐ Subcommittee

Amendment LC# or Description: Attorney General Ammendments

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 Warner Seconded By Senator Oban

Senators	Yes	No	Senators	Yes	No
Chairman Joe Miller		N	Sen. Erin Oban	Y	
Vice Chairman Larry Luick		N	Sen. John M. Warner	Y	
Sen. Jerry Klein		N			
Sen. Oley Larsen		N			

Total Yes 2 No 4

Absent 0

Floor Assignment _____

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

Amendment Failed

Date: 3/20/2015
Roll Call Vote #: 2

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

Senate Agriculture Committee

☐ Subcommittee

Amendment LC# or Description: Senator Miller Amendment: 15.0961.04004

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 Klein Seconded By Senator Larsen

Senators	Yes	No	Senators	Yes	No
Chairman Joe Miller	Y		Sen. Erin Oban	Y	
Vice Chairman Larry Luick	Y		Sen. John M. Warner		N
Sen. Jerry Klein	Y				
Sen. Oley Larsen	Y				

Total Yes 5 No 1

Absent 0

Floor Assignment _____

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

Adopt amendments offered by Senator Miller

Date: 3/20/2015
Roll Call Vote #: 3

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

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 Klein Seconded By Senator Larsen

Senators	Yes	No	Senators	Yes	No
Chairman Joe Miller	Y		Sen. Erin Oban		N
Vice Chairman Larry Luick	Y		Sen. John M. Warner		N
Sen. Jerry Klein	Y				
Sen. Oley Larsen	Y				

Total Yes 4 No 2

Absent 0

Floor Assignment Senator Miller

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

REPORT OF STANDING COMMITTEE

HB 1432, as reengrossed: Agriculture Committee (Sen. Miller, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). Reengrossed HB 1432 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

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   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and advise the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. If the attorney general elects to participate in an administrative or judicial process, as recommended by the review committee under section 1 of this Act, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

2. For purposes of this section, "expenses" include consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

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The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

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Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:

   a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and

   b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $4,000,000, or so much of the sum as may be necessary, which sum the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly

2015 SENATE APPROPRIATIONS

HB 1432

2015 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee
Harvest Room, State Capitol

HB 1432
3/31/2015
Job # 25630

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Emmery Hotberg for Rose Laning

Explanation or reason for introduction of bill/resolution:

Relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors.

Minutes: Attachments: #1 - 7

Legislative Council - Alex Cronquist
OMB - Becky Keller

Chairman Holmberg called the committee to order on HB 1432. Roll Call was taken. All committee members were present.

Sub-committee will be Senator Carlisle, Chairman Holmberg, and Senator Heckaman (Industrial Commission)

Representative Mike Brandenburg, District 28, Bill Sponsor: Introduced HB 1432; expressed concern over the issues state agriculture is experiencing from federal regulation: Farm Bill implementation, Waters of the USA, endangered species, etc. He said that there is a lot of fear pertaining to consequences of the Farm Bill being implemented. If Waters of the USA are implemented, 85% of the farm land could be impacted. Regarding endangered species, he said could prevent land from being broken up to farm.

It became apparent that something needs to be done about dealing with these issues and now the oil and coal industries are impacted. In order to mine coal or drill oil, you need access to agricultural land so this bill puts the industries together. In the beginning, there was $5M in bill and House appropriations committee reduced it down to $4M so now it has $1.5M. $2.5M of this has been moved into the Industrial Commission $1M in the fracking fund, and $1.5M into the mineral resources fund. This review group under the agriculture commissioner will provide information to Attorney General to determine if we should move forward with a litigation issue. People have come together for oil, agriculture and lignite--the 3 biggest industries in the state.

Senator Bowman: Reading the bill, who makes that determination that we're going to take on the federal government in litigation?

Representative Brandenburg: It's a combination of everyone. The review committee is going to look at these issues, they are going to consult with the Attorney General, and the Attorney General is the lead litigator in the state so this we're going to work together.

Chairman Holmberg: Are there any additional examples in state law right now where the Attorney General is dependent upon input from a particular committee or another agency before he pursues litigation?

Representative Brandenburg: I would use the example of the Health Department in their dealing with air quality issues. Dave Glatt in the Health Department puts everything together and if they need to have litigation done they meet with the Attorney General and try to do the same thing as we are trying to do here.

Chairman Holmberg: Could the Attorney General pursue litigation on his own or does he have consultation with this committee before he could do that?

Chairman Holmberg: The Attorney General can do whatever he thinks is the right thing to do but the review committee is put in place so they can help give him information because there is a lot happening out there in agriculture as well as oil and coal. The committee is there to help and give information to the Attorney General and the Attorney General can certainly make that final call whether the state is going to pursue litigation or not. We want to do what is best for industry in state.

Senator Mathern: On page 2, line 11 it refers to Attorney General in participation must be paid by the Agricultural Commissioner. Whatever decision the Attorney General makes goes forward in an action; does that automatically bring money from Agriculture Commissioner to pay for it or does the Agriculture Commission still make a decision about whether or not to provide the funds?

Chairman Holmberg: There was $4M in the bill and $2.5M has been moved to the Industrial Commission mainly dealing with the mineral resources and the impact of fracking issue. This $1.5M that's in the review committee is dealing with the Waters of the USA and endangered species so it pertains to whatever issue it may be, some of this review committee information could say that it could come from the agriculture committee; I think that is something that they are going to have to look at and determine which fund they are going to use. It was felt that by the people in the industries that this was the right way to move the money around because they have had some expertise in dealing with these issues whether it pertains to oil, lignite, or fracking or other issues dealing with agriculture pertaining more to the Agriculture Commissioner. When you get into the endangered species and Waters of the USA, that money is probably going to come out of agriculture.

Chairman Holmberg: Are there other examples in state law where private gifts from groups or individuals can help underwrite lawsuits from ND?

Chairman Holmberg: There are people here who can talk about what they've done in other states and they could give good examples but a lot of times these gifts and donations are so that the state can take care of reclamation and the issues at hand and there are

groups that want to do that. The provision there is to try and accommodate that and I think you'll hear some good examples of other states that have dealt with issues.

Senator Wanzek: The bill we have is the second engrossment and it is still at $4M. I think he's making reference to some amendments that I intend to hand out.

Senator Jim Dotzenrod, District 26: Testified in support of HB 1432.
He proved the committee with a newspaper article - Attachment #1.
Todd Neeley article - Attachment #2.
The bill started out as an idea to ask commodity groups to put ½ cent of their check-off into the fund and that would be agriculture money and the Agriculture Commissioner would control that and would be available to take on some of these cases where people are being dragged into a situation by the federal government where they don't have the resources to fight back. This bill was designed by a committee and it has many pieces to it. If you look at the language in the bill, it does say if the "Attorney General elects..." so in the end, it is going to be a decision made by the Attorney General; there's nothing in the bill that can force the Attorney General to do anything. By having this committee here, it was a way to focus attention on agriculture issues.
This is important for the whole state; it started out as agriculture and now we have a few other people who have expressed a lot of interest and they have their own concerns and falls under the same type of activity.

Senator Mathern: What's the ideology of this concern? Didn't this essentially come about because of congressional action in the farm groups? Is congress trying to shut down farming? It seems people are at the table to bring about the farm bill and the policy so are people having buyer's remorse?

Senator Dotzenrod: I think what the 2014 Farm Bill represents is some major lobbying victories on the part of environmental groups interest in buying land to be used for environmental purposes and they have found that they can get a lot more mileage out of their money by getting involved in federal policy and creating federal policy that accomplishes their objectives. I think if you look the 2014 farm bill, lobbyists were very involved in putting their stamp in the farm bill and it has given them what we think amounts to the taking of property. The main concern I have is wetlands, if you have a legitimate nesting area there's an agreement that should be left alone. But to go into a field that has been farmed for 100 years and the government determines to take the right to manage the water on the surface in the low spots so that the farmer is not allowed to drain it, tile it, or manage the water. Once you have lost the right to manage the water on the surface, essentially you've devalued the property. Congress has said you can go and call something a wetland when it has really been a piece of farmland from the standpoint of the farmer's right. Congress has gotten involved and we're really concerned about the lobbying successes of the groups that have come to the table to put their stamp in the farm bill and they're using some egregious overreaches to reach out and accomplish their environmental objectives in essentially taking property.

Senator Wanzek, District 29: Handed out amendment 15.0961.04007 - Attachment 3.
The amendment is to declare that the Attorney General is the litigator and it is ultimately the Attorney General that we follow when we make a decision to move forward in litigation. By

allowing this committee to come together and play an active role in bringing the issue forward.

The amendment takes the $4M to $1.5M and leaves the money in the Department of Agriculture and the Environmental Litigation Impact fund and we're mostly targeting the Endangered Species and Waters of the USA issue. The intent is by taking the $2.5M out of that $4M to go back into the Industrial Commission budget for the purpose of tracking litigation issues in lignite clean air and clean water. We felt that that issue and those dollars should be separated from this. We are targeting more of the issues that will directly impact agriculture here and let agriculture have a voice or a say in it. From my point of view, the reason this is before you is that we're trying to figure out how we can collectively come together and make a statement about these issues instead of letting our farms get picked off one by one with the farmer incapable of fighting these issues on his own.

Senator Heckaman: Why would you in Section 2 leave energy and oil production in the bill?

Senator Wanzek: We're somewhat inter-connected, energy and oil work with farmers and they need access to their surface rights. We feel there is some correlation and again it goes back to the idea that there's power in numbers. If we stand together, we have a much better chance of trying to impress upon to federal government that they need to change their regulation when they are over reaching to the point of taking our property.

Senator Heckaman: In the other $2.5M that is out there, does it also say for litigation for agriculture, energy, and oil?

Senator Wanzek: The other $2.5M were just taken out of this bill, they don't have anything to do with this bill. Originally, there was $3M in the executive budget for litigation issues regarding fracking, lignite coal, clean water, and clean air issues. That $3M was taken out of the industrial commission and went into this bill. I can't guarantee the $2.5M is going to go back into the Industrial Commission, that is up to the legislature to decide whether they are going to put it back there. I think they should since there's been some rulings on fracking as well so that issue will be separated from this. This is more or less directing the moneys to the Waters of the US and the Endangered Species Acts and things of that nature that more directly impact agriculture and surface land owners and land rights.

Senator Heckaman: Does the energy and oil also include agriculture?

Senator Wanzek: The $2.5 in my opinion will go into the industrial commission and will be used as previous litigation dollars were available and it will be the industrial commission and the energy folks that make that decision. We feel it's important to have them in here.

J. Roger Kelley, Continental Resources, Inc., Oklahoma City:
Testified in favor of HB 1432. Attachment # 4

Dan Wogsland, Executive Director, North Dakota Grain Growers Association:
Testified in favor of HB 1432. Attachment # 5

Senator Bowman: Basically, this is a watch dog for the three industries in our state looking out for the long term benefits or adverse effects that we are going to have and we set in place an opportunity to challenge some of these rules and regulations; is that basically the juxtaposition of this?

Dan Wogsland: This is a proactive approach to bring us all into play. Let me give you one example of a regulatory effort that would not be addressed in this bill. Our former chairman was cited by the Natural Resources and Conservation Services (NRCS) and they said he was out of compliance for 1.8 acres. That issue was $65,000 that he was going to have to give to the federal government if he was wrong. It took 26 months to resolve that and at the end of the day when the NRCS received the right information from its mid-level management, they confirmed that the farmer was right. That could perhaps be impacted by this bill because off-site wetland determinations will impact situations such as that.

Larry Syverson, Chairman, Board of Supervisors of Roseville Township of Traill County and Executive Director, ND Township Officers Association:
Testified in favor of HB 1432. Attachment # 6

Julie Ellingson, ND Stockman's Association:
Testified in favor of HB 1432. No written testimony.

Fred Helbling, Chairman, North Dakota Ag Coalition:
Testified in favor of HB 1432. Attachment # 7

Testimony in Opposition to HB 1432.

Pete Hanebutt, ND Farm Bureau, Lobbyist #320:
Testified Against HB 1432. No written testimony.
Mr. Hanebutt acknowledged that there are problems with federal agencies in agriculture but stated that the Farm Bureau does not think this bill addresses or fixes the problems in any way. He said the Farm Bureau gets involved in litigation often but does not see this bill is going to fix any of those things. He said they did not like the idea of taking the job of the Attorney General and giving it to the Agriculture Commissioner.

Telling an agency what they should be doing or vice versa doesn't make much sense long term particularly when you cannot guarantee who's going to hold any of those offices in the coming years. Senator Dotzenrod said that nothing in this bill is going to force the Attorney General to do those things in litigation, so that is the problem. If we are not happy with our Attorney General for not being aggressive enough towards to the Waters of the USA, that's the Attorney General's job and we need to push him. This bill doesn't have any more teeth in it than if the legislature would pass a concurrent resolution saying that the Attorney General needs to move and do this job. We think this a bad move in public policy to start down this road just like it would be in any other field. We definitely need to take on the government and regulators in a lot of ways, but we don't see that this is going to have enough teeth to do anything.

Chairman Holmberg closed the hearing on HB 1432.

2015 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee
Harvest Room, State Capitol

HB 1014
(also **HB 1358, HB 1432, HB 1443**)
4/2/2015
Job # 25774

☒ Subcommittee
☐ Conference Committee

Committee Clerk Signature Rose Laning

Explanation or reason for introduction of bill/resolution:

This is a sub-committee hearing on the budget of the State Industrial Commission.

Minutes: *Attachments: # 1 - 5*

Legislative Council - Adam Mathiak
OMB - Sheila Peterson

Chairman Carlisle called the sub-committee to order on HB 1014. Senator Holmberg and Senator Heckaman were also present.
HB1443, 1432, 1358

Karlene Fine, Executive Director, State Industrial Commission passed out information packet on bills HB 1358, 1432, 1443 and 1014 - Attachment # 1
Proposed Amendments - Attachment # 1A

1358 - Rather than having dollars from HB 1358, she suggested they be amended into HB 1014.
Another amendment was going to be passed out HB 1432

Senator Heckaman: I have a question on HB 1032. There was a correlation on the green sheets that said there is a request for more funding into the abandoned oil and gas well plugging. What happened to that?

Lynn Helms, Director, Department of Mineral Resources: HB 1032 passed on the senate side that bill increases the cap of that fund to $100M. If we don't hit the trigger before 12/31/15, it also increases the flow into the fund from $5M a year to $7.5M. If we do hit the big trigger, the annual inflow will remain capped at $5M but the overall fund cap will still go up to $100M.

Amendment proposed to HB 1358 (see attachment # 2). This amendment addresses the concern I raised this morning in committee that the operator of a salt water pipeline could just put the thing into service and file with the commission a number of items 60 days after

the pipeline had already been up and running and there was no approval by the commission of any of those items. This amendment says the director of the oil and gas division has thirty days after the receipt of those items which are the design drawing and the pressure test and the monitoring plan to review those and then approve them or notify the operator that we are going to require an increased monitoring plan. If there's some deficiency in one of those pipelines, we would require a significant increase in monitoring.

Senator Heckaman Do you have any concern on the language on line five where it says within 60 days of the pipeline being placed into service? Is that part ok with you?

Lynn Helms: We think that's reasonable, I was not apart of the discussions on how the 60 days was arrived at although I know in some other very complex operations like hydraulic fracturing it takes that long to get all the data together and file it with the commission. I'm comfortable with that if we have the language approving that if we have this language in here approving those items and the authority to require increased monitoring if there is a deficiency.

Senator Heckaman: My only question was I visited with one of the committee members who heard this policy bill and they said they thought there was confusion by the person who introduced the amendment on what the real meaning was and how it got written up. So if you're comfortable with this, that's fine with me.

Lynn Helms: We are comfortable with it if we can get this language amended into the bill.

HB 1432

Chairman Carlisle: We are looking at this money and we want to move $2.5M into this budget for your litigation fund, is that my understanding of how that's going to work?

Lynn Helms: Yes, the amendments to HB 1432 are disassembling the $4M fund so they are going to leave $1.5M with that council but at the request of the Attorney General, they wanted to move $2.5M back under the control of the Industrial commission for the purposes that the original $3M was put in there under the governor's recommendation. If there needed to be litigation based on flaring, hydraulic fracking, or on oil conditioning or jurisdictional issue with the federal government or the tribes, that funding would be under the control of the Industrial Commission who could direct the Attorney General to take up those issues. The $3M was originally in the Industrial Commission budget. The House took it out and put it into the HB 1432 pool. On the Senate side, HB 1432 is being unwound and $2.5M is coming back.

Senator Heckaman: I'm looking at Senator Wanzek's hog house amendment 15.0961-04008 (see Attachment # 3)

Senator Holmberg: The money won't appear in this bill. We're not appropriating it.

Senator Heckaman: On 2nd page - section 2, how would this pertain to oil sector and oil production and agriculture at the same time? This money is going into the Agriculture Commissioner's budget, correct?

Lynn Helms: They could parse it out and it will be in an OMB pool.

Senator Heckaman: This different than what you would use your money for litigation work? Or could it be similar?

Lynn Helms: This would be there could be overlap.

HB 1443 - amendment 15.0867.02003 (see Attachment # 4)

Eric Hardmeyer: Our proposal is that we would take the critical access piece of this out of HB 1443 so we would carve out of existing biennium plus $10M out of the next biennium, enough money to do what is needed in critical access hospital and it relieves HB 1443 of critical access.

Bonnie Storbakken, ND Commissioner of Labor: The only change on HB 1358 is the one that Lynne Helms introduced today. That was the only change that I'm aware of.

Chairman Carlisle: give me quick shot of square feet.

Eric Hardmeyer, President, Bank of North Dakota: $17M from our assets on the property. Around 45,000 square feet and house 3 agencies: DFI, Commerce, and HFI. This is $269/sq.ft and we are paying for it out of assets. We will earn a rate of return similar to bond. This is payment in lieu of taxes.

Senator Heckaman: If finance tax credits come to you, can you actually take a fee out of there?

Jolene Kline, Housing Finance Agency: We have two options under the current century code: we can either pull the fee out of the fund itself or we can charge and assess it to the applicant. In the first program with the $15M, we pulled it out of the fund which meant we put 95% of that fund out in the street. When we went through the public hearing's process, we were proposing to pull it from the applicants so we could put the full $35.4M. So if a developer pays a $100,000 origination fee on a $5M project that becomes a $5.1M project and they receive 30% of it from the fund. The fund is helping to capitalize, we don't do both. Now we are going through another public hearing's process, the public hearing is scheduled for April 13 and it will be up for discussion during that public hearing whether the audience wants it to be continued to be paid by the applicant or whether they want it pulled from the fund. It's the same for the entire biennium program.

Chairman Carlisle: We're at $30M in credits?

Jolene Kline: We're at $30M in this bill, the Senate passed out $50M in SB 2257. The House amended it down to $30M in credits.

Chairman Carlisle: So there is $30M in credits floating around?

Senator Holmberg: We've had numbers of discussions on this issue. At the appropriate time, I'm going to make motion to add another $10M in cash for preparation for conference committee because the House doesn't seem to want any cash at this stage.

Jolene Kline: It's not the fifty that we wanted, but forty is better than thirty.

Chairman Carlisle: On the Mill, 3 years ago we settled on the 75% and we want to go back to 50%.

Senator Heckaman: Is the maximum amount in current law?

Karlene Fine, Executive Director, State Industrial Commission: It is currently $6.3M.

Adam Mathiak, Legislative Council: Statute provides 50% and so session law I 2013 put a cap on the 50%. So if this section was removed, it would go back to 50% without a cap. The House removed the limitation and changed it to 50%.

Senator Heckaman: Where does the $8M come from?

Senator Holmberg: That is what the mill proposed for language.

Chairman Carlisle: The Core Library - we have a lot of support.

Senator Holmberg: I would suggest we consider fully funding the library, but instead of giving UND $100M to sit in bank until they get their proposals together that we authorize them to come for a deficiency appropriation next session and therefore we have saved $1.8M that goes off the books but gives them the authority to come and ask. We still have to approve it.

Chairman Carlisle: 195 to 200 rigs, we are reorganizing some rigs correct?

Lynn Helms: The remainder of the $1M in the current biennium litigation fund be carried over and we want to make that we don't miss that. We were given $1M this biennium and we're already spending it and we want to carry it over.
Handed out 2015-2017 Staffing Model Field Inspector Increases (see attachment # 5).
He explained the FTE assignments.

Chairman Carlisle: We've done this before.

Senator Holmberg: This past session we utilized a notification OMB.

Lynn Helms: Previous to that, we had to hit the average and go to the emergency commission and that went through the budget section and we got the position approved. The last biennium we had to hit the average and then go to the emergency commission and that went to the budget section and we got the position approved. This last biennium, we shortened that to just a notification to OMB and that has worked much better for us to get the hiring process started so we would prefer that.

Senator Holmberg: Did we ever turn down any requests?

Lynn Helms: Never. The only thing that ever happened was sometimes we adjusted the dollars associated with the position because it came later in the biennium and there were unused funds there. Some of them came very late in the biennium we cut the amount for that position in half. We looked at possible triggers on oil prices and well counts but the only thing really predictable is that counts. Rig count will go back up, but we don't know how fast or how soon.

Karlene Fine: In addition to the new language for the general fund transfers, he also asked that we look at the retention of recruiting $410,000 as a result the executive budget. It was up to you whether you put that back in.

Chairman Carlisle suggested to put it in for negotiations in the conference committee.

Senator Heckaman: if it's not general fund, I'm fine with it.

Karlene Fine went over the last section of the bill.
1) Core Library
2) Additional FTE
3) Transfer to HIF
4) Grants to the Lignite Research Council. They had requested $10M, $5M is in the bill right now.

Chairman Carlisle: We will meet on 1358, 1432, 1443 but as I understand it, we have the appropriate parts out of those bills into HB 1014.

Alexis Baxley, ND Petroleum Council: Right now we'd be in oppositions to the amendments Lynn proposed (HB 1358). The discussions that we had in the policy committee, those original 60 days were put in so the company would have to do their pneumatic testing and then only have to submit that paperwork once. That 60 days would provide the buffer time zone to make adjustments. It was also an understanding our understanding that those initial certificates were not meant to be a permitting process or be approved that those rules would come from the industrial commission following that study but this was a way to guarantee that those things were being looked at and done until we could get rules based on that study in place.

Chairman Carlisle asked if Alexis and Lynn could work together to figure out if there is a doable compromise.

Senator Heckaman: When I visited with the members of the committee, Senator Laffen's name came up as a sponsor of the amendment.

Alexis Baxley: The sponsor of the bill brought the amendments in but Senator Laffen helped provide the language on the construction drawings.

Senator Holmberg: I thought what we were doing is we wanted to make sure Adam Mathiak had the package on HB 1014 but then we would come back to these other three ancillary bills next week.

Chairman Carlisle adjourned the subcommittee.

2015 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee
Harvest Room, State Capitol

HB 1432
4/6/2015
Job # 25850

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

A BILL for an Act regarding Federal environmental regulations impacting the states' agriculture, energy & oil production (Do Pass as Amended)

Minutes: Attachment # 1

Chairman Holmberg called the committee to order on Monday, April 06, 2015 in the afternoon in regards to HB 1432. All committee members were present. Alex Cronquist, Legislative Council and Becky Deichert, OMB were also present.

Senator Wanzek presented the Testimony Attached # 1, amendment # 15.0961.04008. and explained the amendments. Energy wants to stay involved with this. Part of the amendment also provides an amendment on which the expenditures will be reimbursed. The only thing that has been brought to my attention, if I could make a motion to amend this amendment, on page 1, section 1, subsection 2, the 3rd sentence; where it starts with impact the state's agricultural, energy, or oil production sectors and advise the attorney general, we want to change the word "advise" to "confer with" the attorney general. Can I further amend this amendment? On page 1, section1, subsection 2, the 3rd sentence, the word "advise" and this is a request of the attorney general's office and change that "advise" to "confer with".

Senator Wanzek: I move that we amend that word "advise" to "confer with". 2nd by Senator Carlisle.

Chairman Holmberg: If there is a problem with it I'll pull it over because I am not going to have you vote on things if we don't understand them.

Senator Heckaman: we are just going to vote on changing "advise" to "confer", is that right?

Chairman Holmberg: All in favor to change "advise" to "confer" say aye. It carried.

Senator Wanzek moved amendment as amended, 04008. 2nd by Senator Carlisle.

Senator Heckaman: I have a couple concerns, the money should go right to the ag office, I look at subsection 2, where it says; "f the attorney general elects to participate", I don't know if we have strong enough language in here to do anything. Because if the attorney general's office decides that this isn't worth litigating, we're no place. I don't know if that's the right way to write that language. I am not sure the funding should be in the ag commissioner's office. I think it should be in the attorney general's office.(5.54)

Senator Mathern: What is the rationale for all of the legislators to be appointed by the Republicans. Why didn't you let the Democrats appoint the Democrats?

Senator Wanzek: There is one member of the legislative assembly from the minority party, I guess by the chairman of the legislative management, is that the objection?

Senator Mathern: That's pretty clearly one House. It doesn't look good.

Senator Wanzek: Is that making the assumption that the Republicans will always be in control?

Senator Mathern: As long as this bill's in place. I'm sure if you wanted this bill to go down. I think there's a general problem, you know, biting the hand that feeds you. I think there is an added problem not giving the minority it's ability to select it's member.

Chairman Holmberg: That in part would depend upon the attitude of the chairman, and I've had the opportunity to serve it two years and I never made any appointments, even though there was a reference to the chairman appointing. I always got the lists from either the House or Senate minority leader. I never appointed someone over their head. Nor should a chairman do that.

Senator Wanzek I didn't dwell on the makeup of the committee that much other than the oil, the energy and agriculture people that are in there, and that's the ones that are the most important in my opinion. It gives them a means of coming together to address those issues. And there are some significant federal rulings and issues coming down that are going to have a very, could potentially have a very negative impact on agriculture and we want to be prepared and have some resources to address that. Some of those resources wouldn't be just for judicial action, it would be for review and investigative and research necessary to figure out what might be the right course of action to take. (8.46)

Senator Heckaman: What happens if the review committee says we need to go into litigation with the federal government and the attorney general's office says "No" because it says "if the attorney general elects". You don't have the power, you aren't giving the power to the committee to direct the attorney general to go into litigation and I just don't know if that section is strong enough to where you want to be.

Senator Wanzek: That may be. The way I look at it. It is going to provide that platform for those people to put pressure on doing something where we don't have it today. Ultimately we have to trust that the attorney general, if this group is researching it and they come to that conclusion, that' going to put a tremendous amount of public opinion pressure on any attorney general that's in office. However, the attorney general might have good legal

reasons why he might be able to sway us why this might not be the right approach. I understand what you are saying, but it still gives this group that have the concern about federal regulations that are coming down to be able collectively address them

V. Chairman Krebsbach: Is there further discussion on the amendment? By the way we did take a vote to further amend, but have we voted on the overall amendment.

Senator Wanzek: I believe we haven't. We're just deliberating the amendment.

V. Chairman Krebsbach; we are deliberating so we have not taken action on it. Alice tells me that the motion was to move the amendment with the change. We do have it properly before us.

Senator Wanzek: This bill has been a project in progress as we've been going. And I know there's been a lot of strong feelings one way or another. We are at a point that everybody can work with it, if there is further review, there will be conference committee. It seems like we have everybody on the same page, the attorney general's office, the Ag. Commissioner's office, the energy people and the agriculture people for the most part seem to be supportive. it's not done yet. This could be in a conference committee.

V. Chairman Krebsbach: Any further discussion? All those in favor of the amendment, say aye. It carried. The amendment is adopted. So we have before us amended House Bill Second Engrossment of the Reengrossed House Bill 1432. Are we ready for a motion?

Senator Wanzek I move a Do Pass as Amended on 1432. 2nd by Senator Carlisle.

V. Chairman Krebsbach: Any discussion on that motion?

Senator Heckaman: I am going to oppose this motion just because I think we don't have a strong enough bill here yet for what we need to do and I think, certainly, I know I will probably go into conference Committee, right now, what we have sitting before us, I can't support.

V. Chairman Krebsbach: Any other discussion? Call the roll on a Do Pass as Amended on HB 1432.

A Roll Call vote was taken. Yea: 10; Nay: 3; Absent: 0. Senator Wanzek will carry the bill.

The hearing was closed on HB 1432.

15.0961.04008
Title.

Prepared by the Legislative Council staff for
Senator Wanzek
March 31, 2015

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1432

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review committee.

1. The federal environmental law impact review committee consists of:
   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and advise the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

3. a. Any member of the legislative assembly serving on the committee is entitled to compensation at the rate provided for attendance at interim committee meetings and reimbursement for expenses, as provided by law for state officers, if the member is attending meetings of the committee or performing duties directed by the committee.

b. The compensation and reimbursement of expenses, as provided for in this subsection, are payable by the legislative council.

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. Any expenses incurred by the agriculture commissioner or by the federal environmental law impact review committee in meeting the requirements of section 1 of this Act must be paid by the agriculture commissioner from the federal environmental law impact fund.

2. If the attorney general elects to participate in an administrative or judicial process, pertaining to federal environmental legislation or regulations, which detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

3. For purposes of this section, "expenses" include administrative costs, consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Gifts - Grants - Donations.

The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

SECTION 4. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:

a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and

b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $1,500,000, or so much of the sum as may be necessary, which the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly

1 of 3

15.0961.04009
Title.06000

Prepared by the Legislative Council staff for
Senate Appropriations Committee
April 7, 2015

TO
4/7/15

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1432

In lieu of the amendments adopted by the Senate as printed on pages 888-890 of the Senate Journal, Engrossed House Bill No. 1432 is amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

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   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and confer

with the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

3. a. Any member of the legislative assembly serving on the committee is entitled to compensation at the rate provided for attendance at interim committee meetings and reimbursement for expenses, as provided by law for state officers, if the member is attending meetings of the committee or performing duties directed by the committee.

   b. The compensation and reimbursement of expenses, as provided for in this subsection, are payable by the legislative council.

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2. If the attorney general elects to participate in an administrative or judicial process, pertaining to federal environmental legislation or regulations, which detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

3. For purposes of this section, "expenses" include administrative costs, consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

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b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $1,500,000, or so much of the sum as may be necessary, which the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly

Date: 4-6-15
Roll Call Vote #: 1

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

Senate Appropriations Committee

☐ Subcommittee

Amendment LC# or Description: 15.0961.04008 with further amended "to confer"

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 Wanzek Seconded By Carlisle

Senators	Yes	No	Senators	Yes	No
Chairman Holmberg			Senator Heckaman		
Senator Bowman			Senator Mathern		
Senator Krebsbach			Senator O'Connell		
Senator Carlisle			Senator Robinson		
Senator Sorvaag					
Senator G. Lee					
Senator Kilzer					
Senator Erbele					
Senator Wanzek					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice Vote - Carried

Date: 4-6-15
Roll Call Vote #: 3

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1432

Senate Appropriations 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 Wanzek Seconded By Carlisle

Senators	Yes	No	Senators	Yes	No
Chairman Holmberg	✓		Senator Heckaman		✓
Senator Bowman	✓		Senator Mathern		✓
Senator Krebsbach	✓		Senator O'Connell		✓
Senator Carlisle	✓		Senator Robinson	✓	
Senator Sorvaag	✓				
Senator G. Lee	✓				
Senator Kilzer	✓				
Senator Erbele	✓				
Senator Wanzek	✓				

Total (Yes) 10 No 3

Absent 0

Floor Assignment ~~Wanzek~~ Wanzek

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

REPORT OF STANDING COMMITTEE

HB 1432, as reengrossed and amended: Appropriations Committee (Sen. Holmberg, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). Reengrossed HB 1432, as amended, was placed on the Sixth order on the calendar.

In lieu of the amendments adopted by the Senate as printed on pages 888-890 of the Senate Journal, Engrossed House Bill No. 1432 is amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review committee.

1. The federal environmental law impact review committee consists of:
   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and confer with the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

3. a. Any member of the legislative assembly serving on the committee is entitled to compensation at the rate provided for attendance at interim committee meetings and reimbursement for expenses, as provided by law for state officers, if the member is attending meetings of the committee or performing duties directed by the committee.

   b. The compensation and reimbursement of expenses, as provided for in this subsection, are payable by the legislative council.

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. Any expenses incurred by the agriculture commissioner or by the federal environmental law impact review committee in meeting the requirements of section 1 of this Act must be paid by the agriculture commissioner from the federal environmental law impact fund.

2. If the attorney general elects to participate in an administrative or judicial process, pertaining to federal environmental legislation or regulations, which detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

3. For purposes of this section, "expenses" include administrative costs, consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Gifts - Grants - Donations.

The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

SECTION 4. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:

   a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and

   b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $1,500,000, or so much of the sum as may be necessary, which the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly

2015 TESTIMONY

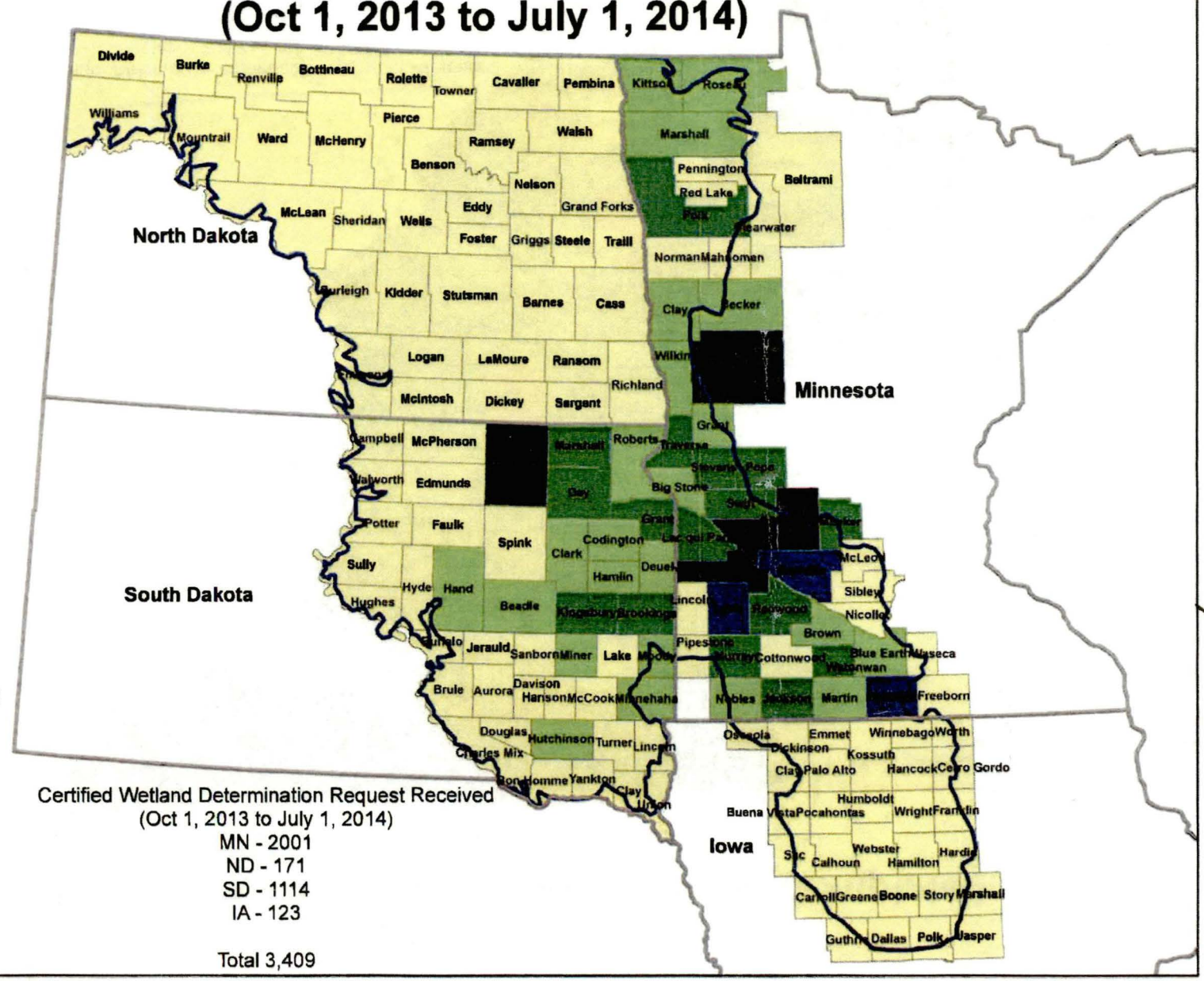
HB 1432

U.S. DEPARTMENT OF AGRICULTURE

NATURAL RESOURCES CONSERVATION SERVICE

Prairie Pothole Region

Certified Wetland Determination Request Received (Oct 1, 2013 to July 1, 2014)



Legend

- NCWCI_State_boundaries
- North_Central_wetland
- NCWCI_Wetland_Counties

Certified Wetlands Received

Sheet1$.TotFyReq12

- Less than 25
- 26 - 50
- 51 - 75
- 76 - 100
- Greater than 100

Source: USDA-NRCS
South Dakota Area Office
Crystal Runge, GIS Specialist
Date: July 2014
Projection: UTM Zone 14N

Certified Wetland Determination Request Received
(Oct 1, 2013 to July 1, 2014)
MN - 2001
ND - 171
SD - 1114
IA - 123

Total 3,409

1

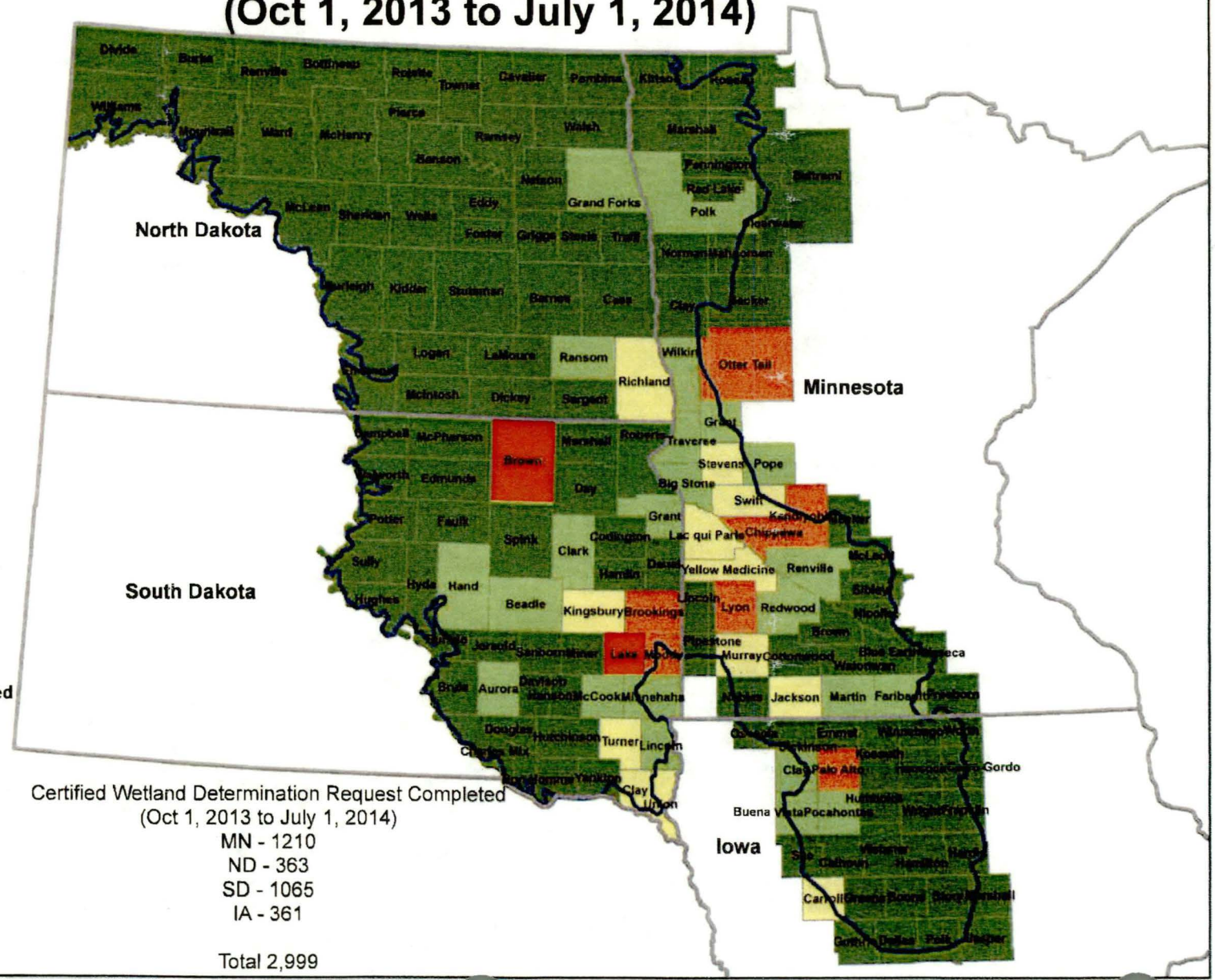
H B 1432
Rep. Brabandt
2/5/15
#1a

U.S. DEPARTMENT OF AGRICULTURE

NATURAL RESOURCES CONSERVATION SERVICE

Prairie Pothole Region

Certified Wetland Determination Request Completed (Oct 1, 2013 to July 1, 2014)



Source: USDA-NRCS
South Dakota Area Office
Crystal Runge, GIS Specialist
Date: July 2014
Projection: UTM Zone 14N

Certified Wetland Determination Request Completed
(Oct 1, 2013 to July 1, 2014)
MN - 1210
ND - 363
SD - 1065
IA - 361

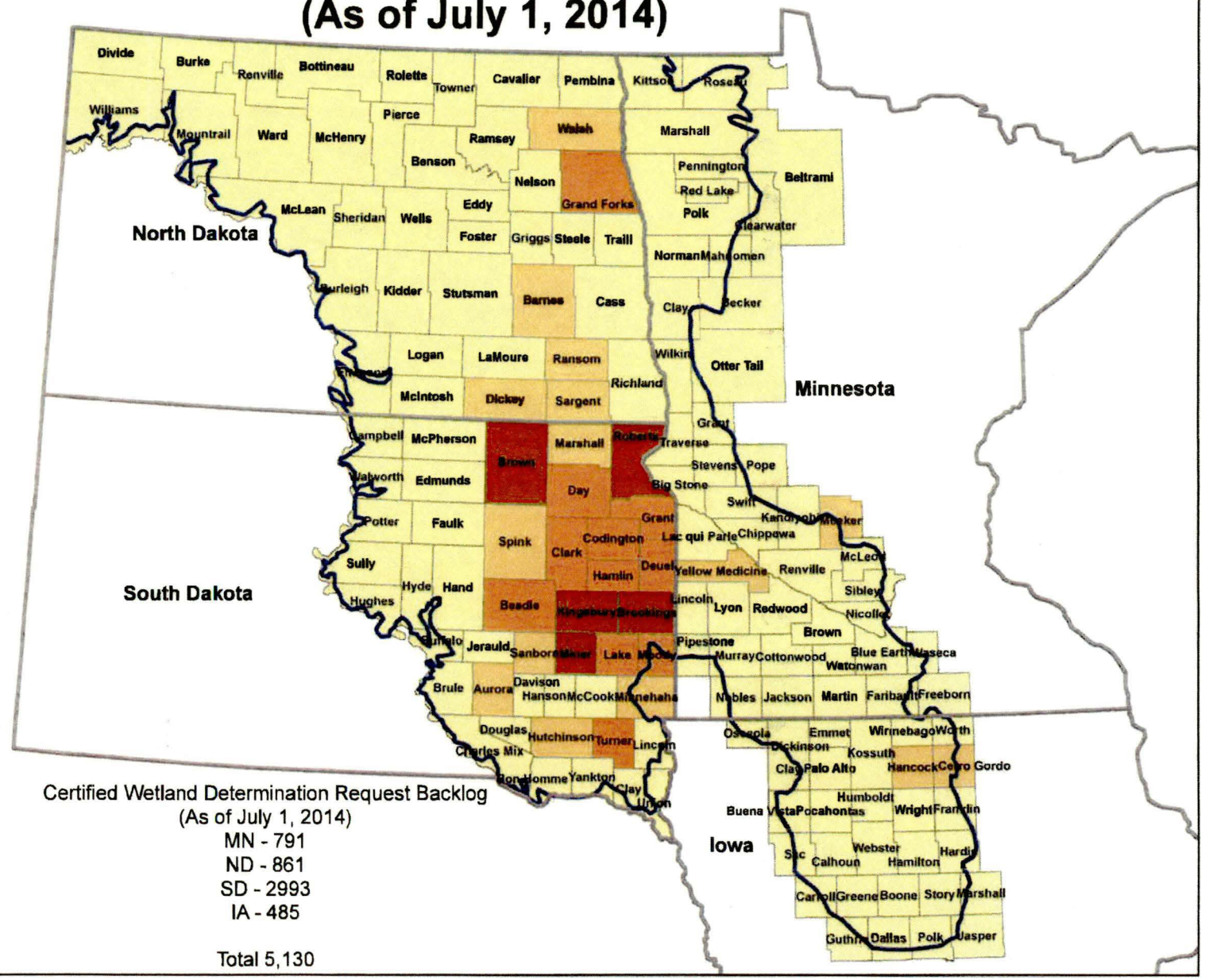
Total 2,999

U.S. DEPARTMENT OF AGRICULTURE

NATURAL RESOURCES CONSERVATION SERVICE

Prairie Pothole Region

Certified Wetland Determination Request Backlog (As of July 1, 2014)



Legend

- NCWCI_State_boundaries
- North_Central_wetland
- NCWCI_Wetland_Counties

Certified Wetlands Backlog

Sheet1$.Jul1Back1

- Less than 50
- 51 - 100
- 101 -150
- 151 - 200
- Greater than 200

Source: USDA-NRCS
South Dakota Area Office
Crystal Runge, GIS Specialist
Date: July 2014
Projection: UTM Zone 14N

Certified Wetland Determination Request Backlog
(As of July 1, 2014)
MN - 791
ND - 861
SD - 2993
IA - 485

Total 5,130

W

2/5/15 #16

15.0961.02001
Title.

Prepared by the Legislative Council staff for
Representative Brandenburg
February 2, 2015

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1432

Page 1, line 18, remove "and"

Page 1, line 19, after "council" insert: "; and

l. One individual appointed by the North Dakota stockmen's association"

Page 2, line 9, after "in" insert "administrative or judicial matters, including"

Page 2, line 9, after "litigation" insert an underscored comma

Renumber accordingly

2/5/15 #2

HB 1432

Good morning, Chairman Johnson and members of the House Agriculture Committee. For the record, I am Sherry Schulz of the North Dakota Stockmen's Association. I am appearing here on behalf of Julie Ellingson, who is representing our state at national cattle industry meetings this week. She asked for me to present this to you.

We appear here in support of HB 1432.

Farmers and ranchers are everyday environmentalists, working hard to improve the land, the water, the air and the other natural resources entrusted in their care. They do so because it is the right thing to do and how they make their living. Still, the agricultural industry continues to come under fire from activist groups and the federal government, which has imposed – and continues to propose – burdensome and costly regulations with little or no scientific evidence.

In recent years, the North Dakota Stockmen's Association has been actively pushing back on issues like the Waters of the United States proposed rule, the Interpretative Rule, the Spill Prevention Control and Countermeasure Rule and others to try and shape them so they do not have a devastating effect on the industry with little or no benefit to the environment. We have an in-house Environmental Services division within our association and stand poised and ready to serve on the Environmental Impact Litigation Advisory Committee with other industry stakeholders if this bill

passes. The beef cattle industry is one of the economic pillars of the state, and we appreciate Rep. Brandenburg adding one of our representatives to the committee to provide an animal agriculture perspective.

Thank you for the opportunity to comment. Julie Ellingson will be back next week and happy to answer any questions you have.

#3a

NORTH DAKOTA
PETROLEUM
COUNCIL
West Broadway, Ste. 200 | P.O. Box 1395 | Bismarck, ND 58501-1395
223.6380 | ndpc@ndoil.org | www.NDOil.org

House Bill 1432
Testimony of Kari Cutting
House Agriculture Committee
February 5, 2015

Representative Brandenburg and members of the committee, my name is Kari Cutting, vice president of the North Dakota Petroleum Council. The North Dakota Petroleum Council (NDPC) represents more than 550 companies directly employing 65,000 employee in North Dakota 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 support of House Bill 1432.

House Bill 1432 will be instrumental in maintaining the rights of the State of North Dakota and its citizens against the onslaught of sue and settle activity that continues to force Federal agencies into actions and deadlines without appropriate citizen input. Sue and Settle cases affect many North Dakota industries, while predominantly threatening to have the greatest impact on Agriculture in our state. For background information on sue and settle, I submit the U.S. Chamber of Commerce report on the subject, its implications and costs to the American taxpayer.

Between 2009 and 2012, a total of 71 lawsuits were settled under circumstances of sue and settle. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with Fish and Wildlife settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted into more than 100 new federal rules, many of which are major rules with compliance costs of more than $100 million annually. Since 2009, regulatory requirements representing as much as $488 billion in new costs have been imposed by the agencies of the federal government. Some that affect the State of North Dakota include: Regional Haze Implementation Rule - $2.16 billion nationwide cost to comply; Revision to the Particulate Matter Ambient Air Quality Standards – up to $350 million nationwide annually;

and Reconsideration of the 2008 Ozone Rule—up to $90 billion national annual cost.

In addition, similar sue and settle activities have taken both the Clean Air Act and the Endangered Species Act hostage. The Environmental Protection Agency (EPA) is set to redefine Waters of the United States, regulations that may require farmers to get permits for work for which they have long been exempt.

Similarly, the U.S. FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group, requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act. Since January 1, 2014, the FWS has listed the following species that impact North Dakota agriculture and energy industries: Dakota Skipper and Poweshiek Skipperling. Another proposed species, the Monarch Butterfly is expected to have a FWS decision this year. If farming activities occur in the habitat of these butterflies, even simple activities such as fencing could be in violation of the Endangered Species Act, subject to enforcement action. The real issue here is that decisions are being made in the absence of thorough scientific population studies. Why? Sue and Settle has led to a huge administrative burden and impossible task for the agencies to meet court ordered deadlines and requiring them to circumvent procedures and to meet the deadlines. In other words, sue and settle cases and other lawsuits are effectively driving the regulatory agenda without time for peer review scientific research or scientific evaluation.

While the U.S. Environmental Protection Agency (EPA) and the Fish and Wildlife Service have been leaders in settling—rather than defending- by the use of scientific research, cases brought by advocacy groups, other agencies, including the U.S. Forest Service, the Bureau of Land Management, the U.S. Department of Agriculture, and the U.S. Department of Commerce, have also agreed to this tactic.

Chairman ~~Brandenburg~~ Johnson and members of the committee, NDPC applauds your actions to establish the Environmental Impact Litigation advisory committee and to appropriate funds through the Environmental Litigation Fund. The establishment of this committee is yet another example of North Dakota leading the way for the rest of the country in citizen's and State's rights.

HB 1432 Kari Cutting 2/5/15 #36

SUE AND SETTLE

Regulating Behind Closed Doors

U.S. CHAMBER OF COMMERCE

ID 1732 A-36

Reconsideration of 2008 Ozone NAAQS

$738 million

Boiler MACT Rule

Lead RRP Rule

$2.16 billion

Regional Haze Implementation Rules

Utility MACT Rule

$9.6 billion

Standards for Cooling Water Intake Structures

$90 billion

$18 billion

Florida Nutrient Standards for Estuaries and Flowing Waters

Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

$3 billion

$350 million

TMDL for Chesapeake Bay

$500 million

Oil and Natural Gas MACT Rule

$384 million

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

HB 1432

#36

2/5/15

A Report on

SUE AND SETTLE

REGULATING BEHIND CLOSED DOORS

U.S. Chamber of Commerce

May 2013

Acknowledgments

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Richard An, Legal Intern

Andrew Marsh, Legal Intern

The lead authors and the project team are from the U.S. Chamber Environment, Technology & Regulatory Affairs Division.

Recognition

The U.S. Chamber of Commerce thanks William Yeatman, assistant director of the Center for Energy and Environment at the Competitive Enterprise Institute, for helping us formulate an additional methodology and the development of a database of sue and settle cases. The database was used to check the validity of, and supplement, the Chamber's database of cases.

Contents

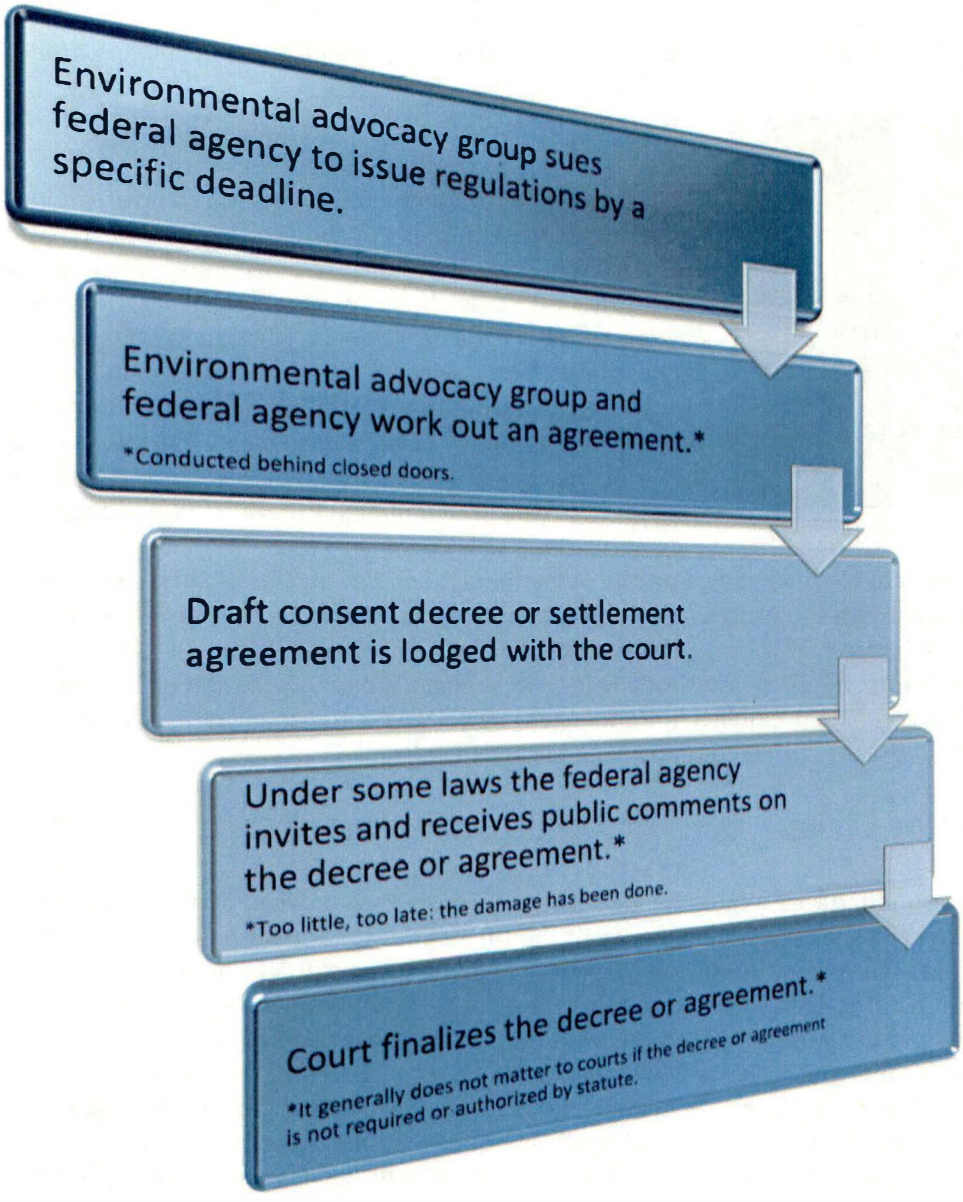
Introduction

What Is Sue and Settle?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

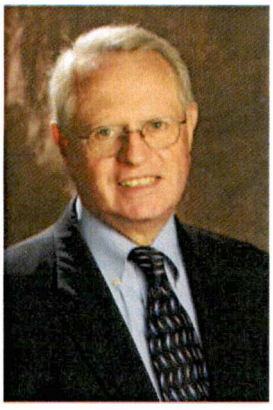
As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget and the public, and compliance with executive orders—at the critical moment when the agency's new obligation is created.

What Is the Sue and Settle Process?



Executive Summary

William L. Kovacs
U.S. Chamber Senior Vice President for Environment, Technology & Regulatory Affairs



Background

The U.S. Chamber of Commerce undertook an investigation of the sue and settle process because of the growing number of complaints by the business community that it was being entirely shut out of regulatory decisions by key federal agencies. While the U.S. Environmental Protection Agency (EPA) and the Fish and Wildlife Service have been leaders in settling—rather than defending—cases brought by advocacy groups, other agencies, including the U.S. Forest Service, the Bureau of Land Management, the National Park Service, the Army Corps of Engineers, the U.S. Department of Agriculture, and the U.S. Department of Commerce, have also agreed to this tactic.

As discussed in our report *Sue and Settle: Regulating Behind Closed Doors*, we found that under this sue and settle process, EPA chose at some point not to defend itself in lawsuits brought by special interest advocacy groups at least 60 times between 2009 and 2012.[1] In each case, it agreed to settlements on terms favorable to those groups. These settlements directly resulted in EPA agreeing to publish more than 100 new regulations,[2] many of which impose compliance costs in the tens of millions and even billions of dollars.[3]

Lack of Agency Transparency On Sue and Settle Cases

We also found that when EPA was asked by Congress to provide information about the notices of intent to sue received by the agency or the petitions for rulemaking served on EPA by private parties, the agency could not—or would not—provide the information. When such lawsuits were initiated, EPA does not disclose the notice of the lawsuit or its filing until a settlement agreement had been worked out with the private parties and filed with the court. As a result, court orders were entered, binding the agency to undertake a specific rulemaking within a specific and usually very short time period, notwithstanding whether the agency actually had sufficient time to perform the obligations imposed by the court order. In response to Congress, EPA made it clear that it is "unable to accommodate this [congressional] request to make all petitions, notices, and requests for agency action publicly accessible in one location on the

[1] A description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.
[2] *See* pages 43–45 for the list of rules and agency actions resulting from sue and settle cases.
[3] For a description of the costs of selected rules, see discussion and notes on pages 14–22.

Internet."[4] Specifically, "the EPA does not have a centralized process to individually characterize and sort all the different types of notices of intent the agency receives."[5] Imagine what would happen if a state or local government, a school district, or a publicly traded company claimed to have no knowledge about lawsuits brought against it, the number of cases settled by its lawyers, or the number of agreements that obligated it to undertake extensive new action? It is unimaginable that such an entity would be able to claim ignorance of lawsuits that significantly impact it or to be unable to provide its citizens, customers, and regulatory agencies with required information. And yet, the position of EPA has been that it would not be bothered to track settlements that impose significant new rules and requirements on the country or to notify the public about them in any systematic fashion.[6]

SUE AND SETTLE SKIRTS PROCEDURAL SAFEGUARDS ON THE RULEMAKING PROCESS

The practice of agencies entering into voluntary agreements with private parties to issue specific rulemaking requirements also severely undercuts agency compliance with the Administrative Procedure Act. The Administrative Procedure Act is designed to promote transparency and public participation in the rulemaking process. Because the substance of a sue and settle agreement has been fully negotiated between the agency and the advocacy group before the public has any opportunity to see it—even in those situations where the agency allows public comment on the draft agreement—the outcome of the rulemaking is essentially set. Sue and settle allows EPA to avoid the normal protections built into the rulemaking process, such as review by OMB, reviews under several executive orders, and reviews by the public and the regulated community. Further, the principles of federalism are also flagrantly ignored when EPA uses the conditions in sue and settle agreements to set aside state-administered programs, such as the Regional Haze program. With no public input, EPA binds itself to the demands of a private entity with special interests that may be adverse to the public interest, especially in the areas of project development and job creation. Sue and settle activities deny the public its most basic of all rights in the regulatory process: the right to weigh in on a proposed regulatory decision before agency action occurs.

SUE AND SETTLE CREATES TENSION BETWEEN THE BRANCHES OF GOVERNMENT

At its heart, the sue and settle issue is a situation in which the executive branch expands the authority of agencies at the expense of congressional oversight. This occurs with at least the implicit cooperation of the courts, which typically rubber stamp proposed settlement agreements even though they enable private parties to dictate agency policy. Congress is harmed because its control over appropriations diminishes. Sue and settle deals (and not Congress) increasingly are what drive an agency's budget concerns. Additionally, the

[4] Letter from Arvin Ganesan, EPA Associate Administrator for the Office of Congressional and Intergovernmental Affairs, to Hon. Fred Upton, Chairman, House Committee on Energy and Commerce (June 12, 2012) at 2.
[5] *Id.*
[6] It is our understanding that EPA has very recently begun to disclose on its website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be required by statute and not just be a voluntary measure. Moreover, agencies such as EPA also need to provide public notice of the filing of a complaint and/or petitions for rulemaking.

implementation of congressionally directed policies is now reprioritized by court orders that the agency asks the court to issue. Once the court approves the consent decree or settlement agreement, EPA is free to tell Congress "we are acting under court order and we must publish a new regulation."

Sue and Settle Migrates To Other Statutes?

A major concern is that the sue and settle tactic, which has been so effective in removing control over the rulemaking process from Congress—and placing it instead with private parties under the supervision of federal courts—will spread to other complex statutes that have statutorily imposed dates for issuing regulations, such as Dodd-Frank or Obamacare. On April 22, 2013, the U.S. District Court for the Northern District of California, which has been very active in sue and settle cases, issued an order in a Food Safety Modernization Act case that sets in motion a new process to bring sue and settle actions under Section 706 of the Administrative Procedure Act. In *Center for Food Safety v. Hamburg*,[7] the court recognized a statutorily imposed deadline, but also recognized that food safety is not always served by rushing a regulation to finality. In this instance, the court ordered the parties to "arrive at a mutually acceptable schedule" because "it will behoove the parties to attempt to cooperate on this endeavor, as any decision by the court will necessarily be arbitrary. The parties are hereby ORDERED to meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction." With a new structure in place that uses the Administrative Procedure Act as a basis for citizen suits, private interest groups and agencies could—without use of any other citizen suit provision—negotiate private arrangements for how an agency will proceed with a new regulation.

The Importance of Fixing the Sue and Settle Problem

Why is it so important to fix the sue and settle process? Congress's ability to act on or undertake oversight of the executive branch is diminished and perhaps eliminated through the private agreements between agencies and private parties. Rulemaking in secret, a process that Congress abandoned 65 years ago when it passed the Administrative Procedure Act, is dangerous because it allows private parties and willing agencies to set national policy out of the light of public scrutiny and the procedural safeguards of the Administrative Procedure Act.

Perhaps the most significant impact of these sue and settle agreements is that by freely giving away its discretion in order to satisfy private parties, an agency uses congressionally appropriated funds to achieve the demands of private parties. This happens even though there are congressional appropriations specifying the use of such funds. In essence, the agency intentionally transforms itself from an independent actor that has discretion to perform duties in a manner best serving the public interest into an actor subservient to the binding terms of the settlement agreements. The magnitude and serious consequences of the sue and settle problem have recently been recognized by at least one court, when it set aside a sue and settle

[7] *Center for Food Safety v. Hamburg*, No. C 12-4529 PJH, slip op. at 10 (N.D. Cal. Apr. 22, 2013).

agreement that would "promulgate a substantial and permanent amendment" to an agency rule.[8]

THE MOST EFFECTIVE SOLUTION TO SUE AND SETTLE LIES WITH CONGRESS

In the final analysis, Congress is also to blame for letting the sue and settle process take on a life free of congressional review. Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes.[9] Because citizen suit provisions were included within the environmental titles of the U.S. Code, Congress placed jurisdiction and oversight of citizen suits with congressional authorizing committees rather than with the House and Senate Judiciary Committees. Despite the fact that the sole purpose of citizen suits is to grant access to the federal courts, which is the primary jurisdiction of the Judiciary committees, jurisdiction was instead placed in committees that had no expertise in the subject matter. Accordingly, no meaningful oversight has been conducted in more than four decades over the use and abuse of citizen suit activity, such as sue and settle.

Fortunately, however, in 2012, the House Judiciary Committee began looking at the abuses of the sue and settle process. It introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012, which the House passed as part of a larger bill. Under the bill, before the agency and outside groups can file a proposed consent decree or settlement agreement with a court, the proposed consent decree or settlement has to be published in the *Federal Register* for 60 days to allow for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. It is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

[8] *Conservation Northwest v. Sherman*, No. 11-35729, slip op. at 15 (9th Cir. Apr. 25, 2013) ("Because the consent decree in this case allowed the Agencies effectively to promulgate a substantial and permanent amendment to [a regulation] without having followed statutorily required procedures, it was improper.").

[9] *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Resource Conservation and Recovery Act, 42 U.S.C. § 6972.

SUE AND SETTLE

REGULATING BEHIND CLOSED DOORS

May 2013

INTRODUCTION

Over the past several years, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements as a technique to shape agencies' regulatory agendas. The overwhelming majority of instances of sue and settle actions from 2009 to 2012 have occurred in the environmental regulatory context. These actions were primarily brought under the citizen suit provisions of the Clean Air Act, the Clean Water Act, and the Endangered Species Act.[10] The citizen suit provisions in environmental statutes such as the Clean Air Act provide advocacy groups with the most direct and straightforward path to obtain judicial review of an agency's failure to meet a statutory deadline or perform such other duty a plaintiff group believes is necessary and desirable.[11] From a new wave of endangered species listings to the EPA's federalization of the Chesapeake Bay cleanup program, to the federal takeover of regional haze programs, recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interest groups.

Beginning in 2011, the U.S. Chamber of Commerce began working to better understand the full scope and consequences of the sue and settle issue. We set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. Compiling information on sue and settle agreements turned out to be labor intensive and time consuming. Many such agreements are not clearly disclosed to the

[10] Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Endangered Species Act, 16 U.S.C. §1540(g).

[11] Interest groups have traditionally also obtained judicial review of agency action (or inaction) through section 706 of the Administrative Procedure Act (APA), even where the underlying statute does not contain an explicit citizen suit provision. *See, e.g., Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971)(Court of Appeals for the D.C. Circuit holds that an agency's compliance with NEPA is reviewable, and that the agency is not entitled to assert that it has wide discretion in performing the procedural duties required by NEPA). APA-based citizen suits to enforce or expand the requirements of regulatory programs developed under recent laws such as Dodd-Frank and the Affordable Care Act, and the potential for advocacy group-driven sue and settle agreements in areas like financial regulation, healthcare, transportation, and immigration are a growing likelihood. *See Center for Food Safety v. Hamburg*, No. C 12-4529 (PJH)(N.D. Cal. Apr. 22, 2013)(nonprofit group sued the Food and Drug Administration under section 706 of the APA to compel a rulemaking on a specific deadline. Despite agency's assertion that the "issuance of the required regulations on a rushed or hurried basis would not help protect human health and safety," the court ordered the parties to "meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction.").

public or other parties until after they have been signed by a judge and the agency has legally bound itself to follow the settlement terms. Even then, agencies do not maintain lists of their sue and settle cases that are publicly available.

Using a combination of approaches, the Chamber was able to compile a database of sue and settle cases and their subsequent rulemaking outcomes. This combined database, which is summarized at the end of this report, indicates the sue and settle cases for the current administration. The Chamber also developed data on the use of the tactic during earlier administrations.

WHAT IS SUE AND SETTLE?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.[12]

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget (OMB) and other agencies, reviews under executive orders, and review by other stakeholders—at the critical moment when the agency's new obligations are created.

Because sue and settle lawsuits bind an agency to meet a specified deadline for regulatory action—a deadline the agency often cannot meet—the agreement essentially reorders the agency's priorities and its allocation of resources. These sue and settle agreements often go beyond simply enforcing statutory deadlines and the agreements themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public. The realignment of an agency's duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

WHAT DID OUR RESEARCH REVEAL?

By using the methodologies described in Appendix A and Appendix B, the Chamber was able to compile a list of sue and settle cases that occurred between early 2009 and 2012. Because agencies are not required to notify the public when they receive notices from outside groups of

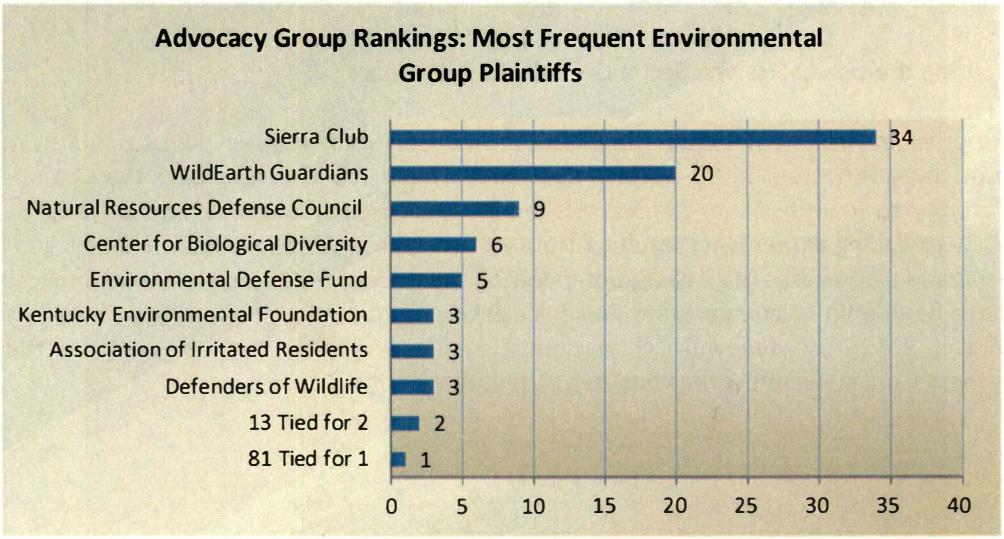
[12] The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with the court *on the same day* the advocacy group filed its complaint against EPA. *See Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C. Cir. Apr. 23, 2013).

their intent to sue, or, in many cases, when they reach tentative settlement agreements with the groups, it is often extremely difficult for an interested party (e.g., a state, a regulated business, the public) to know about a settlement until it is final and has legally binding effect on the agency. For this reason, we do not know if the list of cases we have developed is a truly complete list of recent sue and settle cases. Only the agencies themselves and the Department of Justice[13] really know this.

Number of Sue and Settle Cases

Our investigation shows that from 2009 to 2012, a total of 71 lawsuits (including one notice of intent to sue) were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber's definition. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service (FWS) settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules with estimated compliance costs of more than $100 million annually.

Which Advocacy Groups Use the Sue and Settle Process the Most?

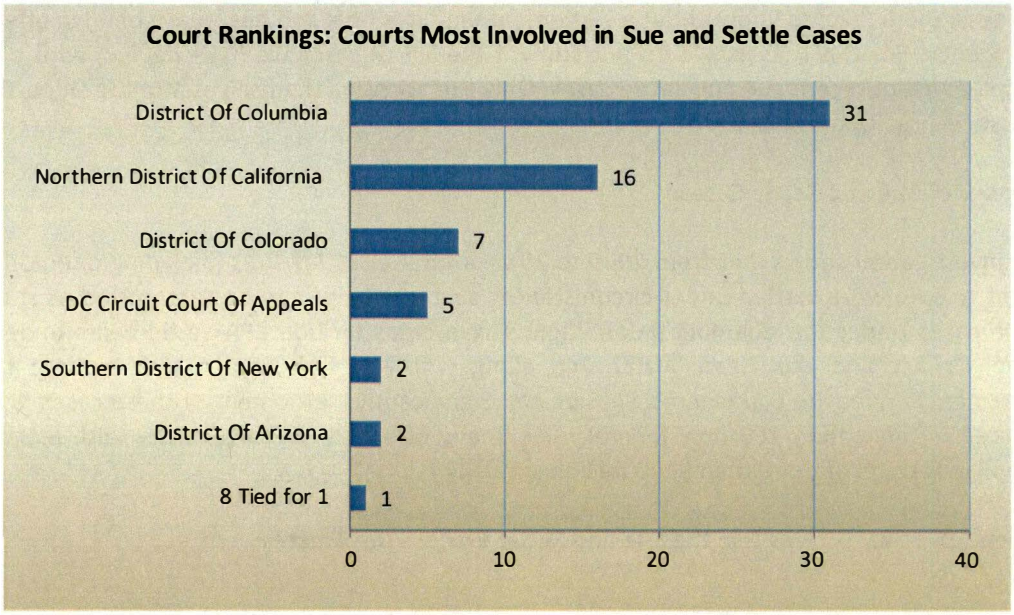


Several environmental advocacy groups have made the sue and settle process a significant part of their legal strategy. By filing lawsuits covering significant EPA rulemakings and regulatory initiatives, and then quickly settling, these groups have been able to circumvent the normal rulemaking process and effect immediate regulatory action with the consent of the agencies themselves.[14]

[13] Virtually all lawsuits against federal agencies are handled by U.S. Department of Justice attorneys. In all of the sue and settle cases the Chamber found, the Department of Justice represented the agency.

[14] Although the Chamber was not able to compile a complete database on the extent to which advocacy groups receive attorney's fees from the federal government, a review of a portion of the Chamber's database revealed that attorney's fees

Which Courts Handle the Most Sue and Settle Cases?

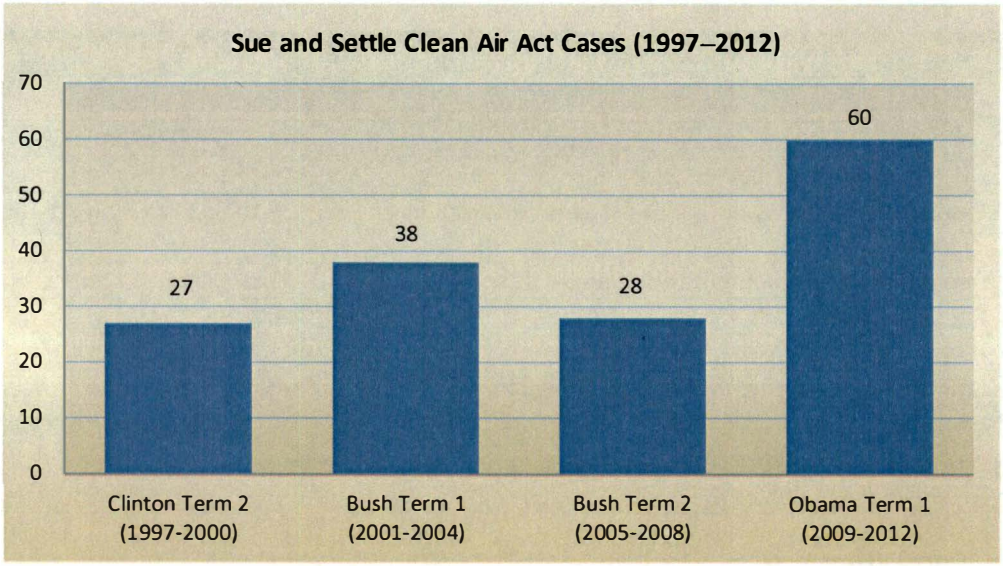


Comparing the Use of Sue and Settle Over the Past 15 Years

Unlike other environmental laws, the Clean Air Act specifically requires EPA to publish notices of draft consent decrees in the *Federal Register*.[15] These public notices gave the Chamber the opportunity to identify Clean Air Act settlement agreements/consent decrees going back to 1997. By excluding agreements resulting from enforcement actions, permitting cases, and other non-sue and settle cases (e.g., cases not involving the issuance of rules of general applicability), we have been able to compare the Clean Air Act sue and settle cases that occurred between 1997 and 2012. The following chart compares Clean Air Act sue and settle settlement agreements and consent decrees finalized during that period.

were awarded in at least 65% (49 of 71) of the cases. These fees are not paid by the agency itself, but are paid from the federal Judgment Fund. In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas.

[15] Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), provides that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . the Administrator shall provide a reasonable opportunity by notice in the *Federal Register* to persons who are not named as parties or intervenors to the action or matter to comment in writing." Of all the other major environmental statutes, only section 122(i) of the Superfund law, (42 U.S.C. § 9622(i)) requires an equivalent public notice of a settlement agreement.



The results show that sue and settle is by no means a recent phenomenon[16] and that the tactic has been used during both Democratic and Republican administrations. To the extent that the sue and settle tactic skirts the normal notice and comment rulemaking process, with its procedural checks and balances, agencies have been willing for decades to allow sue and settle to vitiate the rulemaking requirements of the Administrative Procedure Act.[17] Moreover, our research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA action. While advocacy groups have used sue and settle much more often in recent years, both interest groups and industry have taken advantage of the tactic.

WHAT ARE THE ECONOMIC IMPLICATIONS OF OUR FINDINGS?

Since 2009, regulatory requirements representing as much as $488 billion in new costs have been imposed by the federal government.[18] By itself, EPA is responsible for adding tens of billions of dollars in new regulatory costs.[19] Significantly, more than 100 of EPA's costly new rules were the product of sue and settle agreements. The chart below highlights just ten of the most significant rules that arose from sue and settle cases:

[16] The sue and settle problem dates back at least to the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice policy memorandum, referred to as the "Meese Memo," addressing the problematic use of consent decrees and settlement agreements by the government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. *See* Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986).

[17] 5 U.S.C. Subchapter II.

[18] Sam Batkins, American Action Forum, "President Obama's $488 Billion Regulatory Burden" (September 19, 2012).

[19] *Id*. Mr. Batkins estimates the regulatory burden added by EPA in 2012 alone to be $12.1 billion.

Ten Costly Regulations Resulting From Sue and Settle Agreements		
1.	Utility MACT Rule	Up to $9.6 billion annually
2.	Lead Renovation, Repair and Painting (LRRP) Rule	Up to $500 million in first-year
3.	Oil and Natural Gas MACT Rule	Up to $738 million annually
4.	Florida Nutrient Standards for Estuaries and Flowing Waters	Up to $632 million annually
5.	Regional Haze Implementation Rules	$2.16 billion cost to comply
6.	Chesapeake Bay Clean Water Act Rules	Up to $18 billion cost to comply
7.	Boiler MACT Rule	Up to $3 billion cost to comply
8.	Standards for Cooling Water Intake Structures	Up to $384 million annually
9.	Revision to the Particulate Matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)	Up to $350 million annually
10.	Reconsideration of 2008 Ozone NAAQS	Up to $90 billion annually

1. Utility MACT Rule

In December 2008, environmental advocacy groups sued EPA, seeking to compel the agency to issue maximum achievable control technology (MACT) air quality standards for hazardous air pollutants from power plants.[20] In October 2009, EPA lodged a proposed consent decree.[21] The intervenor in the case, representing the utility industry, argued that MACT standards such as those proposed by EPA were not required by the Clean Air Act.[22]

Utility MACT (also known as the Mercury Air Toxics Standard, or MATS) is a prime example of EPA taking actions, in the wake of a sue and settle agreement, that were not mandated by the Clean Air Act. Ironically, even in this situation, where an affected party was able to intervene, EPA and the advocacy groups did not notify or consult with them about the proposed consent decree. Moreover, even though the District Court for the District of Columbia expressed some concern about the intervenor being excluded from the settlement negotiations, the court still approved the decree in the lawsuit.[23] The extremely costly Utility MACT Rule, which EPA was not previously required to issue, is estimated by EPA to cost $9.6 billion annually by 2015.[24]

2. Lead Renovation, Repair and Painting Rule for Residential Buildings

In 2008, numerous environmental groups sued EPA to challenge EPA's April 22, 2008, Lead Renovation, Repair and Painting Program (LRRP) Rule, and these suits were consolidated in the

[20] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC) (D.D.C.), filed December 18, 2008.
[21] *American Nurses Ass'n*, Defendant's Notice of Lodging of Proposed Consent Decree (Oct. 22, 2009).
[22] *American Nurses Ass'n*, Motion of Defendant-Intervenor Utility Air Regulatory Group for Summary Judgment (June 24, 2009)(Defendant-Intervenors argued that the proposed consent decree improperly limited the government's discretion because it required EPA to find that MACT standards under section 112(d) of the Clean Air Act were required, rather than issuing less burdensome standards or no standards at all).
[23] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).
[24] 77 Fed. Reg. 9,304, 9306 (Feb. 16, 2012); *see also* Letter from President Barack Obama to Speaker John Boehner (August 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."

D.C. Circuit Court of Appeals. EPA chose not to defend the suits and settled with the environmental groups on August 24, 2009. As part of the settlement agreement, EPA agreed to propose significant and specific changes to the rule, including the elimination of an "opt-out" provision that had been included in the 2008 rule. The opt-out authorized homeowners without children under six or pregnant women residing in the home to allow their contractor to forgo the use of lead-safe work practices during the renovation, repair, and/or painting activity. Removing the opt-out provision more than doubled the amount of homes subject to the LRRP rule—to an estimated 78 million—and increased the cost of the rule by $500 million per year.[25] To make matters worse, EPA underestimated the number of contractors who would have to be trained to comply with the new rule and failed to anticipate that there were too few trainers to prepare contractors by the rule's deadline.

3. Oil and Natural Gas MACT Rule

In January 2009, environmental groups sued EPA to update federal regulations limiting air emissions from oil- and gas-drilling operations. EPA settled the dispute with environmentalists on December 7, 2009. The settlement required EPA to review and update three sets of regulations: (1) new source performance standards (NSPS) for oil and gas drilling, (2) the Oil and Gas MACT standard, and (3) the air toxics "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. Despite concerns by the business community that EPA had rushed its analysis of the oil and gas industry's emissions and relied on faulty data, EPA issued final rules on August 16, 2012. These rules are estimated by the agency to impose up to $738 million in additional regulatory costs each year.[26]

4. Florida Nutrient Standards for Estuaries and Flowing Waters

Environmental groups sued EPA in July 2008 to set water quality standards in Florida that would cut down on nitrogen and phosphorous in order to reduce contamination from sewage, animal waste, and fertilizer runoff. EPA entered into a consent decree with the plaintiffs in August 2009—a consent decree that was opposed by nine industry intervenors. As part of the settlement, EPA agreed to issue numeric nutrient limits in phases. Limits for Florida's estuaries and flowing waters were proposed on December 18, 2012. Final rules are required by September 30, 2013. EPA recently approved Florida's proposed nutrient standards as substantially complying with the federal proposal. The estimated cost of the federal standards is up to $632 million per year.[27]

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[25] 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).

[26] *See* Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector – New Source Performance Standards and NESHAPS," RIN: 2060-AP76, at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2060-AP76.

[27] EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters, November 2012, at http://water.epa.gov/lawsregs/rulesregs/upload/floridafaq.pdf.

5. Regional Haze Implementation Rules

EPA's regional haze program, established decades ago by the Clean Air Act, seeks to remedy visibility impairment at federal national parks and wilderness areas. Because regional haze is an aesthetic requirement, and not a health standard, Congress emphasized that states—and not EPA—should decide which measures are most appropriate to address haze within their borders.[28] Instead, EPA has relied on settlements in cases brought by environmental advocacy groups to usurp state authority and federally impose a strict new set of emissions controls costing 10 to 20 times more that the technology chosen by the states. Beginning in 2009, advocacy groups filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state regional haze plans. In five separate consent decrees negotiated with the groups and, importantly, without notice to the states that would be affected, EPA agreed to commit itself to specific deadlines to act on the states' plans.[29] Next, on the eve of the deadlines it had agreed to, EPA determined that each of the state haze plans was in some way procedurally deficient. Because the deadlines did not give the states time to resubmit revised plans, EPA argued that it had no choice but to impose its preferred controls federally. EPA used sue and settle to reach into the state haze decision-making process and supplant the states as decision makers—despite the protections of state primacy built into the regional haze program by Congress.

As of 2012, the federal takeover of the states' regional haze programs is projected to cost eight states an estimated $2.16 billion over and above what they had been prepared to spend on visibility improvements.[30]

6. Chesapeake Bay Clean Water Act Rules

On January 5, 2009, individuals and environmental advocacy groups filed a lawsuit against EPA alleging that the agency was not taking necessary measures to protect the Chesapeake Bay.[31] On May 10, 2010, EPA and the groups entered into a settlement agreement that would require EPA to establish stringent total maximum daily load (TMDL) standards for the Bay. EPA also agreed to establish a new stormwater regime for the watershed. The U.S. District Court for the District of Columbia signed the settlement agreement on May 19, 2010.[32] The agency later cited the binding agreement as the legal basis for its expansive action on TMDLs and stormwater.[33]

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[28] *See* 42 U.S.C. § 7491 (b)(2)(A).

[29] The five consent decrees are: *Nat'l Parks Cons. Ass'n, et al. v. Jackson*, No. 1:11-cv-01548 (D.D.C. Aug 18, 2011); *Sierra Club v. Jackson*, No. 1-10-cv-02112-JEB (D.D.C. Aug. 18, 2011); *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743-CMA-MEH (D.Col. June 16, 2011); *WildEarth Guardians v. Jackson*, No. 4-09-CV02453 (N.D.Cal. Feb. 23, 2010); *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218-REB-BNB (D.Col. Oct. 28, 2010).

[30] *See* William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012)(Oklahoma was ultimately forced to comply with federally mandated SO2 controls rather than implementing fuel switching; costs for the SO2 controls were estimated to at $1.8 billion). The report is available at http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf.

[31] *Fowler v. EPA*, case 1:09-00005-CKK, Complaint (Jan. 5, 2009).

[32] *Fowler v. EPA*, Settlement Agreement (May 19, 2010).

[33] *See Clouded Waters: A Senate Report Exposing the High Cost of EPA's Water Regulations and Their Impacts on State and Local Budgets*, U.S. Senate Committee on Environment and Public Works, Minority Staff, at pp. 2-3 (June 30, 2011), available at http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f.

Several lawmakers, in a 2012 letter, argued that EPA was taking this substantive action even though it was not authorized to do so under law.[34] Further, they also argued that EPA was improperly using settlements as the regulatory authority for other Clean Water Act actions:

> We are concerned that EPA has demonstrated a disturbing trend recently, whereby EPA has been entering into settlement agreements that purport to expand federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature.
>
> One example of this practice is EPA's out-of-court settlement agreement with the Chesapeake Bay Foundation in May 2010. EPA has referred to that settlement as a basis for its establishment of a federal total maximum daily load (TMDL) for the entire 64,000 square-mile Chesapeake Bay watershed and EPA's usurpation of state authority to implement TMDLs in that watershed. EPA also has referred to that settlement as a basis for its plan to regulate stormwater from developed and redeveloped sites, which exceeds the EPA's statutory authority.[35]

The sweeping new federal program for the Chesapeake Bay is major in its scope and economic impact. The program sets land use–type limits on businesses, farms, and communities on the Bay based upon their calculated daily pollutant discharges. EPA's displacement of state authority is estimated to cost Maryland and Virginia up to $18 billion[36] to implement.

The federal takeover of the Chesapeake Bay program is unprecedented in its scope; however, by relying on the settlement agreement as the source of its regulatory authority for the TMDLs and stormwater program, EPA did not have to seek public input, explain the statutory basis for its actions in the Clean Water Act, or give stakeholders an opportunity to evaluate the science upon which the agency relies. Because the rulemakings resulted from a settlement agreement that set tight timelines for action, the public never had access to the information, which would have been necessary in order to comment effectively on the modeling and the assumptions EPA used.

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[34] Letter to EPA Administrator Lisa Jackson from House Transportation and Infrastructure Committee Chairman John L. Mica, House Water Resources and Environment Subcommittee Chairman Bob Gibbs, Senate Environment and Public Works Committee Ranking Member James Inhofe, and Senate Water and Wildlife Subcommittee Ranking Member Jeff Sessions, January 20, 2012. The date of the letter is based on the press release date, http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f and this project Vote Smart page, http://votesmart.org/public-statement/663407/letter-to-lisa-jackson-administrator-of-environmental-protection-agency-epa.

[35] "House, Senate Lawmakers Highlight Concerns with EPA Sue & Settle Tactic for Backdoor Regulation," United States Senate Committee on Environment & Public Works, Minority Office, January 20, 2012 at http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f.

[36] *See* Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (Apr. 2011); *CHESAPEAKE BAY JOURNAL*, January 2011, available at www.bayjournal.com/article.cfm?article=4002.

7. Boiler MACT Rule

In 2003, EPA and Sierra Club entered into a consent agreement that required EPA to set a MACT standard for major- and area-source boilers. In 2006, the U.S. District Court for the District of Columbia issued an order detailing a schedule for the rulemaking. On September 10, 2009, April 3, 2010, and September 20, 2010, EPA and Sierra Club agreed to extend the deadline for the rule. Sierra Club subsequently opposed EPA's request to further extend the deadline from January 16, 2011, to April 13, 2012, despite declarations by EPA officials that the agency could not meet the January 2011 deadline because of the time necessary to consider and respond to all of the public comments on the proposed rule. The D.C. District Court ruled that EPA had had enough time and gave the agency only an additional month to finalize the rule. EPA knew the final rule it had been ordered to issue would not survive court challenge. Accordingly, EPA published a notice of reconsideration the same day it finalized the rule: March 21, 2011. Based on comments it received from the public as well as additional data, EPA issued final reconsidered rules on January 31, 2013, and February 1, 2013. The cost of the 2012 Boiler MACT Rule that EPA had to issue prematurely was estimated by the agency to be $3 billion.[37]

8. Standards for Cooling Water Intake Structures

On November 17, 2006, environmental advocacy groups sued EPA, claiming that the agency had failed to use "Best Technology Available" when it issued a final rule setting standards for small, existing cooling water intake structures under section 316(b) of the Clean Water Act.[38] EPA defended against this lawsuit. On July 23, 2010, EPA and the groups agreed to a voluntary remand of the 2006 cooling water intake rule. On November 22, 2010, EPA entered into a settlement agreement with the environmental groups to initiate a new rulemaking and to take public comment on the appropriateness of subjecting small, existing facilities to the national standards developed for larger facilities. EPA published the proposed rule on April 20, 2011. The proposal would increase dramatically the cost to smaller facilities—such as small utilities, pulp and paper plants, chemical plants, and metal plants—by more than $350 million each year.[39]

9. Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

EPA entered into a consent decree with advocacy groups and agreed to issue a final rule by December 14, 2012, revising the NAAQS for fine particulate matter ($PM_{2.5}$). Even by EPA's own admission, this deadline was unrealistic. In a May 4, 2012, declaration filed with the U.S. District Court of the District of Columbia, Assistant Administrator for Air Regina McCarthy stated that EPA would need until August 14, 2013, to finalize the $PM_{2.5}$ NAAQS due to the many technical and complex issues included in the proposed rulemaking.[40] Despite this recognition of the time

[37] Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."
[38] 71 Fed. Reg. 35,046 (Jun. 16, 2006).
[39] "2012 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," rule web page for "Criteria and Standards for Cooling Water Intake Structures," RIN: 2040-AE95, available at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=2040-AE95.
[40] *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 20.

constraints, EPA agreed in the original consent decree to a truncated deadline, promising to finish the rule in only half the time it believed it actually needed to do the rulemaking properly. The final rule is estimated to cost as much as $382 million each year.[41]

10. Reconsideration of the 2008 Ozone NAAQS

On May 23, 2008, environmental groups sued EPA to challenge the final revised ozone NAAQS, which the agency had published on March 27, 2008. The 2008 rule had lowered the eight-hour primary ground-level ozone standard from 84 parts per billion (ppb) to 75 ppb. On March 10, 2009, EPA filed a motion requesting that the court hold the cases in abeyance to allow time for officials from the new administration to review the 2008 standards and determine whether they should be reconsidered. On January 19, 2010, EPA announced that it had decided to reconsider the 2008 ozone NAAQS.[42] Although EPA did not enter into a settlement agreement or consent decree with the environmental group, it readily accepted the legal arguments put forth by the group despite available legal defenses.[43] The agency announced its intention to propose a reconsidered standard ranging between 70 ppb and 65 ppb.[44] Although the reconsidered ozone NAAQS was not published—and was withdrawn by the administration on September 2, 2011—EPA had estimated that the reconsidered standard would impose up to $90 billion of new costs per year on the U.S. economy.[45]

Other Sue and Settle-Based Rulemakings of Particular Note

Revisions to EPA's Rule on Protections for Subjects in Human Research Involving Pesticides

In 2006, EPA issued a final rule on protecting human subjects in research involving pesticides.[46] Various advocacy groups sued EPA, alleging that the rule did not go far enough.[47] In November 2010, EPA and the advocacy groups finalized a settlement agreement that required EPA to include specific language for a new proposed rule.

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[41] "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter)," Environmental Protection Agency (2012), *see* http://www.epa.gov/pm/2012/decfsoverview.pdf.

[42] 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).

[43] Most of the sue and settle cases identified in this report involve a consent decree or settlement agreement. However, there is a variation of this standard type of sue and settle case that contains many of the same problems that these cases contain, but do not involve a consent decree or settlement agreement. In these cases, advocacy groups sue agencies and then the agencies take the desired action sought by the advocacy groups without any consent decrees or settlement agreements.

[44] 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).

[45] Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More." EPA's intention to revise the 2008 Ozone NAAQS Rule less than two years after it had been finalized—which was unprecedented—and the standard's staggering projected compliance costs, caused tremendous public outcry, which lead to the planned rule being withdrawn at the order of the White House on September 2, 2011. EPA is expected to propose the revised ozone NAAQS in late 2013 or early 2014.

[46] 71 Fed. Reg. 6,138 (Feb. 6, 2006).

[47] *Natural Resources Defense Council v. EPA*, No. 06-0820-ag (2d Cir.). NRDC filed a petition for review on February 23, 2006. Other plaintiffs filed petitions shortly thereafter. The case was consolidated into this case before the Second Circuit.

The advocacy group's influence on the substance of the rules is reflected in the fact that their desired regulatory changes were directly incorporated into the proposed rule. In the preamble of the 2011 proposed rule,[48] EPA wrote:

> EPA also agreed to propose, at a minimum, amendments to the 2006 rule that are substantially consistent with language negotiated between the parties and attached to the settlement agreement.... Although the wording of the amendments proposed in this document [2011 proposed rule] differs in a few details of construction and wording, they are substantially consistent with the regulatory language negotiated with Petitioners, and EPA considers these amendments to address the Petitioners' major arguments.[49]

In fact, there are entire passages from the settlement agreement that are identical to the language included in the 2011 proposed rule.[50] EPA was not mandated by statute to take any action on the human-testing rule and certainly was not required to "cut and paste" the language sought by the advocacy groups. If EPA was concerned that the rule needed to be changed, it should have gone through a normal notice and comment rulemaking rather than writing the substance of the proposed rule behind closed doors.

U.S. Fish and Wildlife Service (FWS) Endangered Species Act Listings and Critical Habitat Designation

FWS agreed in May and July 2011, to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act.

FWS used a settlement in 2009 to designate a large critical habitat area under the Endangered Species Act.[51] In 2008, environmental advocacy groups sued FWS to protest the exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the endangered Hine's emerald dragonfly under the Endangered Species Act.[52] Initially, FWS disputed the case; however, while the case was pending, the new administration took office, changed its mind, and settled with the plaintiffs on February 12, 2009.[53] FWS doubled the size of the critical habitat area from 13,000 acres to more than

[48] 76 Fed. Reg. 5,735, 5,740 (February 2, 2011).
[49] Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820, (2nd Cir.), November 3, 2010. *See also* 76 Fed. Reg. 5,735, 5,740-5,741 (February 2, 2011).
[50] *See* Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820 (2nd Cir.), November 3, 2010, and the proposed rule at 76 Fed. Reg. 5735, 5740. Much of the language in 26.1603(b) and (c) of the proposed rule is identical to the language set forth in the settlement agreement.
[51] *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, (N.D. Ill.), Stipulated Settlement Agreement and Order of Dismissal (February 12, 2009).
[52] *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, Complaint for Declaratory and Injunctive Relief, March 10, 2008 (N.D. Ill.).
[53] *Supra*, note 37.

26,000 acres, as sought by the advocacy groups.[54] Thus, FWS effectively removed a large amount of land from development without affected parties having any voice in the process. Even the federal government did not think FWS was clearly mandated to double the size of the critical habitat area, as evidenced by the previous administration's willingness to fight the lawsuit.

Moreover, FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group, requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act.[55] Agreeing to list this many species all at once imposes a huge new burden on the agency. According to the director of FWS, in FY 2011, FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency spent more than 75% of this allocation ($15.8 million) taking the substantive actions required by court orders or settlement agreements resulting from litigation.[56] In other words, sue and settle cases and other lawsuits are effectively driving the regulatory agenda of the Endangered Species Act program at FWS.

THE PUBLIC POLICY IMPLICATIONS OF SUE AND SETTLE

By being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use sue and settle to dictate the policy and budgetary agendas of an agency. Instead of agencies being able to use their discretion on how best to utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

According to the director of the FWS, in FY 2011 the FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency spent more than 75% of this allocation ($15.8) taking the substantive actions required by court orders or ***settlement agreements*** *resulting from litigation.*

Through sue and settle, advocacy groups also significantly affect the regulatory environment by getting agencies to issue substantive requirements that are not required by law. Even when a regulation is required, agencies can use the terms of a sue and settle agreement as a legal basis for allowing special interests to dictate the discretionary terms of the regulations. Third parties have a very difficult time challenging the agency's surrender of its discretionary power because they typically cannot intervene, and the courts often simply want the case to be settled quickly.

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[54] *See, e.g.*, 75 Fed. Reg. 21,394 (August 30, 2010).

[55] Stipulated Settlement Agreements, *WildEarth Guardians v. Salazar* (D.D.C. May 10, 2011) and *Center for Biological Diversity v. Salazar* (D.D.C. July 12, 2011). The requirement to add more than 720 candidates for listing as endangered species would significantly add to the existing endangered species list that contains 1,118 plant and animal species, which could significantly expand the amount of critical habitat in the U.S. This would be a nearly two-thirds expansion in the number of listed species. Fish and Wildlife Species Reports, at http://ecos.fws.gov/tess_public/pub/Boxscore.do.

[56] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011).

Likewise, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the rulemaking process can suffer greatly. Dates for regulatory action are often specified in statutes, and agencies like EPA are typically unable to meet the majority of those deadlines. To a great extent, these agencies must use their discretion to set resource priorities in order to meet their many competing obligations. By agreeing to deadlines that are unrealistic and often unachievable, the agency lays the foundation for rushed, sloppy rulemaking that often delays or defeats the objective the agency is seeking to achieve. These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations, or court-ordered remands to the agency. Ironically, the process of issuing rushed, poorly developed rules and then having to spend months or years to correct them defeats the advocacy group's objective of forcing a rulemaking on a tight schedule. The time it takes to make these fixes, however, does not change a regulated entity's immediate obligation to comply with the poorly constructed and infeasible rule.

Instead of agencies being able to use their discretion on how best to utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

Moreover, if regulated parties are not at the table when deadlines are set, an agency will not have a realistic sense of the issues involved in the rulemaking (e.g., will there be enough time for the agency to understand the constraints facing an industry, to perform emissions monitoring, and to develop achievable standards?). Especially when it comes to implementation timetables, agencies are ill-suited to make such decisions without significant feedback from those who actually will have to comply with a regulation.

By setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking. These requirements include the Regulatory Flexibility Act (RFA)[57] and the Unfunded Mandates Reform Act.[58] In addition to undermining the protections of these statutory requirements, rushed deadlines can limit the review of regulations under the OMB's regulatory review under executive orders,[59] among other laws. This short-circuited process deprives the public (and the agency itself) of critical information about the true impact of the rule.

Unreasonably accelerated deadlines, such as with $PM_{2.5}$ NAAQS, have adverse impacts that go well beyond the specific rule at issue. As Assistant Administrator McCarthy noted in her declaration before the court in the $PM_{2.5}$ NAAQS case discussed above, an unreasonable deadline for one rule will draw resources from other regulations that may also be under

[57] Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612.
[58] Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501 et seq.
[59] *See, e.g.*, Executive Order 12,866, "Regulatory Planning and Review" (September 30, 1993); Executive Order 13132, "Federalism" (August 4, 1999); Executive Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001); Executive Order 13,563 "Improving Regulation and Regulatory Review" (January 18, 2011).

deadlines.[60] When there are unrealistic deadlines, there will be collateral damage on these other rules, which will invite advocacy groups to reset EPA's priorities further when they sue to enforce those deadlines.

In fact, one of the primary reasons advocacy groups favor sue and settle agreements approved by a court is that the court retains jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. For its part, the agency cannot change any of the terms of the settlement (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promise, regardless of the consequences for the agency or regulated parties.

Because a settlement agreement directs the structure (and sometimes even the actual substance) of the agency rulemaking that follows, interested parties have a very limited ability to alter the subsequent rulemaking through comments.

For all of these reasons, sue and settle violates the principle that if an agency is going to write a rule, then the goal should be to develop the most effective, well-tailored regulation. Instead, rulemakings that are the product of sue and settle agreements are most often rushed, sloppy, and poorly conceived. They usually take a great deal of time and effort to correct, when the rule could have been done right in the first place if the rulemaking process had been conducted properly.

Notice and Comment Allowed After a Sue and Settle Agreement Does Not Give the Public Real Input

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, is not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement—even after it receives adverse comments.[61]

[60] "This amount of time [requested as an extension by EPA] also takes into account the fact that during the same time period for this rulemaking, the Office of Air and Radiation will be working on many other major rulemakings involving air pollution requirements for a variety of stationary and mobile sources, many with court-ordered or *settlement agreement deadlines*." *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 15 (emphasis added).

[61] In the $PM_{2.5}$ NAAQS deadline settlement agreement discussed above, for example, the timetable for final rulemaking action remained unchanged despite industry comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself agreed that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance[62]) of the agency rulemaking that follows, interested parties usually have a very limited ability to alter the design of the subsequent rulemaking through their comments.[63] In effect, the "cement" of the agency action is set and has already hardened by the time the rule is proposed, and it is very difficult to change it. Once an agency proposes a regulation, the agency is restricted in how much it can change the rule before it becomes final.[64] Proposed regulations are not like proposed legislation, which can be very fluid and go through several revisions before being enacted. When an agency proposes a regulation, they are not saying, "let's have a conversation about this issue," they are saying, "this is what we intend to put into effect unless there is some very good reason we have overlooked why we cannot." By giving an agency feedback during the early development stage about how a regulation will affect those covered by it, the agency learns from all stakeholders about problems before they get locked into the regulation.

Rather than hearing from a range of interested parties and designing the rule with a panoply of their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through sue and settle, advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

Sue and settle agreements cut this critical step entirely out of the process. Rather than hearing from a range of interested parties and designing the rule with a panoply of their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through sue and settle, advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

SUE AND SETTLE IS AN ABUSE OF THE ENVIRONMENTAL CITIZEN SUIT PROVISIONS

Congress expressed concern long ago that allowing unlimited citizen suits under environmental statutes to compel agency action has the potential to severely disrupt agencies' ability to meet their most pressing statutory responsibilities.[65] Matters are only made worse when an agency

[62] *See* discussion of the Human Testing Rule, *supra* on page 21.

[63] EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately promulgated largely as they had been proposed. As EPA Assistant Administrator for Air McCarthy recently noted, "[m]y staff has made me aware of some instances in which EPA changed the substance of Clean Air Act settlement agreements in response to public comments. For example, after receiving adverse comments on a proposed settlement agreement [concerning hazardous air standards for 25 individual industries] EPA modified deadlines for taking proposed or final actions and clarified the scope of such actions for a number of source categories before finalizing the agreement. However, I am not aware of every instance in which EPA has made such a change." McCarthy Response to Questions for the Record submitted by Senator David Vitter to Assistant Administrator Gina McCarthy, Senate Environment and Public Works Committee April 8, 2013, Confirmation Hearing at 24. The Chamber is not aware of any other instances where EPA has made such a change in response to public comments.

[64] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974) ("logical outgrowth doctrine" requires additional notice and comment if final rule differs too greatly from proposal).

[65] The Court of Appeals for the District of Columbia noted in 1974 that "While Congress sought to encourage citizen suits, citizen suits were specifically intended to provide only 'supplemental ... assurance that the Act would be implemented and

does not defend itself against sue and settle lawsuits, and when it willingly allows outside groups to reprioritize its agenda and deadlines for action.

Most of the legislative history that gives an understanding of the environmental citizen suit provision comes from the congressional debate on the 1970 Clean Air Act. There is little legislative history beyond the Clean Air Act.[66] The addition of the citizen suit provision in later statutes was perfunctory, and the statutory language used was generally identical to the Clean Air Act language.[67]

The inclusion of a citizen suit provision was far from a given when it was being considered in the Clean Air Act. The House version of the bill did not include a citizen suit provision.[68] The Senate bill did include such a provision,[69] but serious concern was expressed during the Senate floor debate. Senator Roman Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed two major concerns about the citizen suit provision: the limited opportunity for Senators to review the provision and the failure to involve the Senate Judiciary Committee:

> Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best course of action to follow.
>
> Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.[70]

Senator Hruska entered into the record a memo written by one of his staff members. It reiterated the problem of ignoring the Judiciary Committee:

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enforced.' *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Congress made 'particular efforts to draft a provision that would not reduce the effectiveness of administrative enforcement, ... nor cause abuse of the courts while at the same time still preserving the right of citizens to such enforcement of the act.' Senate Debate on S. 3375, March 10, 1970, *reprinted in* Environmental Policy Division of the Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1970, Vol. I. at 387 (1974) (remarks of Senator Cooper)." *Friends of the Earth, et al. v. Potomac Electric Power Co.*, 546 F. Supp. 1357 (D.D.C. 1982); "[T]he agency might not be at fault if it does not act promptly or does not enforce the act as comprehensively and as thoroughly as it would like to do. Some of its capabilities depend on the wisdom of the appropriation process of this Congress. It would not be the first time that a regulatory act would not have been provided with sufficient funds and manpower to get the job done.... Notwithstanding the lack of capability to enforce this act, suit after suit after suit could be brought. The functioning of the department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the act." (Sen. Hruska arguing against the citizen suit provision of the Clean Air Act during Senate debate on S.4358 on Sept. 21, 1970).

[66] *See, e.g.*, Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. New Eng. L. Rev. 311 (1998) at 318.

[67] *Id.* at 313–314, 318.

[68] *See, e.g.*, "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.

[69] *Id.*

[70] Senate debate on S. 4358 at 277.

> The Senate Committee on the Judiciary has jurisdiction over, among other things, "(1) Judicial proceedings, civil and criminal, generally.... (3) Federal court and judges...." The Senate should suspend consideration of Section 304 [the citizen suit provision] pending a study by the Judiciary Committee of the section's probable impact on the integrity of the judicial system and the advisability of now opening the doors of the courts to innumerable Citizens Suits against officials charged with the duty of carrying out the Clean Air Act.[71]

Senator Griffin (R-MI), also a member of the Senate Judiciary Committee, noted the lack of critical feedback that was received regarding the provision:

> [I]t is disturbing to me that this far-reaching provision was included in the bill without any testimony from the Judicial Conference, the Department of Justice, or the Office of Budget and Management concerning the possible impact this might have on the Federal judiciary.[72]

The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees. The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later. There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.

The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees.[73] The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.[74] There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.[75]

Fortunately however, in 2012, during the 112th Congress, the House Judiciary Committee began looking at the abuses of the sue and settle process. Representative Ben Quayle (R-AZ) introduced H.R. 3862, the Sunshine for Regulatory Decrees and Settlements Act of 2012. This bill became Title III of H.R. 4078, the Red Tape Reduction and Small Business Job Creation Act, which passed the House of Representatives on July 24, 2012, by a vote of 245 to 172. As part of the development of the Sunshine for Regulatory Decrees

[71] *Id.* at 279.
[72] *Id.* at 350.
[73] "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980; The legislative history was also searched using Lexis.
[74] "A Legislative History of the Water Pollution Control Act Amendments of 1972, Together with a Section-By-Section Index," Library of Congress, U.S. Govt. Print. Off., 1973-1978; The legislative history was also searched using Lexis.
[75] In 1985, the Senate Judiciary Committee held a hearing on the Superfund Improvement Act of 1985 that among other things discussed citizen suits (S. Hrg. 99-415). The hearing covered a wide range of issues, such as financing of waste site clean-up, liability standards, and joint and several liability. To find hearing information, a comprehensive search was conducted using ProQuest Congressional at the Library of Congress. The search focused on hearings from 1970-present that addressed citizen suits.

and Settlements Act, the House Judiciary Committee held extensive hearings on sue and settle and issued a committee report on July 11, 2012. Under the bill, which passed the House as Title III of H.R. 4078, before a court could sign a proposed consent decree between a federal agency and an outside group, the proposed consent decree or settlement must be published in the *Federal Register* for 60 days for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement. The agency would also have to inform the court of its other mandatory duties and explain how the consent decree would benefit the public interest. Unfortunately, the Senate never took action on its version of the sue and settle bill, also called the Sunshine for Regulatory Decrees and Settlements Act of 2012, which was introduced by Senator Chuck Grassley on July 12, 2012.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. The 2013 Act is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

RECOMMENDATIONS

The regulatory process should not be radically altered simply because of a consent decree or settlement agreement. There should not be a two-track system that allows the public to meaningfully participate in rulemakings, but excludes the public from sue and settle negotiations which result in rulemakings designed to benefit a specific interest group. There should not be one system where agencies can use their discretion to develop rules and another system where advocacy groups use lawsuits to legally bind agencies and improperly hand over their discretion.

- **Notice**

Federal agencies should inform the public immediately upon receiving notice of an advocacy group's intent to file a lawsuit.[76] This public notice should be provided in a prominent location, such as the agency's website or through a notice in the *Federal Register*.[77] By having this advanced notice, affected parties will have a better opportunity to intervene in cases and also prepare more thoughtful comments.

- **Comments and Intervening**

Federal agencies should be required to submit a notice of a proposed consent decree or settlement agreement before it is filed with the court. This notice should be published in the *Federal Register* and allow a reasonable period for public comment (e.g., 45 days).

[76] The Department of Justice also should provide public notice of the filing of lawsuits against agencies, as well as settlements the agencies agree to.

[77] It is our understanding that EPA recently began to disclose on this website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be statutorily required, not just a voluntary measure.

Currently, because it is so difficult for third parties to intervene in sue and settle cases, courts should presume that it is appropriate to include a third party as an intervenor. The intervenors should only be excluded if this strong presumption could be rebutted by showing that the party's interests are adequately represented by the existing parties in the action. Given that intervenors presently can be excluded from settlement negotiations, *sometimes without even being notified of the negotiations*, there should be clarification that all parties in the action, including the intervenors, should have a seat at the negotiation table.

- **Substance of Rules**

Agencies should not be able to cede their discretionary powers to private interests, especially the power to issue regulations and to develop the content of rules. This problem does not exist in the normal rulemaking process. Yet, since courts readily approve consent decrees that legally bind agencies in the sue and settle context, the decree itself becomes a vehicle for agencies to give up their discretionary rulemaking power—and even to develop rules with questionable statutory authority.

Courts should review the statutory basis for agency actions in consent decrees and settlement agreements in the same manner as if they were adjudicating a case. For example, they should ensure that an agency is required to perform a mandatory act or duty, and, if so, that the agency is implementing the act or duty in a way that is authorized by statute.

- **Deadlines**

Federal agencies should ensure that they (and their partners, including states and other agencies) have enough time to comply with regulatory timelines. The public also should be given enough time to meaningfully comment on proposed regulations, and agencies should themselves take enough time to adequately conduct proper analysis. This would include agency compliance with the RFA, executive orders, and other requirements designed to promote better regulations. This is particularly important because recent rulemakings are often more challenging to evaluate in terms of scope, complexity, and cost than earlier rules were.

- **The Sunshine for Regulatory Decrees and Settlements Act of 2013**

Fortunately, there is a simple, noncontroversial way to address the sue and settle problem that currently undermines the fundamental protections that exist within our regulatory system. Passage of the Sunshine for Regulatory Decrees and Settlements Act of 2013 would solve the sue and settle problem and restore the protections of the Administrative Procedure Act to all citizens and stakeholders.

Catalog of Sue and Settle Cases

Sue and Settle Cases Resulting in New Rules and Agency Actions[78] (2009–2012)

Case	Agency	Issue and Result
***American Petroleum Institute v. EPA* (petroleum refineries NSPS)** 08-1277 (D.C. Cir.) Settled: 12/23/2010 (date is from EPA website)	EPA	**Issue**: Greenhouse gas (GHG) New Source Performance Standards (NSPS) for petroleum refineries **Result**: EPA agreed to issue the first-ever NSPS for GHG emissions from petroleum refineries.
***American Lung Association v. EPA* (consolidated with *New York v. Jackson*)** 12-00243 (consolidated with 12-00531) (D.D.C.) Settled: 6/15/2012	EPA	**Issue**: National ambient air quality standards (NAAQS) for particulate matter **Result**: EPA agreed to sign a final rule addressing the NAAQS for particulate matter. In January 2013, EPA published a final rule making the standard more stringent.
American Nurses Association v. Jackson 08-02198 (D.D.C.) Settled: 10/22/2009	EPA	**Issue**: Maximum achievable control technology (MACT) emissions standards for hazardous air pollutants (HAP) from coal- and oil-fired electric utility steam generating units (EGUs) **Result**: EPA entered into a consent decree requiring the agency to issue MACT standards under Section 112 of the Clean Air Act for coal- and oil-fired electric utility steam generating units (known as the "Utility MACT" rule). The rule was finalized in February 2012.
***Association of Irritated Residents v. EPA et al.* (2008 $PM_{2.5}$ SIP)** 10-03051 (N.D. Cal.) Settled: 11/12/2010	EPA	**Issue**: CA state implementation plan (SIP) submission regarding 1997 $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on the 2008 $PM_{2.5}$ San Joaquin Valley Unified Air Control District Plan for compliance with 1997 $PM_{2.5}$ NAAQS. The final action was taken in November 2011.
***Association of Irritated Residents v. EPA et al.* (SIP revisions)** 09-01890 (N.D. Cal.) Settled: 10/21/2009	EPA	**Issue**: CA SIP revision regarding two rules amended by the San Joaquin Valley Unified Air Pollution Control District **Result**: EPA agreed to take final action on the SIP revision and specifically the two rules amended by the San Joaquin Valley Unified Air Pollution Control District (Rule 2020 "Exemptions" and Rule 2020 "New and Modified Stationary Source Review Rule"). The final action was taken in May 2010.
***Center for Biological Diversity et al. v. EPA* (kraft pulp NSPS)**	EPA	**Issue**: Kraft pulp NSPS

[78] For a description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.

Case	Agency	Issue and Result
11-06059 (N.D. Cal.) Settled: 8/27/2012		**Result:** EPA agreed to review and, if applicable, revise the kraft pulp NSPS air quality standards.
Center for Biological Diversity v. EPA 09-00670 (W.D. Wash.) Settled: Settlement agreement (parties entered into it on 3/10/10). Notice of voluntary dismissal, 3/11/10. Notice discusses settlement agreement.	EPA	**Issue:** GHGs and ocean acidification under the Clean Water Act **Result:** In a settlement agreement, EPA agreed to take public comment and begin drafting guidance on how to approach ocean acidification under the Clean Water Act. On November 15, 2010, in guidance, EPA urged states to identify waters impaired by ocean acidification under the Clean Water Act and urged states to gather data on ocean acidification, develop methods for identifying waters affected by ocean acidification, and create criteria for measuring the impact of acidification on marine ecosystems.
Center for Biological Diversity v. U.S. Department of Agriculture 08-03884 (N.D. Cal.) Settled: 12/15/2010	Dept. of Agriculture, U.S. Forest Service	**Issue:** Southern California Forest Service Management Plans **Result:** Conservation groups sued U.S. Forest Service over a forest management plan for four California national forests. The challenged plans designated more than 900,000 roadless acres for possible road building or other development. In 2009, a federal district court agreed with the groups, ruling that the plans violated the National Environmental Policy Act (NEPA). The parties entered into a settlement agreement that withholds more than 1 million acres of roadless areas from development. Further, the agency allowed the advocacy groups to participate in a collaborative process to, among other things, identify a list of priority roads and trails for decommissioning and/or restoration projects.
Center for Biological Diversity v. U.S. Dept. of the Interior (DOI) 10-00952 (D.D.C.) Settled: 1/14/2011	DOI, Dept. of Agriculture, BLM, U.S. Forest Service	**Issue:** Grazing fees on federal lands; environmental groups wanted the fees raised **Result:** In a settlement agreement, agencies agreed to respond to the plaintiffs' petition by January 18, 2011, and determine whether a NEPA environmental impact statement was required to issue new rules for the fee grazing program. The agencies ultimately declined to revise the rules for the fee grazing program, citing other high-priority efforts that took precedence.
Coal River Mountain Watch. et al. v. Salazar et al. 08-02212; A related case is National Parks Conservation Association v. Kempthorne: 09-001 15; Settlement agreement: 09-00115 (D.D.C) (D.D.C.) Settled: 3/19/2010	EPA and DOI	**Issue:** Stream Buffer Zone Rule **Result:** The 1983 stream buffer rule restricted mining activities from impacting resources within 100 feet of waterways. The Bush administration revised the rule to allow activity inside the buffer if it was deemed impractical for mine operators to comply. Environmental groups want the Obama administration to undo that change and declare that the stream buffer zone rule prohibits "valley fills." Environmental groups sued DOI in 2008 over the changes. Secretary Salazar tried to revoke the rule in April 2009, but a court held that OSM must go through a full rulemaking process. OSM agreed to amend or replace the stream buffer rule.
Colorado Citizens Against Toxic Waste, Inc. et al. v. Johnson 08-01787 (D. Colo.) Settled: 9/3/2009	EPA	**Issue:** National emission standards for radon emissions from operating mill tailings **Result:** EPA agreed to review and, if appropriate, revise national emission standards for radon emissions from operating mill tailings. EPA also agreed to certain public participation stipulations.

Case	Agency	Issue and Result
Colorado Environmental Coalition v. Salazar 09-00085 (D. Colo.) Settled: 2/15/2011	DOI	**Issue**: Bureau of Land Management (BLM) decision to amend resource management plans (RMPs), which opened 2 million acres of federal lands for potential oil shale leasing; plaintiffs alleged failure to comply with NEPA and other statutes **Result**: BLM agreed to consider amending each of the 2008 RMP decisions. As part of the amendment process, BLM agreed to consider several proposed alternatives, including alternatives that would exclude lands with wilderness characteristics and core or priority habitat for the imperiled sage grouse from commercial oil shale leasing. BLM also agreed to delay any calls for commercial leasing, but retained the right to continue nominating parcels for Research, Development, and Demonstration (RD&D) leases and to convert existing RD&D leases to commercial leases.
***Comite Civico del Valle, Inc. v. Jackson et al.* (CA SIP)** 10-00946 (N.D. Cal.) Settled: 6/11/2010	EPA	**Issue**: CA SIP regarding measures to control particulate matter emissions from beef feedlot operations within the Imperial Valley **Result**: EPA agreed to take final action on the SIP revision regarding particulate matter emissions from beef feedlot operations within the Imperial Valley. The final rule was published on November 10, 2010.
***Comite Civico del Valle, Inc. v. Jackson et al.* (Imperial County 1)** 09-04095 (N.D. Cal.) Settled: 11/10/2009	EPA	**Issue**: CA SIP revision regarding Imperial County Air Pollution Control District Rules 800-806 (addressing PM_{10}) **Result**: EPA agreed to take final action on the Imperial County Air Pollution Control District's Rules 800-806 (addressing PM_{10}) that revise the CA SIP. A proposed rule was published on January 7, 2013.
***Comite Civico del Valle, Inc. v. Jackson et al.* (Imperial County 2)** 10-02859 (N.D. Cal.) Settled: 10/12/2010	EPA	**Issue**: CA SIP revision regarding Imperial County Air Pollution Control District Rules 201, 202, and 217 **Result**: EPA agreed to take final action on Imperial County Air Pollution Control District Rules 201, 202, and 217 that revise the CA SIP.
Defenders of Wildlife v. Jackson 10-01915 (D.D.C.) Settled: 11/5/2010, 11/8/10 moved for entry same day the complaint was filed (see page 3 of the 3/18/12 memorandum opinion), 3/18/12 (ordered)	EPA	**Issue**: Effluent Limitation Guidelines for Steam Electric Power Generating Point Source **Result**: EPA agreed to sign a notice of proposed rulemaking regarding revisions to the effluent guidelines for steam electric power plants, followed by a final rule. In this case, the advocacy group's complaint was filed on the same day that the parties moved to enter the consent decree.
El Comite Para El Bienestar De Earlimart et al. v. EPA et al. 11-03779 (N.D. Cal.) Settled: 11/14/2011	EPA	**Issue**: CA SIP submission regarding fumigant rules in San Joaquin Valley **Result**: EPA agreed to take final actions on the Pesticide Element SIP Submittal and the Fumigant Rules Submittal. A final rule was published on October 26, 2012.
Environmental Defense Fund v. Jackson 11-04492 (S.D.N.Y.) Settled: 7/6/2012	EPA	**Issue**: NSPS for municipal solid waste landfills **Result**: EPA agreed to review and, if applicable, revise the NSPS for municipal solid waste landfills.

Case	Agency	Issue and Result
Florida Wildlife Federation v. Jackson 08-00324 (N.D. Fla.) Settled: 8/25/2009	EPA	**Issue**: Numeric nutrient criteria for waters in FL **Result**: Environmental groups sued EPA in July 2008 to develop numeric nutrient criteria for FL. EPA entered into a consent decree with the plaintiffs in 2009. As part of the consent decree, EPA agreed to issue limits in phases. Limits for FL's inland water bodies outside South FL were finalized on December 6, 2010; the limits for estuaries and coastal waters, and South FL's inland flowing waters were proposed on December 18, 2012. Final rules, by consent decree, are required by September 30, 2013.
Fowler v. EPA 09-00005 (D.D.C.) Settled: 5/10/2010	EPA	**Issue**: Clean Water Act regulatory regime for Chesapeake Bay **Result**: EPA agreed to establish a Total Maximum Daily Load for the Chesapeake Bay. The settlement requires EPA to develop changes to its storm water program affecting the Bay.
Friends of Animals v. Salazar 10-00357 (D.D.C.) Settled: 7/21/2010	DOI	**Issue**: DOI non-action on plaintiff's petitions to list 12 species of parrots, macaws, and cockatoos as endangered or threatened under the Endangered Species Act **Result**: DOI agreed to issue 12-month findings on the 12 species contained in the petition.
In re Endangered Species Act Section 4 Deadline Litigation **(This case relates to Center for *Biological Diversity v. Salazar*, 10-0230, and 12 different WildEarth Guardians complaints)** 10-00377 (D.D.C.) Settled: Wildlife Guardians: 5/10/2011 CBD: July 12, 2011	DOI	**Issue**: WildEarth Guardians cases: 12 lawsuits seeking to designate 251 species as threatened or endangered under the Endangered Species Act. CBD case: Seeking 90-day findings for 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and 403 southeast aquatic species. **Result**: WildEarth: U.S. Forest Service agreed to make a final determination on Endangered Species Act status for 251 candidate species on or before September 2016. CBD: FWS agreed to make requested findings no later than the end of 2011 (this covers 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and the 403 southeast aquatic species). Note: There are additional actions required for both settlements.
Kentucky Environmental Foundation v. Jackson **(Huntington-Ashland SIP)** 10-01814 (D.D.C.) Settled: 8/4/2011	EPA	**Issue**: KY SIP revision addressing 1997 $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on the Kentucky SIP addressing 1997 $PM_{2.5}$ NAAQS for the Huntington-Ashland area. The final rule was published in April 2012.
Kentucky Environmental Foundation v. Jackson **(Louisville SIP)** 11-01253 (D.D.C.) Settled: 2/27/2012	EPA	**Issue**: KY SIP regarding 1997 $PM_{2.5}$ NAAQS **Result**: EPA had already taken actions by the time the agreement was made. EPA did agree to take final action on the $PM_{2.5}$ emissions inventory for the Louisville SIP.
Louisiana Environmental Action Network v. Jackson 09-01333 (D.D.C.) Settled: 11/23/2010	EPA	**Issue**: LA SIP for 1997 ozone NAAQS **Result**: LEAN brought the case to compel EPA to take action on ozone standards in the Baton Rouge area. As part of the settlement, LEAN agreed to ask the court to hold the litigation in abeyance and EPA agreed to take action if the Baton Rouge area does not come into attainment.
Mossville Environmental	EPA	**Issue**: New MACT standards for polyvinyl chloride (PVC) manufacturers

Case	Agency	Issue and Result
Action NOW v. Jackson 08-01803 (D.D.C.) Settled: 10/30/2009		**Result:** Environmental groups previously litigated and won a decision overturning EPA's 2002 decision not to make the MACT standards for PVC makers more stringent. Environmental groups brought this case in 2008 to compel EPA to set new MACT standards. In 2009, there was a settlement agreement between EPA and the plaintiffs. The agreement called upon EPA to finalize the new MACT standards. EPA issued a final rule in April 2012.
***National Parks Conservation Association v. Jackson* (Regional haze FIPS and SIPs)** 11-01548 (D.D.C.) Settled: 11/9/2011	EPA	**Issue:** Regional haze FIPs and SIPs **Result:** EPA agreed to deadlines to promulgate proposed and final regional haze FIPs and/or SIPs (or partial FIPs and SIPs).
Natural Resources Defense Council et al. v EPA 09-60510 (5th Cir.) Settled: 5/25/2010	EPA	**Issue:** Reporting requirements for concentrated animal feeding operations (CAFOs) **Result:** EPA agreed to create publicly available guidance to assist in the implementation of NPDES permit regulations and Effluent Limitation Guidelines and Standards for CAFOs. The agency also agreed to publish a proposed rule regarding reporting requirements for CAFOs. A proposed rule was published in October 2011 and later withdrawn in July 2012.
Natural Resources Defense Council v. EPA 06-0820 (2d Cir.) Settled: 6/17/2010 (see EarthJustice press release), Finalized on 11/3/10 (see proposed rule)	EPA	**Issue:** Pesticide human testing consent rule **Result:** A 2006 human-testing rule required subjects of paid pesticide experiments to provide "legally effective informed consent." Environmental groups challenged the rule. A June 2010 settlement required EPA to propose amendments to the rule to make it stricter. The settlement required EPA to incorporate specific language in the rule. The new rules were proposed on February 2, 2011. The final rule was published on February 14, 2013 and includes the negotiated language.
***Natural Resources Defense Council v. EPA* (California SIP)** 10-06029 (C.D. Cal.) Settled: 12/13/2010	EPA	**Issue:** CA SIP submission for 1997 ozone and $PM_{2.5}$ NAAQS **Result:** EPA agreed to take action on SIPs as they apply to $PM_{2.5}$ and ozone for California's South Coast Air Basin.
Natural Resources Defense Council v. Salazar 10-00299 (D.D.C.) Settled: 6/18/2010	Fish and Wildlife Service (FWS); DOI	**Issue:** Listing of whitebark pine tree as an endangered species under the Endangered Species Act as a result of climate change **Result:** On July 19, 2011, FWS found that the whitebark pine tree should be listed as threatened or endangered under the Endangered Species Act as a result of climate change. It was the first time the federal government has declared a widespread tree species in danger of extinction because of climate change.
New York v. EPA 06-1322 (D.C. Cir.) Settled: 12/23/2010 (see EPA settlement page)	EPA	**Issue:** GHG NSPS for power plants **Result:** On April 13, 2012, EPA proposed the first-ever NSPS for GHG emissions from new coal- and oil-fired power plants. This came about as a result of a settlement of a 2006 lawsuit challenging power plant NSPS.
Northwoods Wilderness Recovery v. Kempthorne 08-01407 (N.D. Ill.)	FWS; DOI	**Issue:** FWS's exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the Hine's emerald dragonfly under the Endangered Species Act

Case	Agency	Issue and Result
Settled: 1/13/2009		**Result**: FWS agreed to a remand without vacatur of the critical habitat designation in order to reconsider the federal exclusions from the designation of critical habitat for the Hine's emerald dragonfly. FWS doubled the size of the critical habitat from 13,000 acres to more than 26,000. The final rule was published in April 2010.
Portland Cement Assn. v. EPA 07-1046 (D.C. Cir.) Settled: 1/6/2009 (This date is based on when DOJ signed the settlement agreement)	EPA	**Issue**: MACT standards for cement kilns **Result**: EPA settled a lawsuit seeking to force the agency to control mercury emissions from cement kilns. The settlement was between EPA and numerous petitioners that challenged the 2006 cement MACT rule. The petitioners included environmental groups, states, and the cement industry. The final cement MACT rule was published in the Federal Register on September 9, 2010; environmental groups and cement industry petitioned for reconsideration of the 2010 rule. EPA denied in part and amended in part the petitions to reconsider. EPA published a new final rule on February 12, 2013. The reconsidered rule relaxed some aspects of the 2010 rule, and allowed cement companies more time to comply.
Riverkeeper v. EPA 06-12987 (S.D.N.Y.) Settled: 11/22/2010	EPA	**Issue**: Clean Water Act 316(b) standards on cooling water intake structures **Result**: The EPA agreed to propose and finalize a rule regulating cooling water intake structures under 316(b), and to consider the feasibility of more stringent technical controls.
***Sierra Club et al. v. Jackson* (ozone NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA)** 10-04060 (N.D. Cal.) Settled: 8/12/2011 (Date that court ordered Joint Motion to Stay All Deadlines. This motion was filed with the Notice of Proposed Settlement)	EPA	**Issue**: Action on 1997 ozone NAAQS revisions for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA **Result**: EPA agreed to take final action on 1997 Ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA.
***Sierra Club et al. v. Jackson et al.* (CA RACT SIP)** 11-03106 (N.D. Cal.) Settled: 1/6/2012	EPA	**Issue**: CA SIP submissions regarding reasonably available control technology demonstration **Result**: EPA agreed to take final action on the CA RACT SIP.
***Sierra Club et al. v. Jackson et al.* (San Joaquin Valley)** 10-01954 (N.D. Cal.) Settled: 11/8/2010	EPA	**Issue**: CA SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on the 8-hour ozone plan submitted by the San Joaquin Valley Air Pollution Control District, the purpose of which is to achieve progress toward attainment of 1997 ozone NAAQS. A final rule was published on March 1, 2012.
***Sierra Club et al. v EPA* (lead case)** 08-1258 (D.C. Cir.) Settled: 8/24/2009 (see also the amended settlement	EPA	**Issue**: Lead Renovation, Repair and Painting Program **Result**: In 2008, numerous environmental groups commenced lawsuits against EPA to challenge the Lead Renovation, Repair, and Painting Program Rule, and these suits were consolidated in the DC Circuit Court of Appeals.

Case	Agency	Issue and Result
agreement referring to this date)		As part of this settlement agreement, EPA agreed to propose significant and specific changes to the rule that were outlined in the settlement agreement. Significantly, EPA agreed to drop an "opt-out" provision that would allow millions of homes without children or pregnant women to waive the lead restrictions.
Sierra Club filed a notice of intent to file a lawsuit NOTICE OF INTENT Settled: 12/19/2011	EPA	**Issue**: Attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, MO and other areas **Result**: EPA agreed to make attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, and MO. The "other areas" were not included because EPA and plaintiffs agreed that EPA had already addressed the issues for those areas.
***Sierra Club v. EPA* (Nitric Acid)** 09-00218 (D.D.C.) Settled: 11/3/2009	EPA	**Issue**: Nitric acid plants NSPS **Result**: EPA agreed to review NSPS for nitric acid plants. As a result of this review, EPA proposed NSPS for nitric acid plants in October 2011. The final rule was published in August 2012.
***Sierra Club v. EPA et al.* (clay ceramics)** 08-00424 (D.D.C.) Settled: 11/20/2012	EPA	**Issue**: Brick MACT **Result**: EPA agreed to issue final rules setting MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
***Sierra Club v. EPA et al.* (TX ozone PM SIP)** 10-01541 (D.D.C.) Settled: 9/13/2011	EPA	**Issue**: TX SIP submission regarding 1997 ozone and $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on certain infrastructure components of TX SIP submissions for 1997 ozone and $PM_{2.5}$ NAAQS.
***Sierra Club v. Jackson* (21 states)** 10-00133 (D.D.C.) Settled: 4/29/2010 (EPA lodged consent decree with court on this date)	EPA	**Issue**: 21 states' SIPs submissions for 1997 ozone NAAQS **Result**: EPA agreed to approve or disapprove the 1997 8-hour ozone NAAQS Infrastructure SIPs for ME, RI, CT, NH, AL, KY, MS, SC, WI, IN, MI, OH, LA, KS, NE, MO, CO, MT, SD, UT, and WY.
***Sierra Club v. Jackson* (28 different MACT)** 09-00152 (N.D. Cal.) Settled: 7/6/2010	EPA	**Issue**: MACT standards for 28 industry source categories **Result**: Sierra Club sued EPA on January 13, 2009—seven days prior to the change in administration—to review and revise Clean Air Act MACT standards for 28 different categories of industrial facilities, including wood furniture manufacturing, Portland Cement, pesticides, lead smelting, secondary aluminum, pharmaceuticals, shipbuilding, and aerospace manufacturing. On July 6, 2010, EPA lodged a consent decree that required EPA to revise MACT standards for all 28 categories.
***Sierra Club v. Jackson* (AL and GA SIPs)** 11-02000 (D.D.C.) Settled: 7/20/2012	EPA	**Issue**: AL SIP submission for 1997 $PM_{2.5}$ NAAQS and GA SP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on "numerous SIP submittals" by AL for the 1997 $PM_{2.5}$ NAAQS and GA for the 1997 8-hour ozone NAAQS.
***Sierra Club v. Jackson* (AR Regional Haze)**	EPA	**Issue**: AR Regional Haze SIP

Case	Agency	Issue and Result
10-02112 (D.D.C.) Settled: 8/3/2011		**Result:** EPA agreed to sign a notice of final rulemaking to approve or disapprove the AR Regional Haze SIP.
***Sierra Club v. Jackson* (Boiler MACT and RICE rule)** 01-01537 (D.D.C.) Settled: RICE and Boiler MACT: 5/22/03 (consent decree). For RICE: 11/15/07 amendment to change deadlines; 11/9/09 amendment to change deadlines; 2/10/10 was a third modification to the deadline.	EPA	**Issue:** MACT standards for boilers and stationary reciprocating internal combustion engines (RICE) **Result:** In 2003, EPA and Sierra Club entered into a consent decree that required MACT standards for boilers and RICE. There were other MACT standards requirements as well. For Boiler MACT: The rule history is extremely complicated. In 2006, the DC District court issued an order detailing a schedule. EPA and Sierra Club both agreed multiple times to extend the deadline to finalize rules. However, Sierra Club opposed EPA's motion to extend a January 16, 2011 deadline that was established in a September 20, 2010, order, from January 16, 2011 to April 13, 2012. EPA realized that it needed much more time for the final rules. Judge Paul Friedman of the DC District Court decided that enough was enough and gave EPA only one month to issue the rules. EPA did in fact issue the rule on March 21, 2011, and that same day published a notice of reconsideration. The final rules based on the reconsideration were published on January 31, 2013, and February 1, 2013. For the RICE rule: In 2007, 2009, and 2010, EPA and Sierra Club modified the deadline dates for final action as required in the decree. EPA agreed to take additional comment on the RICE rule in June and October 2012, and published the final RICE rule in January 2013.
***Sierra Club v. Jackson* (DSW Rule)** 09-1041 Consol. with 09-1038 (D.C. Cir.) Settled: 9/7/2010 (see also proposed rule that says this date, pp. 44, 102)	EPA	**Issue:** Revisions to the Definition of Solid Waste under RCRA **Result:** Sierra Club challenged the 2008 "Definition of Solid Waste" rule, which established requirements for recycling hazardous secondary materials. To settle the lawsuit, EPA agreed it would review and reconsider the rule. In July 2011, EPA published a proposed rule, significantly tightening the types of materials that can be recycled under RCRA.
***Sierra Club v. Jackson* (Houston-Galveston-Brazoria)** 12-00012 (D.D.C.) Settled: 6/21/2012	EPA	**Issue:** TX SIP submission for 1997 ozone NAAQS **Result:** EPA agreed to take final action on the SIP for the Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas.
***Sierra Club v. Jackson* (Kentucky Regional Haze)** 10-00889 (D.D.C.) Settled: 10/29/2010	EPA	**Issue:** KY SIP submissions for 1997 ozone NAAQS and Regional Haze **Result:** EPA agreed to the following: By April 15, 2011, EPA would take final action on ozone SIP submittals for various Kentucky ozone maintenance areas; by March 15, 2012, EPA would take final action on KY's Regional Haze SIP.
***Sierra Club v. Jackson* (MA, CT, NJ, NY, PA. MD, and DE SIPs)** 11-02180 (D.D.C.) Settled: 7/23/2012	EPA	**Issue:** SIP submissions for certain NAAQS by MA, CT, NJ, NY, PA, MD, and DE **Result:** EPA agreed to take final actions on SIPs for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE.
***Sierra Club v. Jackson* (ME, MO, IL, and WI SIPs)** 11-00035 (D.D.C.) Settled: 11/30/2011	EPA	**Issue:** SIP submissions for 1997 ozone NAAQS by ME, MO, IL, and WI **Result:** EPA agreed to take final action on the SIPs for certain areas of IL, ME, and MO. Wisconsin was not included because the issue was already

Case	Agency	Issue and Result
		resolved.
***Sierra Club v. Jackson* (NC and SC SIPs)** 12-00013 (D.D.C.) Settled: 6/28/2012	EPA	**Issue**: NC and SC SIP submissions regarding 1997 ozone NAAQS **Result**: EPA agreed to take final actions on North Carolina and South Carolina SIPs for Charlotte-Gastonia-Rock Hill.
***Sierra Club v. Jackson* (OK SIP)** 12-00705 (D.D.C.) Settled: 10/15/2012	EPA	**Issue**: OK SIP revision regarding excess emissions **Result**: EPA agreed to ake final action on a revision to the OK SIP regarding excess emissions.
***Sierra Club v. Jackson* (ozone TX, CT, MD, NY, NJ, MA, and NH)** 11-00100 (D.D.C.) Settled: 9/12/2011	EPA	**Issue**: Attainment determinations for 1-hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH **Result**: EPA agreed to make attainment determinations for 1 hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH.
***WildEarth Guardians et al. v. Jackson* (ozone AZ, NV, PA, and TN)** 10-04603 (N.D. Cal.) Settled: 3/23/2011 (Date found in the notice of proposed settlement)	EPA	**Issue**: Nonattainment of 1997 ozone NAAQS for areas in AZ, NV, PA, and TN **Result**: EPA agreed to set a deadline for issuing findings of failure to submit SIPs for the 1997 ozone NAAQS for areas in NV and PA. Other actions addressed concerns in two other states.
***WildEarth Guardians v. Jackson* (2008 ozone NAAQS)** 11-01661 (D. Ariz.) Settled: 12/12/2011	EPA	**Issue**: Area designations for 2008 ground level ozone NAAQS **Result**: EPA agreed to sign for publication in the Federal Register a notice of the Agency's promulgation of area designations for the 2008 ground-level ozone NAAQS.
***WildEarth Guardians v. Jackson* (2nd suit for Phoenix)** 11-02205 (N.D. Cal.) Settled: 6/7/2011	EPA	**Issue**: AZ SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take action on AZ SIP submission pertaining to Phoenix-Mesa's plan to achieve progress toward attainment of 1997 ozone NAAQS. EPA issued a final rule on June 13, 2012.
***WildEarth Guardians v. Jackson* (CO, UT, MT, and NM SIPs)** 09-02148 (D. Colo.) Settled: 2/1/2010	EPA	**Issue**: Final action on 22 SIP submissions from CO, UT, and MT **Result**: EPA agreed to take final action on 22 SIP submissions from CO, UT, and MT, and then added 19 SIP submissions from NM, for a total of 41 SIP submissions.
***WildEarth Guardians v. Jackson* (oil and gas)** 09-00089 (D.D.C.) Settled: 12/3/2009	EPA	**Issue**: Clean Air Act Regulations on Oil and Gas Drilling Operations **Result**: In January 2009, environmental groups sued EPA to update federal regulations limiting air pollution from oil and gas drilling operations. EPA settled with environmentalists on December 3, 2009. The settlement required EPA to review and update three sets of regulations: (1) NSPS for oil and gas drilling; (2) MACT standards for hazardous air pollutant emissions; (3) and "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. On August 16, 2012, EPA issued final rules covering NSPS, MACT, and residual risk for the oil and gas sector.

Case	Agency	Issue and Result
***WildEarth Guardians v. Jackson* (ozone)** 09-02453 (N.D. Cal.) Settled: 2/18/2010	EPA	**Issue**: SIP submissions for 1997 8-hour ozone and $PM_{2.5}$ NAAQS by CA, CO, ID, NM, ND, OK, and OR **Result**: EPA agreed to decide, for each state, whether to approve or deny SIPs for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, or whether to instead force the states to comply with a federal implementation plan.
***WildEarth Guardians v. Jackson* ($PM_{2.5}$)** 11-00190 (N.D. Cal.) Settled: 8/25/2011	EPA	**Issue**: SIP submissions for 2006 $PM_{2.5}$ MAAQS infrastructure by 20 states **Result**: EPA agreed to sign a final action to approve or disapprove the 2006 $PM_{2.5}$ NAAQS infrastructure SIPs for AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY,NV, AR, NH, SC, MA, AZ, GA, and WV.
***WildEarth Guardians v. Jackson* (CO, WY, MT, and ND SIPs)** 11-00001 (Consolidated with 11-00743) (D. Colo.) Settled: 6/6/2011	EPA	**Issue**: CO, WY, MT, and ND SIP submissions for Regional Haze and excess emissions standards **Result**: EPA agreed to decide for each state whether to approve or deny the SIP submissions.
***WildEarth Guardians v. Jackson* (Utah breakdown provision)** 09-02109 (D. Colo.) Settled: 11/23/2009	EPA	**Issue**: Utah SIP revision regarding breakdown provision **Result**: EPA agreed to take a final action regarding the "Utah breakdown provision," which allows sources to exceed their permitted air pollution limits during periods of "unavoidable breakdown." In April 2011, EPA found the breakdown provision inadequate and called on the state to revise its SIP.
***WildEarth Guardians v. Jackson* (Utah SIP)** 10-01218 (D. Colo.) Settled: 10/28/2010	EPA	**Issue**: Utah SIP submissions for Regional Haze and PM_{10} NAAQS **Result**: EPA agreed to sign a final action approving or disapproving, in whole or in part, Utah's request to redesignate Salt Lake City's attainment status for PM_{10} NAAQS. EPA also agreed to take final action on Utah's Regional Haze submission.
***WildEarth Guardians v. Jackson, et al.* (Utah Salt Lake and Davis Counties SIP)** 12-00754 (D. Colo.) Settled: 7/11/2012	EPA	**Issue**: Deadline for action on Utah SIP for 1997 NAAQS for ozone regarding Salt Lake and Davis Counties **Result**: EPA agreed to sign a notice of final action regarding Utah's proposed SIP revision for maintenance of the 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties.
WildEarth Guardians v. Kempthorne 08-00689 (D. Ariz.) Settled: 4/29/2009	DOI	**Issue**: Critical habitat designation for the Chiricahua leopard frog **Result**: DOI under the Bush administration listed the leopard frog as threatened under the Endangered Species Act but declined to designate a critical habitat because doing so would not be "prudent," as is permitted by the Endangered Species Act. WildEarth Guardians sued to challenge this decision, and the Obama administration's DOI settled the case. The terms of the settlement provided that DOI would reconsider its prudency determination. On March 20, 2012, DOI finalized a rule that reversed its prudency decision and designated approximately 10,346 acres as critical habitat for the Chiracahua leopard frog.
WildEarth Guardians v. Locke 10-00283 (D.D.C.)	Dept. of Commerce	**Issue**: Alleged failure by National Marine Fisheries Service (NMFS) to set Endangered Species Act protections for sperm whales, fin whales, and sei

Case	Agency	Issue and Result
Settled: 6/25/2010		whales **Result**: NMFS agreed to issue recovery plans for sperm whales, fin whales, and sei whales by the end of 2011.
***WildEarth Guardians v. Salazar* (674 species)** 08-00472 (D.D.C.) Settled: 3/13/2009	DOI	**Issue**: DOI non-action on plaintiff's petitions to list 674 plant and animal species as threatened under the Endangered Species Act **Result**: DOI agreed to issue decisions on hundreds of species for which no finding had already been made.
***WildEarth Guardians v. Salazar* (Wright's marsh thistle)** 10-01051 (D.N.M.) Settled: 6/2/2010	DOI	**Issue**: DOI non-action on petition to list the Wright's marsh thistle as endangered or threatened under the Endangered Species Act **Result**: DOI agreed to issue a decision on whether to list the the Wright's marsh thistle. FWS listed the Wright's marsh thistle as endangered or threatened on November 4, 2010 (it was a 12-month petition finding).

Most sue and settle cases are resolved through a consent decree or settlement agreement. However, there is a comparable type of case in which the case is resolved by agency action in response to the legal challenge, as opposed to resolving the case with a consent decree or settlement agreement. Like with the "standard" sue and settle cases, special interests bring legal actions to compel agencies to take their desired actions. A common thread between the cases is the special interests are able to change policy affecting the general public without the public having sufficient notice or opportunity to change agency actions.

Case	Agency	Issue and Result
California v. EPA 08-1178 (D.C. Cir.) Settled: 6/30/2009 (EPA granted the waiver; see also EPA waiver web page)	EPA	**Issue**: Grant of California GHG Waiver **Result**: EPA, California, environmental groups and the automobile industry negotiated a settlement of a multi-party lawsuit requesting that EPA set Clean Air Act Title II emissions limitations on GHG emissions from automobiles, and granting California a waiver to set its own automobile GHG standards. EPA had previously denied the waiver in 2008; a lawsuit followed. In January, 2009, California asked for reconsideration of the waiver request. EPA granted the waiver in June 2009 (the notice was published in the Federal Register on July 8, 2009).
Center for Biological Diversity v. Kempthorne 08-05546 (lead case--a consolidated case is NRDC v. DOI, 08-05605) (N.D. Cal.) Settled: 5/14/2009	DOI, NMFS, Dept. of Commerce	**Issue**: December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act **Result**: While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
Greater Yellowstone Coalition v. Kempthorne 08-02138 (D.D.C.) Settled: 11/2/2009	National Park Service, DOI	**Issue**: December 2008 rule allowing limited recreational snowmobile use (720 snowmobiles per day) inside Yellowstone National Park **Result**: While the lawsuit was pending, the National Park Service

Case	Agency	Issue and Result
		announced, on October 15, 2009, a new winter rule superseding the December 2008 rule of which the plaintiffs complained. The plan reduced snowmobile usage to 318 snowmobiles per day, which is less than half the allowed number under the prior rule.
League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Kevin Martin 09-01023 (D. Or.) Settled: Stipulation of Dismissal, 12/30/2009	U.S. Forest Service	**Issue**: Whether authorization of the Wildcat Fuels Reduction and Vegetation Management Project in the Umatilla National Forest violates NEPA and Administrative Procedure Act **Result**: U.S. Forest Service agreed to withdraw its decision notice for the project, which would have allowed timber to be harvested from the National Forest. The parties then agreed to dismiss the case.
***Mississippi v. EPA* (ozone case)** 08-1200 (D.C. Cir.) Settled: 1/19/2010 (This is the publication date of the proposed ozone standards)	EPA	**Issue**: Ozone NAAQS Reconsideration **Result**: Earthjustice sued EPA in 2008 challenging the NAAQS for ground-level ozone, which were lowered at the time from 84 parts per billion (ppb) to 75 ppb. In 2009, EPA announced it would reconsider the rule, and Earthjustice agreed to place its lawsuit on hold as long as EPA imposed stricter ozone NAAQS. EPA proposed new NAAQS somewhere in the range of 60 and 70 ppb. The Obama Administration put the planned rule on hold. However, the rule is expected to be proposed in late 2013.
Natural Resources Defense Council v. Federal Maritime Commission 08-07436 (C.D. Cal.) Settled: 9/11/2009	Federal Maritime Comm'n	**Issue**: Federal Maritime Commission (FMC) decision to terminate portions of the Port of Los Angeles' and Long Beach's Clean Trucks Programs **Result**: While the lawsuit was pending, FMC ended its administrative investigation against the Ports of Los Angeles and Long Beach related to their clean trucks programs, and in a related case, FMC's attempt to block implementation of the ports' clean trucks program was dismissed.
Natural Resources Defense Council v. DOI 08-05605 (N.D. Cal.) Settled: 5/15/2009	DOI, NMFS, Dept. of Commerce	**Issue**: December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act **Result**: While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
Ohio Valley Environmental Coalition v. Army Corps of Engineers 09–247 (R46–024) (U.S.) Settled: 7/30/2010 (Memo that effectively settled the case)	EPA	**Issue**: Clean Water Act Guidance for Mountaintop Removal Mining Permits **Result**: Environmental groups challenged Clean Water Act permitting for mountaintop removal mining, saying EPA did not account for the impact on stream function. EPA issued this "guidance" while suit was pending in the U.S. Supreme Court, which effectively settled the case.
***Sierra Club v. EPA* (emission case)** 09-1063 (D.C. Cir.) Settled: 6/15/2010 EPA revoked the rule	EPA	**Issue**: Emission-Comparable Fuels (ECF) conditional exclusion reconsideration **Result**: EPA issued a December 2008 rule creating a category of Emission-Comparable Fuels (ECF) wastes that could be burned in industrial boilers without triggering RCRA combustion requirements, as long as the resulting

Case	Agency	Issue and Result
		emissions were comparable to those produced by burning fuel oil. Environmental groups sued, and EPA proposed a rule that would withdraw this conditional exclusion for ECF. In June, 2010, EPA published a final rule that revoked this conditional exclusion.
Southern Appalachian Mountain Stewards v. Anninos 09-00200 (Complaint, Army Corps Joint Status Report (stating decision to suspend NWP 21 permit), Stipulation of Dismissal) Settled: 6/18/2010 (This date is based on a 6/30/10 status report explaining the suspension of permits as of 6/18/10)	Army Corps	**Issue**: Decision to issue a streamlined nationwide Clean Water Act permit for surface coal mining **Result**: Army Corps suspended the use of Nationwide Permit 21, which authorized discharges of dredged or fill material into waters of the United States for surface coal mining activities. As a result, coal mining companies must obtain costly, time-consuming individual dredge and fill permits from the Corps.
Taylor v. Locke 09-02289 (D.D.C.) Settled: 7/19/2010	National Marine Fisheries Service (NMFS)	**Issue:** Atlantic Herring Fishery Revocation of Exemption **Result**: Settlement removes exemption that allowed herring industrial trawlers to release small amounts of fish that remain after pumping without federal inspection. The new final rule by NMFS, published in 2010, requires federal accounting and inspection for all fish brought on board.

List of Rules and Agency Actions

Rules and Agency Actions Resulting From Sue and Settle Cases (Pending or Final) 2009–2012

Air

- The Environmental Protection Agency (EPA) agreed to propose the first-ever greenhouse gas (GHG) regulations for power plants.
- EPA agreed to propose the first-ever GHG regulations for petroleum refineries.
- EPA issued Maximum Achievable Control Technology (MACT) standards for cement kilns.
- EPA revoked rule that made it easier to burn Emission Comparable Fuel wastes.
- EPA proposed stricter ozone standards (withdrawn, but could be published at any time).
- EPA issued a rule that made the National Ambient Air Quality Standards (NAAQS) for particulate matter more stringent.
- EPA issued MACT standards for hazard air pollutants for coal- and oil-fired electric utility steam generating units (Utility MACT).
- EPA granted waiver to CA to set its own limitations on GHG emissions from automobiles.
- EPA to increase regulations on oil- and gas-drilling operations regulations, including:
  - New Source Performance Standards (NSPS) for oil and gas drilling
  - MACT standards for hazardous air pollutant emissions
  - Residual Risk Standards
- EPA finalized new MACT standards for polyvinyl chloride manufacturers.
- EPA agreed to set MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
- EPA imposed a Federal Implementation Plan (FIP) on OK impacting three coal-fired power plants.
- EPA imposed an FIP on ND impacting seven coal-fired power plants.
- EPA imposed an FIP on NM impacting one coal-fired power plant.
- EPA imposed an FIP on NE impacting one coal-fired power plant.
- EPA agreed to review kraft pulp NSPS.
- EPA revised NSPS for nitric acid plants.
- EPA agreed to review national emissions standards for radon emissions from operating mill tailings.
- EPA agreed to review NSPS for municipal solid waste landfills.
- EPA issued MACT standards for boilers (Boiler MACT).
- EPA issued MACT standards for stationary reciprocating internal combustion engines (RICE rule).

EPA issuing MACT standards for:

- Marine tank vessel loading operations
- Pharmaceuticals production
- Printing and publishing industry
- Hard and decorative chromium electroplating and chromium anodizing tanks
- Steel pickling—HCL process facilities and hydrochloric acid regeneration plants
- Group I polymers and resins
- Shipbuilding and ship repair
- Ferroalloys production—ferromanganese and silicomanganese
- Wool fiberglass manufacturing
- Secondary aluminum production
- Pesticide active ingredient production
- Polyether polyols production
- Group IV polymers and resins
- Flexible polyurethane foam production
- Generic MACT—acrylic and modacrylic fibers

- Wood furniture manufacturing operations
- Primary lead smelting
- Secondary lead smelting
- Pulp and paper production industry
- Aerospace manufacturing and rework facilities
- Mineral wool production
- Primary aluminum reduction plants
- Portland cement manufacturing industry
- production
- Generic MACT—polycarbonate production
- Off-site waste and recovery operations
- Phosphoric acid manufacturing
- Phosphate fertilizers production plants
- Group III polymers and resins—manufacture of amino/phenolic resins

EPA agreed to take action on the following proposals related to State Implementation Plans (SIPs):

- CA SIP revision regarding San Joaquin Valley (SJV) 1997 $PM_{2.5}$ attainment plan
- CA SIP revision regarding rule changes for SJV Unified Air Pollution Control District
- CA SIP revision regarding particulate matter from beef feedlot operations
- CA SIP revision regarding PM_{10} emissions in Imperial County
- CA SIP revision regarding air quality rules in Imperial County
- Pesticide Element SIP submittal and the Fumigant Rules submittal
- KY SIP submission regarding 1997 $PM_{2.5}$ NAAQS for the Huntington-Ashland area
- KY SIP submission regarding 1997 $PM_{2.5}$ NAAQS emissions inventory for Louisville
- EPA agreed to issue a federal plan if Louisiana regulators do not attain 1997 ozone standards in Baton Rouge
- CA SIP revisions addressing 1997 $PM_{2.5}$ and ozone NAAQS for South Coast Air Basin
- 1997 ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA
- CA SIP submission demonstrating RACT for SJV
- CA SIP submission for 1997 ozone NAAQS plan for SJV
- 1997 ozone NAAQS submission by NY, NJ, CT, MA, IL, and MO
- TX SIP submission addressing 1997 ozone and $PM_{2.5}$ NAAQS
- EPA required to approve or disapprove ozone NAAQS SIPs for 21 states
- AL SIP for 1997 $PM_{2.5}$ NAAQS and GA SIP for 1997 8-hour ozone NAAQS
- AR regional haze SIP
- TX SIP submission for Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas
- KY SIP submission addressing 1997 ozone NAAQS in 3 counties
- SIP submission for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE
- SIPS for certain areas of IL, ME, and MO
- NC and SC SIP submissions for 1997 ozone NAAQS
- OK SIP submission regarding excess emissions
- Determination of 1-hour ozone attainment designations for areas in TX, CT, MD, NY, NJ, MA, and NH
- 1997 ozone NAAQS for areas in NV and PA
- Determination of area designations for the 2008 ground-level ozone NAAQS
- AZ SIP submission regarding plan for 1997 NAAQS attainment in Phoenix-Mesa
- 41 SIP submissions by CO, UT, MT, and NM
- SIP submissions for 1997 8-hour ozone and $PM_{2.5}$ NAAQS by CA, CO, ID, NM, ND, OK, and OR
- 2006 $PM_{2.5}$ NAAQS Infrastructure SIP submissions by AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY, NV, AR, NH, SC, MA, AZ, GA, and WV
- SIP submissions regarding regional haze and excess emissions standards in CO, WY, MT, and ND
- UT SIP revision regarding the "breakdown provision"
- Two UT SIP submissions, including one on regional haze
- 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties (UT)
- UT SIP submission addressing PM_{10} NAAQS designations for Salt Lake County, Utah County, and Ogden City

Land

- U.S. Forest Service (USFS) considering blocking 1 million acres in CA federal parks from development.
- EPA considering revisions to "definition of solid waste."
- Office of Surface Mining agreed to consider restricting mining activities near waterways (Stream Buffer Zone Rule).
- The Bureau of Land Management agreed to consider amending 12 resource management plans that opened 2

million acres of federal lands for potential oil shale leasing.
- National Park Service reduced snowmobile usage inside Yellowstone National Park.
- USFS agreed to withdraw its decision notice regarding the "Wildcat" project on the Umatilla National Forest.

Plants and Animals

- National Marine Fisheries Service (NMFS) imposed inspection requirements for Atlantic Herring Fishery.
- Fish and Wildlife Service (FWS) doubled size of critical habitat of Hine's emerald dragonfly to more than 26,000 acres in MI and MO.
- The Department of the Interior (DOI) designated about 10,386 acres of critical habitat for Chiracahua leopard frog.
- DOI agreed to issue decisions that had not already been made on hundreds of plant and animal species from list of 674 species.
- FWS listed the whitebark pine tree as an endangered species as a result of climate change.
- NMFS agreed to issue recovery plans for sperm plans, fin whales, and sei whales.
- DOI agreed to issue 12-month findings under the Endangered Species Act on 12 species of parrots, macaws, and cockatoos.
- USFS agreed to make final determinations under the Endangered Species Act for 251 species.
- FWS agreed to make findings under the Endangered Species Act for at least 477 species.
- DOI agreed to issue a decision whether to list Wright's marsh thistle.

Water

- New water quality standards for FL (inland).
- New water quality standards for FL (coastal).
- Guidance for mountaintop removal mining permits.
- EPA issued guidance on how states should address ocean acidification under the Clean Water Act.
- Army Corps of Engineers suspended nationwide surface coal mining permit.
- EPA finalizing rule regulating cooling water intake structures.
- EPA agreed to issues rules that revise steam electric effluent guidelines.
- EPA agreed to establish a total maximum daily load for the Chesapeake Bay.
- EPA agreed to develop changes to its stormwater regulations nationally.

Other

- EPA issued stricter pesticide human-testing consent rule.
- EPA agreed to issue specific changes to the Lead Renovation, Repair and Painting Program Rule.
- Federal Maritime Commission ended its administrative investigation of the ports of Los Angeles and Long Beach related to their clean trucks program.

Appendix A

Methodology I for Identifying Cases in the Sue and Settle Database

To identify the cases included in the current version of the sue and settle database, the following approaches were used:

The database was *only* designed to capture examples of major sue and settle cases. To accomplish this, a multijurisdictional federal court search was conducted in 2011 using Lexis-Nexis looking at cases 2.5 years before the start of the Obama administration and 2.5 years after (through June 2011). The names of numerous environmental groups were used and dockets of cases were identified.

For those cases identified that were still open, they were not pursued any further because an open case is by its nature not a sue and settle case. If the case was closed, then the case was searched on PACER (www.pacer.gov). If there was a settlement, relevant cases were included in a larger database that included challenges to projects. In the current version of the database, challenges to projects were excluded.

To add major cases or cross-check the existing database:

- A search was conducted in the Fall Unified Agendas for 2009–2012.[79] Economically significant active, completed, and long-term actions were searched. If a consent decree or settlement agreement was listed as being connected to a specific rule, a case search was conducted to verify this information.
- House Report 112-593, which is the House Report for the Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862), included information on sue and settle cases. These cases were either added or cross-checked with the database, as was information from the following House testimony: *Addressing Off Ramp Settlements: How Legislation Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity*, Testimony of Roger R. Martella, Jr. before the House Committee on the Judiciary, Feb. 2, 2012; and *The Use and Abuse of Consent Decrees in Federal Rulemaking*, Testimony of Andrew M. Grossman before the House Committee on the Judiciary, Feb. 2, 2012.
- The following GAO report was used: GAO, *Environmental Litigation: Cases Against EPA and Associated Costs Over Time* GAO-11-650 (Washington, D.C.: August, 2011). The U.S. Chamber's report on regional haze and sue and settle was also used: *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs, Chamber of Commerce of the United States*, William Yeatman (August 2012). In addition,

[79] Since only one Unified Agenda was published in 2012, which was in December, this agenda was used for 2012.

environmental groups announce settlements and lawsuits on their websites—this information served as a resource.

The database includes environmental-related cases, regardless of federal agency or federal statute; however, actions that were not of general applicability (except for some FOIA cases) were excluded, such as enforcement actions and Title V permit cases.

Appendix B

Methodology II for Identifying Cases in the Sue and Settle Database

Clean Air Act

Clean Air Act settlement agreements and were compiled using a database search of the *Federal Register*. Pursuant to Clean Air Act section 113(g), all settlement agreements and consent decrees must be announced in the *Federal Register*. The search terms were:

- Agency: "Environmental Protection Agency"
  Title: "Settlement Agreement" or "Consent Decree"
  Dates: Between "1/20/2009" and "1/20/2013"

All settlement agreements and consent decrees pursuant to a Title V challenge or an enforcement action were removed in order to ensure that the settlement agreement or consent decree had a general applicability.

It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using www.pacer.gov.

Clean Water Act

Clean Water Act settlement agreements pursuant to citizen deadline suits are not announced in the *Federal Register*. Two techniques were used to find them.

The first was a database search of "Inside EPA," and used two sets of search terms:

- "Clean Water Act" and "Settlement Agreement"
  "Clean Water Act" and "Consent Decree"

The second was a database search of the *Federal Register*. Instead of searching for announcements of settlement agreements (as had been done for the Clean Air Act), regulations pursuant to Clean Water Act settlement agreements or consent decrees were searched. The search terms were as follows:

- Agency: "Environmental Protection Agency"
  Title: "Clean Water Act"
  Full Text or Metadata: "Settlement Agreement" or "Consent Decree"
  Dates: Between "1/20/2009" and "1/20/2013"

As with the Clean Air Act methodology, all settlement agreements and consent decrees pursuant to an enforcement action were removed to ensure that the settlement agreement or consent decree had general applicability. It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using www.pacer.gov.

2/5/15 HB 1432 #36

Reconsideration of 2008 Ozone NAAQS

Boiler MACT Rule

Lead RRP Rule

$2.16 billion

Regional Haze Implementation Rules

Utility MACT Rule

$9.6 billion

Standards for Cooling Water Intake Structures

$90 billion

$18 billion

Florida Nutrient Standards for Estuaries and Flowing Waters

$3 billion

Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

$350 million

$500 million

TMDL for Chesapeake Bay

Oil and Natural Gas MACT Rule

$384 million

HB 1432 #36

U.S. CHAMBER OF COMMERCE

Environment, Technology & Regulatory Affairs Division

1615 H Street, NW, Washington, DC 20062

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#4

North Dakota
Grain Growers Association

Your voice for wheat and barley. www.ndgga.com

North Dakota Grain Growers Association
Testimony on HB 1432
House Agriculture Committee
February 5, 2015

Chairman Dennis Johnson, members of the House Agriculture Committee, for the record my name is Dan Wogsland, Executive Director of the North Dakota Grain Growers Association. The North Dakota Grain Growers Association is in full support of HB 1432.

How has it come to this? How have we come to a situation where the state of North Dakota has to provide $5 million in funding to protect ourselves from ourselves? Yet sadly this is precisely the situation we find ourselves in as regulatory over-reach and federal regulatory creep threatens our agriculture industry, our energy industry as well as our business climate in the state of North Dakota. HB 1432 is before you today to provide North Dakota the means necessary to protect itself and its strong economic engines from potentially harmful regulatory efforts that would be detrimental not only to our economy but to the citizens of our state.

Let's be clear, not all federal regulatory efforts are detrimental to our state, our economy or to our people. We as state and a nation enjoy the benefits of clean water and clean air due in part to federal regulations. Our soil is protected in part from conservation regulations designed to preserve the land for generations to come. Our wildlife are protected and preserved in part due to federal regulatory efforts. However when regulatory over-reach goes out of control we as a state must have a mechanism in place to protect our citizens and our economy from negative federal interference.

There are a host of examples of federal regulatory creep in North Dakota; every industry in the state can cite the horror stories. Proposed Waters of the United States regulations, off-site wetland determinations, pesticides and buffer zones, nutrients, endangered species, the list for agriculture alone goes on and on.

Individually, and even collectively, the economic engines of this state like agriculture, energy and business cannot match the resources of the federal government in terms of litigation. We need a partner; HB 1432 provides that partner.

Chairman Johnson, members of the House Agriculture Committee, HB 1432 represents a proactive approach by the North Dakota legislature in asserting our state's rights in protecting our state's economic engines, our natural resources and most importantly our citizens. Therefore Chairman Johnson, members of the House Agriculture Committee the North Dakota Grain Growers Association appears today in support of HB 1432 and we would ask the Committee's favorable recommendation of the legislation.

#5

House Bill 1432
Testimony of J. Roger Kelley
House Agriculture Committee
February 5, 2015

Representative Brandenburg and members of the committee, my name is Roger Kelley, Director of Regulatory Affairs for Continental Resources, Inc. Continental is a significant producer of oil and gas in the North Dakota Bakken oil play. Through our interactions in North Dakota and other states in the Union, we have gained an appreciation and respect for the need to preserve the rights of private land owners in the use of their land. Over the past few years, the Federal Government has advanced efforts in many areas that challenge that right. Two of those areas are the subject of this bill, namely the Federal Water Pollution Control Act of 1977 or the Clean Water Act (CWA) and the Endangered Species Act of 1973 (ESA). Granted both of the statutes have been in effect for many years, but over the past six (6) years, efforts set forth under the assumed authority of both of these acts have been tremendously exaggerated and I might say, have exasperated the situation.

Under the CWA, the U.S. Environmental Protection Agency has proposed to define, again, the "Waters of the United States" (WOTUS) to become more inclusive than ever before. In fact the proposed definition goes so far as to create a Federal nexus to groundwater. Over the years since the inception of the CWA, this definition has been changed by policy and by court decision.

If the WOTUS definition is accepted as currently proposed, then any water on a property or any surface of a property can be considered the WOTUS such that an activity from building a barn or a feeder to the clearing of land for any purpose on the agricultural side, or the preparation of a drilling pad and building of roads on the energy side would require the acquisition of a Section

House Bill 1432
Testimony of J. Roger Kelley
House Agriculture Committee
February 5, 2015

404 permit from the Corp of Engineers. These permits trigger a myriad of regulatory requirements that can add time and expense to the construction process. In fact, the delay could be sufficient on some situations that the oil lease could actually expire before the process is completed and the reserves could be lost.

The ESA can have even a greater impact on private land use. Under the authority of the ESA, the U.S Fish and Wildlife Service of the Department of the Interior (FWS) can designate a species as a candidate species for threatened or endangered threatened status based on minimal science. Once a species is accepted as a candidate, the FWS can then designate critical habitat for that species and propose habitat restrictions that will be imposed if the critter is listed as threatened or endangered. These restrictions will apply to all land within that critical habitat, both public and private and can restrict any use of that land with no consideration or input from the landowner. In fact, once a critter is listed as threatened or endangered, the state that has held and protected that species in trust no longer has control over the species mitigation process. Of course any conservation efforts by the state or any other entity will be considered, but they are all subject to approval and acceptance by the FWS.

Now I give you all of this information to make one point, and that is that these two issues represent a significant threat to the state of North Dakota in general and to the agricultural/landowner and energy community in particular. They both challenge the use of private land and they also challenge the right of the state of North Dakota to manage their own

affairs. The underlying attitude of the Federal Government on this and all regulatory issues is that the Federal agencies know what is best for your state and that your state government does not. Our industry has been in a battle with the FWS in many states in different parts of the country and has found this same attitude throughout the country. We do not doubt that some species warrant protection, but we do not necessarily agree that the Federal government is the only one that can perform that function.

HB 1432 provides a vehicle by which North Dakota can organize its efforts on these two issues. It is critical that states become organized and take control of these and similar environmental and regulatory issues so that we can demonstrate to Congress and this administration that the states can develop programs to conduct the necessary conservation and environmental protection under the authority of these federal statutes. All states need to put forth this same effort and be proactive in doing so.

HB 1432 places the leadership of this advisory committee under the authority of the Commissioner of Agriculture who is also one of the three members of the NDIC. The Ag Commissioner can foster this symbiotic relationship between the agricultural/landowner community and the energy sector. We have found that the needs of both of these groups are very similar and can be simultaneously satisfied in most situations.

Continental therefore recommends a Do Pass on HB 1432 and suggests that doing so will prove beneficial to this state and to the advancement of states' rights in so dealing with the Federal issues.

HB 1432
2/5/15

#6

Good Morning Chairman Johnson and members of the agriculture committee. For the record my name is Bart Schott. I am a 3rd generation farmer from Kulm, ND and am former president of the National Corn Growers Association. I currently serve on the Public Policy Committee of the North Dakota Corn Growers Association. The North Dakota Corn Growers support HB1432 that establishes an environmental litigation fund to provide protection for farmers against the federal overreach that we are encountering.

During my time serving as National President one large issue that we followed on the national level was the Chesapeake Bay Authority and the nutrient criteria modeling that they used to measure what the agricultural community was contributing to waters in the Chesapeake Bay Watershed. It became obvious that agriculture was singled out because it was much easier for high populous areas to point their finger at the minority. Through modern technology, farmers can now produce one bushel of corn using .8 lbs of Nitrogen fertilizer. Yet the Chesapeake Bay nutrient criteria modeling still uses 1.2 lbs of Nitrogen to produce a bushel of corn. We argued that if they are going to use models they need to include up to date numbers, rather than numbers from the 1980's.

The Supreme Court ruling of Rapanos and Carabell in 2006 established that threshold tests are to be used on a case by case evaluation of jurisdiction for relative flow permanence. This ruling affects these regulations:

- Intrastate waters, where their use, degradation, or destruction could affect interstate commerce
- Tributaries of above waters
- Wetlands adjacent to above waters

Recently the EPA proposed a rule under definitions of "Waters of the United States" or WOTUS. The proposed rule was very open ended and over reaching in my view. The rule defines tributary as "waters with bed and banks and an ordinary high water mark that contribute flow to traditionally navigable waters, interstate water or territorial seas." The proposed WOTUS rule also stated that adjacent waters are jurisdictional and that "adjacency applies to all waters, not just wetlands." The proposed WOTUS rule also indicates that "other waters may

be aggregated where they perform similar functions and are located close together in the same watershed."

We have been informed that groundwater, irrigation and artificial lakes or ponds created for stock watering would be exempt from this ruling. Even though it has been stated there are exemptions, one question that you all need to ponder is who is going to be interpreting these rules? They say we will have exemptions but if you read the language "adjacency applies to all waters, not just wetlands." You could argue that a common road ditch could be regulated under this ruling if the wrong person or persons interpreted it this way.

Members of the Committee, the agricultural community needs your help. Farmers and Ranchers are among the best stewards of our resources, particularly water. We need to stop this federal overreach and these potential interpretations that could stifle production. We need sensible regulation that is science based and up to date. HB1432 sticks up for our farmers and ranchers. I would urge you to consider it.

Thank you and I would be happy to answer any questions.

Attorney General
Wayne Stenehjem

#1a
HB1432
2/5/15

Energy Generation: Lawsuits, Amicus Briefs, and Comments Filed

I. GHG

GHG Cases (ND is a Party)

- Background: Numerous consolidated cases involving EPA's regulatory scheme for regulating greenhouse gases.
  - EPA adopted 4 different rules, all of which were challenged:
    - The **Endangerment Finding**: In December 2009, EPA made a determination that GHGs endanger the public health and welfare. Although the Endangerment Finding was conducted under a Clean Air Act provision that involves motor vehicle emissions, it opened the door for EPA's regulation of GHGs from stationary sources.
    - Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (a/k/a the "**Tailpipe Rule**"): This rule specifically addresses motor vehicle emissions. But, according to EPA, it triggered regulation of GHGs from stationary sources.
    - Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs (a/k/a the "Johnson Memo Reconsideration Rule", "**Timing Rule**", or "Triggering Rule"): This action clarifies that stationary sources need to get permits covering GHGs beginning January 2, 2011 (the same date the national controls went into effect for the Tailpipe Rule).
    - Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (a/k/a the "**Tailoring Rule**"): This rule is an attempt by EPA to alleviate the "absurd" consequences of regulating stationary sources' GHG emissions under the current regulatory scheme. For instance, without this rule, even small emitters (ex.: office buildings) would need to get an air permit. This rule phases in permit requirements for large stationary sources.
  - Many states and industry challenged the rules. Many other states and environmental groups joined on the side of EPA.
- DC Circuit ("*Coalition for Responsible Regulations v.* EPA"): On June 26, 2012, the D.C. Circuit Court issued an opinion upholding all of EPA's GHG regulations. The Court denied the petitions challenging the Endangerment Finding and the Tailpipe Rule, and dismissed the petitions challenging the Timing and Tailoring Rules for lack of standing. Petitioners, including State Petitioners, filed a petition for rehearing en banc, which was denied on December 20, 2012.
- SCOTUS ("*UARG v. EPA*"):
  - North Dakota and several other states, led by Texas, filed a cert petition. Cert was granted on the following issue: "whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."
  - The Supreme Court issued its opinion on June 23, 2014 – holding:

- EPA does not have the authority to require facilities to obtain CAA permits solely on the basis of GHG emissions ("non-anyway sources").
- EPA does have the authority to impose Best Available Control Technology ("BACT") for GHG emissions on facilities already subject to CAA PSD permitting requirements due to their emissions of conventional pollutants ("anyway sources").
- The Court did not specify the threshold level of GHG emissions a source would have to emit to be subject to permitting as an "anyway source."

❖ DC Circuit Remand: The cases are back at the DC Circuit and the parties have recently filed Motions to Govern.
- ➢ ND joined with other states to argue that the rules should be vacated and remanded to EPA.
- ➢ EPA contends that the rules should be remanded without vacatur.
- ➢ Briefing is underway.

Climate Action Plan (GHG Emission Standards for Fossil Fuel-Fired Electric Generating Units)

❖ Background: EPA is in the process of adopting rules limiting GHG emissions from new electrical general units, modified and reconstructed units, and existing units. These regulations could have a big impact on ND's utilities and coal industry.
- ➢ NSPS for EGUs (111(b)): GHG emission standards for new sources. The proposed sets separate standards for natural gas and coal. New coal plants would need to implement CCS technology to control GHG emissions. Comment period closed on 5/9/14. Final rule is projected to be issued in January 2015.
- ➢ Standards for Modified and Reconstructed Sources (111(b)): GHG emission standards for modified and reconstructed sources, which are new sources under the CAA and EPA rules. EPA is treating them as existing sources under the proposed rule – meaning they would be subject to EPA's proposed 111(d) existing source rule. But EPA may also try to rely on this rule as the necessary predicate rule regulating new sources under 111(b) to authorize regulation of existing sources under 111(d). Comment period closed on 10/16/14.
- ➢ Emission Guidelines for Existing EGUs aka "Clean Power Plan" (111(d)): Emission guidelines for states to follow in developing plans to address GHG emissions from existing EGUs. EPA has proposed state-specific "goals" and "guidelines" to meet those goals. Comments are due 12/1/14.
  - Issued Notice of Data Availability ("NODA") with additional technical information relating to the proposed rule on 10/27/14.
- ➢ Clean Power Plan Supplemental Proposal: Addresses GHG emissions in Indian Country and US Territories. Issued on 10/28/14 and comments are due 12/19/14.

❖ Letters to EPA: The ND AG's Office has joined with other states' AG's in providing early comment to EPA on these issues.
- ➢ In June 2013, ND joined with other energy-producing states in a letter responding to notices of intent to sue filed with EPA by primarily eastern states. The eastern states alleged a failure by EPA to perform its non-discretionary duties of

promulgating standards of performance for greenhouse gas emissions from new electric generating units and issuing emission guidelines for existing units. The energy-producing states asked EPA not to engage in settlement discussions but instead give all interested parties an opportunity to participate in the policymaking.

- In September 2013, ND and seventeen other states submitted a white paper to EPA outlining the states' position on performance standards for GHG emissions from existing units. The white paper focused on the states' authority (not EPA) under 111(d) to adopt substantive standards for individual sources.
- In August 2014, ND and 12 other states set a letter to EPA asking it to withdraw the Existing Source and Modified and Reconstructed Source rule due to EPA's failure to provide key materials in the docket, as required by CAA 307(d).

❖ Comments on Proposed Rules:

- New Source:
  - 16 AG's (including ND) filed comments with EPA, arguing that EPA's determination that CCS is the best demonstrated system of emission reduction ("BSER") is legally flawed.
  - The AG's Office assisted NDDH is submitting primarily technical comments on the proposed rule.
- Modified and Reconstructed:
  - 14 AG's (including ND) filed an extension request with EPA to extend the deadline to be the same as the Existing Source deadline. EPA denied the request.
  - The AG's Office assisted NDDH is submitting legal and technical comments on the proposed rule, arguing, among other things, that the rule cannot serve as the predicate rule under 111(b) to regulate existing sources under 111(d) if EPA is going to treat modified and reconstructed sources as existing sources.
- Existing Sources:
  - Comments are being drafted. ND plans on submitting extensive legal and technical comments.

❖ Energy-Producing States Summit: The Health Department is hosted a summit on April 16-17 to discuss states 111(d) plans for existing sources. More than 15 energy producing states, industry, and EPA attended. The AG's Office is providing the Health Department with legal assistance relating to the Energy-Producing States' Group.

II. REGIONAL HAZE

❖ Background: Involves the State's plan to implement EPA's Regional Haze Rule, which is intended to improve visibility in national parks and wilderness areas.

- As required, the Health Department submitted a state implementation plan (SIP) for reducing pollution causing visibility impairment. Pollutants impairing visibility include fine particulate matter (PM2.5), nitrogen oxides (NO_x), and sulfur dioxides (SO_2). Sources meeting certain criteria must install emission controls, known as best available retrofit technology (BART). Sources may also be subject to

emission controls under the reasonable progress portion of the regional haze program.

- On November 29, 2010, the Department received a letter from EPA notifying it that EPA intended to reject a portion of ND's Regional Haze SIP and instead implement a federal implementation plan (FIP). In a letter dated December 8, 2010, the Department informed EPA that it believes its SIP does meet the requirements of the Clean Air Act and that EPA's proposed FIP is improper.
- On September 21, 2011, EPA published its proposal to partially approve and partially disapprove ND's SIP and intent to implement a FIP.
- EPA's final rule regarding ND's SIP was published in the Federal Register on April 6, 2012.
  - The final rule approved a majority of ND's plan, including the ND Health Department's BART Determinations for Minnkota Power Cooperative's Milton R. Young Station and Basin Electric's Leland Olds Station.
    - This was an important change from the proposed rule, which sought to overrule the Health Department's determination that SCR is <u>not</u> technically feasible for those sources.
    - EPA relied primarily on an opinion involving Milton R. Young Station that was issued by Judge Hovland of the U.S. District Court for North Dakota in December 2011 to explain this change.
  - But the final rule disapproved other key areas of ND's plan and implemented a federal plan in place of the state plan in those areas.

❖ Petitions for Reconsideration of the rule filed with EPA: **(PENDING ISSUES)**

- Environmental groups asked EPA to reconsider its decision to approve ND's SIP for Milton R. Young and Leland Olds.
  - EPA granted the petition but proposed to uphold its approval of ND's SIP on for the two plants. EPA took public comment and held a hearing in Bismarck.
  - EPA has not yet issued a final decision.
- The Health Department asked EPA to reconsider its decision to disapprove of the state plan for GRE's Coal Creek Station.
  - This request was based on the Department's Supplemental BART determination for Coal Creek Station, which looked at corrected information submitted by GRE about the plant (all parties agree there was an error in GRE's original submittal to the Department).
  - EPA **has not yet acted** on this request.

❖ 8th Circuit Challenges:

- North Dakota filed a petition for judicial review of EPA's rule in the 8th Circuit, challenging the parts of the rule that disapproved of the SIP and imposed a FIP.
- Environmental groups filed a petition for judicial review and a petition for reconsideration with EPA. They are primarily concerned with EPA's approval of the Department's determination that SCR is not technically feasible and with EPA's approval of the Department's decision regarding Coyote Station. GRE, Basin, and Minnkota are also parties to the litigation.

❖ 8th Circuit Decision: Issued on September 23, 2013. 75% favorable to the state.

- <u>Coal Creek Station:</u>

- EPA was not required to wait for the state to evaluate GRE's corrected cost information.
- EPA's refusal to consider existing pollution control technology (DryFining) voluntarily installed by GRE was arbitrary and capricious. **The FIP for CCS is vacated.**
- GRE will need to have a BART determination. Unclear how and when that will happen. Probably an issue of debate between EPA and the Health Department.

➢ Antelope Valley Station:
- EPA was **not arbitrary in disapproving the state's reasonable progress determination** based on its rejection of the state's cumulative source visibility modeling.
- The Court deferred to EPA's conclusion that North Dakota's use of an actual/existing background was inconsistent with the Regional Haze program, since the question of modeling "involves 'technical matters within [EPA's] area of expertise.'"

➢ Coyote Station:
- The Environmental Groups argued EPA's approval of the state's emission limit was arbitrary and capricious. This argument was rejected and **the state's determination stands.**

➢ Milton R. Young & Leland Olds Stations (SCR Issue):
- The Court held that it **doesn't have jurisdiction** to review the Environmental Groups' challenges because they must be raised in a petition for reconsideration.

❖ Related Litigation:
- ➢ Several other states are involved (or soon to be involved) in litigation with EPA over Regional Haze plans.
- ➢ ND and several other states, led by AZ, joined an amicus brief supporting OK's Petition for Rehearing en Banc in the 10th Circuit. (Unfavorable parts of the 8th Circuit's opinion relied on the 10th Circuit's opinion.). The Petition was denied.

❖ Supreme Court Litigation:
- ➢ ND filed a cert petition with the US Supreme Court on February 5, 2014. EPA's response is due April 21, 2014.
  - The main issue on appeal involves the proper standard of review to be applied when reviewing an EPA finding that the State acted unreasonably in carrying out obligations that the Clean Air Act delegates to the State (deference to EPA or State?). (Note: GRE and SCR issues are not part of this appeal. Those issues are subject to ongoing administrative action by EPA. There will likely be additional litigation on those issues when EPA acts.)
- ➢ OK has filed a cert petition on a similar issue.
- ➢ Sixteen states filed an amicus supporting ND and OK (led by AZ).
- ➢ Cert was denied for the ND and OK cases on 5/27/14.

III. SUE & SETTLE

- Background: In recent years, EPA and environmental groups have often engaged in a process known as "sue and settle," in which an environmental group sues EPA on an issue impacting states and within a very short period of time (days or weeks), a consent decree is finalized without the affected states' involvement.
- SO2 Designations: (ND leading states' effort on this issue.)
  - ND Case: On July 9, 2013 ND filed a complaint against EPA for failing to make final SO2 designations, as required by the Clean Air Act. The case was filed in the U.S. District Court for the District of North Dakota.
    - SD, NV and TX joined ND's complaint.
    - Court granted a stay, pending the outcome of the California case. The states opposed the stay.
  - CA Case: On September 27, 2013, ND led a group of states (AZ, KY, LA, NV, and TX) in intervening in a similar case filed by the Sierra Club and Natural Resources Defense Council. The case was filed in the U.S. District Court for the Northern District of California.
    - ND and the other states were concerned that a consent decree would be entered into without any state input.
    - North Carolina filed a separate Motion to Intervene.
    - The states were all granted intervention and the parties are currently trying to negotiate a settlement for the remedy (EPA admitted to the failure to act).
    - EPA and the Environmental Groups reached a settlement. The states oppose the CD. EPA and the Environmental Groups dispute the allegation that it is a "sue and settle."
      - Public Comment on the Proposed CD:
        - The states group litigating the deadline suit filed comments opposing the proposed CD.
        - 10 other AG's filed comments opposing the proposed CD.
        - On July 28, 2014, AG Stenehjem sent a letter to EPA's General Counsel Avi Garbow asking him to review the matter and respond to the states' concerns regarding cooperative federalism and the proposed CD.
      - Court review of Proposed CD and brief on remedy:
        - The parties have briefed the issues and a hearing was held on 10/28/14, with Special Assistant AG Paul Seby providing the majority of the argument on behalf of the states' group.
        - 14 additional states filed an amicus brief opposing the entry of the CD.
        - We are awaiting the Court's decision.
  - D.C. Cir. Case: On December 30, 2013, a group of states – led by ND – was granted intervention in a case filed by environmental groups in the D.C. Circuit Court of Appeals. The case raises similar issues to the federal district court cases filed in ND and CA.
    - Case in currently being held in abeyance due to the on-going California litigation.
- State FOIA Lawsuit:

- On July 16, 2013, OK led 11 states (including ND) in filing a lawsuit against EPA to compel its compliance with the Freedom of Information Act ("FOIA").
- The lawsuit was filed because EPA denied several requests of the states for records involving EPA's communications with non-governmental organizations regarding consent decrees, particularly regional haze consent decrees.
- On December 18, 2013, the Court granted EPA's motion to dismiss, holding that the States' request did not reasonably describe the records requested.
- OK has indicated that they will continue to pursue this issue and ND has pledged its continued support.

IV. OTHER EPA RULES & ACTIONS

Utility MACT (aka "White Stallion")

- Background: Involves EPA's Clean Air Mercury Air Toxics Standards ("MATS") Rule, also known as the Utility Maximum Achievable Control Technology ("MACT") Rule, which requires coal and oil-fired power plants to reduce emissions of mercury, other metallic toxics, acid gases, and organic air toxics.
  - ND joined several other states – led by NE – on comments submitted to EPA on this rule. The states urged EPA to withdraw the rule as an unlawful interpretation of the Clean Air Act and poor policy.
  - On April 16, 2012, North Dakota and over twenty states – led by Michigan – filed a Petition for Review of the rule in the D.C. Circuit Court of Appeals. Industry also challenged the rule.
    - The rule's projected costs far outweigh its projected benefits.
    - States are primarily concerned about the rule's impact on the reliability of the nation's electricity supply.
    - On April 15, 2014, the Court denied the petition for review of the rule.
- Supreme Court: On July 14, 2014, ND joined Michigan and 19 other states in filing a cert petition. The Court granted the petition on November 25, 2014, on the following issue: "Whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities."

Luminant Generation Company v. EPA (ND Providing Amicus Support)

- Background: Involves Texas's rules for excess air emissions from startup, shutdown, and maintenance activities. EPA disapproved of Texas's affirmative defense for emissions from planned maintenance because, in EPA's view, the maintenance activities should happen during process shutdown or while control equipment is operating.
  - ND joined 17 other states – led by Texas – in an amicus brief supporting Luminant's cert petition asking the Supreme Court to review the case. The states argued that the Fifth Circuit Court of Appeals did not give proper deference to state decisions on how to implement the CAA.
  - On October 7, 2013, the Supreme Court denied the cert petition.

EME Homer City Cases (ND Providing Amicus Support)

- Background: Two consolidated cases (*EPA v. EME Homer City Generation L.P.*, and *American Lung Association v. EME Homer City Generation L.P.*) that involve EPA's latest attempt to implement the Clean Air Act's cross-state air pollution provision (aka "good neighbor" provision).
  - In 2011 EPA adopted a rule, known as the "Transport Rule," to replace EPA's 2005 Clean Air Interstate Rule ("CAIR"), which the D.C. Circuit Court had declared invalid.
  - In the Transport Rule, EPA identified 28 states that it found were emitting excessive quantities of certain pollutants and set forth federal implementation plans to control those pollutants – without giving states the first opportunity to comply.
  - The Transport Rule was challenged by industry and several states. (ND is not a party, as it is **not covered** by the current rule.)
  - The D.C. Circuit Court held that the rule was invalid because it:
    - improperly required upwind states to reduce emissions by more than the amount necessary to prevent their own significant contributions to nonattainment downwind
    - improperly gave the federal government rather than the states the first opportunity to implement those reductions
- Cert Petition: EPA and the American Lung Association asked the Supreme Court to review the D.C. Circuit Court's decision.
  - Supreme Court granted cert on the following issues for cert: (**#2 most important for ND**)
    - Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.
    - Whether States are excused from adopting SIPs prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.
    - Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.
- Why Important?: This case presents important issues involving states' rights and cooperative federalism. For example, does EPA have to allow states a reasonable first chance to create a state implementation plan before EPA promulgates a federal implementation plan? The outcome will impact all states, including North Dakota.

- North Dakota joined an amicus brief with 8 other states, led by West Virginia.
- On April 29, 2014, the Court issued an opinion reversing the DC Circuit and upholding the rule. (Numerous challenges to specific applications of the rule that have not been ruled on by SCOTUS remain before the DC Circuit and will be argued next year.)

Startup, Shutdown, Malfunctions (SSM)

- Background: EPA believes air emissions "unregulated" if numerical emission standards intended for periods of normal operations are not applied during SSM periods. In the proposed rule, EPA seeks to declare previously-approved SIPs "substantially inadequate" under the Clean Air Act due to the SSM provisions in those SIPs. States believe they have better methods of addressing emission during SSM periods and that EPA does not have the authority to intervene.
- Comments:
  - On March 15, 2013, the ND AG's Office joined with other states – led by OK – in filing an extension request.
  - The AG's Office assisted in submitting comments opposing the SIP Call (Note: This is a big issue for some states but not really for ND due to recent changes made to our SIP.)

Methane Emissions

- Background: Several northeastern states filed a Notice of Intent to Sue with EPA regarding EPA's decision not to regulate methane emission from new and existing oil and natural gas drilling, production and processing facilities under the New Source Performance Standards program.
- On May 2, 2013, ND joined a group of energy-producing states (led by OK) that submitted a response asking EPA not to negotiate a settlement with the northeastern states because such regulation is not appropriate under the Clean Air Act. Alternatively, the energy-producing states requested that they be allowed to participate in the negotiations so that our viewpoint could be considered in any policymaking.

Alabama SIP Call

- Background: In October 2008, EPA approved the visible emissions rule in Alabama's SIP. Then, EPA proposed to unilaterally determine this was in "error" and disapprove of these SIP revisions.
- On May 16, 2014, the ND AG's Office joined the AL AG's Office – together with 6 other AG's – in comments opposing EPA's action as a violation of cooperative federalism and that AL should be given, at a minimum, the opportunity to provide information to EPA.

Mingo Logan

- Background: Although not directly related to energy generation, EPA's revocation of Mingo Logan Coal Company's Clean Water Act Section 404 permit has the potential to impact energy and related sectors. The permit authorized the operation of the Spruce No. 1 surface coal mine in Logan County, WV. EPA originally agreed with the permit but asked the Corps to revoke it in 2009. The Corps ultimately rejected EPA's request, finding no reason to take such action under its regulations. The State of West Virginia also objected to the Agency's request. For the first time ever, EPA retroactively vetoed an existing 404 permit.
- Why is it important?: If EPA is allowed to retroactively revoke such permits, it could have serious impacts for states (either by discouraging private development or vetoing public works projects that are already completed or being constructed).
- Mingo Logan filed a cert petition with the US Supreme Court, after the D.C. Circuit upheld EPA's action. ND joined in an amicus brief authored by WV supporting the request. The petition was denied on March 21, 2014.

V. CHALLENGES TO OTHER STATES' REGULATION

Minnesota

- Background: In August 2007, MN's Next Generation Energy Act became effective. The goal of the Act is to reduce statewide greenhouse gases emissions, but emissions aren't confined to those produced in Minnesota. Included are emissions "from the generation of electricity imported from outside the state and consumed in Minnesota." As a result, ND facilities are affected by the Act.
- The ND Industrial Commission has participated in the following actions by the Minnesota Public Utilities Commission to implement the Act and related laws:
  - NDIC participated in a rulemaking to establish the estimate of the likely cost of future carbon dioxide regulation. MPUC rejected NDIC's argument that applying the estimate to electricity generation beyond Minnesota's borders violated the Commerce Clause of the United States Constitution.
  - NDIC also participated in MPUC's review of GRE's Resource Plan. An issue in the proceedings was the proper interpretation of Minn. Stat. § 216H.03 and whether that statute bars electricity produced at Great River's Spiritwood Station from the Minnesota market. GRE's proposed carbon offset plan pursuant to Minn. Stat. § 216H.03 was set to be heard by an administrative law judge and North Dakota had been granted participant status in the matter but the case was dismissed after the MN legislature amended the law to include an exemption benefitting Great River Energy's Spiritwood Station.
  - NDIC is participating in an MPUC docket involving a request by environmental groups' to reopen the Externalities Docket and have MPUC update the values imposed for the environmental and socioeconomic costs of electricity generation. ND is concerned that MPUC may seek to increase its regulation of ND facilities, though at the present time it appears that MPUC will not change the previously-

agreed on geographic limits (reached during litigation in the 1990s and early 2000s).

- ❖ Lawsuit: On November 2, 2011, North Dakota filed a complaint challenging the Next Generation Energy Act in the United States District Court for the District of Minnesota. Industry is also participating in the case.
  - ➢ North Dakota argues that the act is unconstitutional and seeks declaratory and injunctive relief. Issues are whether the NGEA: (1) violates the Commerce Clause; (2) is preempted by the Federal Power Act; and (3) is preempted by the Clean Air Act.
  - ➢ Parties have filed cross-motions for summary judgment. A hearing was held on October 17, 2013.
  - ➢ On April 18, 2014, the Court struck down essential portions of MN's Next Generation Energy Act. An appeal is pending before the 8th Cir. Court of Appeals.

California – Ethanol

- ❖ *Rocky Mountain Farmers Union, et al. v. James Goldstene*
  - ➢ This case is a challenge to California's Low Carbon Fuel Standard ("LCFS"), which is designed to reduce greenhouse gas emissions. The LCFS requires businesses selling transportation fuel in California to reduce the carbon footprints attributable to the production and importation of that fuel. As part of this regulatory scheme, the LCFS facially discriminates against ethanol made outside of California on the theory that out-of-state ethanol must travel further to get to California and certain out-of-state ethanol production techniques involve a higher carbon footprint. The LCFS also discriminates against out-of-state crude oil that is better for the environment than its California-produced counterpart.
  - ➢ Plaintiffs (ethanol producers/ farmers) argue that California is regulating beyond its borders – in violation of the dormant commerce clause – to the detriment of the Midwest ethanol industry.
  - ➢ The United States District Court for the Eastern District of California struck down California's low carbon fuel standard as unconstitutional under the Dormant Commerce Clause. The case was appealed to the 9th Circuit, which struck down the decision. Plaintiffs have filed a cert petition with the US Supreme Court.
  - ➢ ND and several ethanol-producing states – led by Nebraska – have joined in an amicus effort supporting the plaintiffs. ND has joined several amicus briefs filed in this case.
  - ➢ Supreme Court: In April 2014, ND joined the states' group in filing an amicus brief in support of the cert petition filed in this case. Cert was denied on 6/30/14.

Attorney General
Wayne Stenehjem
HB 1432
#76
2/5/15

November 14, 2014

Submitted Electronically Via Regulations.gov

Water Docket
United States Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comments of the State of North Dakota on the Proposed *Definition of Waters of the United States* (Docket ID No. EPA-HQ-OW-2011-0880)

Dear Administrator McCarthy:

The Governor, Attorney General, North Dakota Agriculture Commissioner, North Dakota State Engineer, North Dakota Department of Transportation, North Dakota Department of Health, and North Dakota Industrial Commission (collectively North Dakota) respectfully submit these comments on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) proposed *Definition of Waters of the United States* (WOTUS), published on April 21, 2014 (79 FR 2218).

The North Dakota Department of Agriculture is the lead state pesticide agency. The department also provides: a fertilizer program, pesticide enforcement, a pesticide water quality program, and a state Waterbank program that helps producers conserve water on their lands and promote water quality. By working with producers through our programs, we aim to monitor water quality and prevent pollution from pesticides.

The North Dakota State Water Commission (NDSWC) is responsible for water management and development throughout the State. The State Engineer is the secretary and chief engineer of the State Water Commission. Additionally, the State Engineer regulates water appropriation, dikes and dams, drainage, and sovereign lands.

The North Dakota Department of Transportation's mission is to safely provide for the movement of people and goods throughout the state. The construction, operation, and maintenance of transportation facilities necessarily impacts water resources and drainage.

The North Dakota Department of Health (NDDH) is the agency charged with implementing and enforcing the State's various environmental regulatory programs, including the federal Clean Water Act (CWA) programs. The Department also implements and enforces state laws relating to the protection of state waters – which is all water, including groundwater.

The Legislature created the North Dakota Industrial Commission (NDIC) in 1919 consisting of the Governor, Attorney General and the Agriculture Commissioner, to conduct and manage, on behalf of the State, certain utilities, industries, enterprises, and business projects established by state law. In addition the NDIC, through the Department of Mineral Resources, has regulatory authority over oil and gas, coal exploration, geothermal resources, paleontological resources, and subsurface minerals, including Class II, Class III, and potentially Class VI (primacy pending) injection wells.

North Dakota has reviewed the proposed rule and draft scientific assessment, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*[1] and *Scientific Evidence: Overview of Scientific Literature on Aquatic Resource Connectivity and Downstream Effects.*[2] North Dakota has serious concerns with the proposed rule's attempt to expand federal authority. The proposed rule would bring under federal jurisdiction waters that have traditionally been solely within the authority of states. This expansion of federal authority into areas of state control is neither legally nor scientifically justifiable.

Moreover, federal regulation of all waters is not necessary. Waters outside the scope of federal jurisdiction are already being regulated and protected by states. Federal regulation will not result in increased environmental benefits; it will only lead to increased confusion.

The State's position is that defects in the proposed rule are so extensive that EPA and the Corps must withdraw the proposed rule. Before re-proposing a rule defining WOTUS, EPA and the Corps should consult with the state co-regulators and officials knowledgeable in agriculture, water management, and water quality issues. Any such rule should bring clarity, not confusion, and be workable for state agencies and industries.

North Dakota has the following additional specific comments on the proposed rule:

1. The proposed rule is an unlawful incursion on state jurisdiction.

The proposed rule is an inappropriate and unlawful federal incursion on state jurisdiction and poses a serious threat to state and individual interests through federal over-regulation and overreach. The proposed rule redefines virtually all surface waters as WOTUS. While there are a few claims of exemptions and exclusions (groundwater, upland ditches, etc.), they are confusing and nearly meaningless under the proposed rule.

The proposed rule makes little hydrologic sense and frequently violates the sense of connectivity proposed in EPA's own scientific document. For example, the rule claims to exempt groundwater, but could use the groundwater connection to take jurisdiction over the surface water bodies on either end of the connection. It makes little hydrologic or jurisdictional sense that an upstream waterbody would be federally regulated because of a connection to a downstream waterbody when the hydrologic connection itself is not federally jurisdictional.

EPA has effectively given itself federal jurisdiction over waters that belong under state jurisdiction and is trying to achieve this by finessing the language of the Supreme Court in *Rapanos v. United States* and other rulings in which the Court's intent was clearly to restrict federal jurisdiction.[3] As reviewed in depth in the joint letter of the States' Attorneys General, the Supreme Court has clearly ruled that EPA has overreached its authority and must retract to limitations closely connected to waters navigable in the traditional sense. Furthermore, EPA has used the rulemaking process to effectively recapitulate the Oberstar bill, which attempted to nullify the *Rapanos* ruling and failed in

[1] Office of Research and Development, U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013) (Preliminary Draft).

[2] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, App. A (proposed April 21, 2014).

[3] North Dakota's legal concerns with the proposed rule are explained in more detail in the Comments of the Attorneys General of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota and the Governors of Iowa, Kansas, Mississippi, Nebraska, North Carolina, and South Carolina submitted to the docket on October 8, 2014.

Congress.[4] In doing so, EPA has used rulemaking to subvert the intent of both the Supreme Court and Congress.

For example, EPA cites in their webinars spills in upstream tributaries to Tampa Bay and Texas to justify their incursions. These types of examples do not justify nullifying state jurisdiction over waters of the state. EPA's authority would be necessary and appropriate only at the point where upstream conditions had actually affected downstream WOTUS, which are navigable in the traditional sense at or in proximity to the confluence.

North Dakota's primary concern is that this rule intrudes on state authority over waters and allows the federal government to assert federal jurisdiction over virtually all waters. It is ill-defined, overly broad, and scientifically unjustified. If a pollution event occurs, it must be dealt with; however, this rule creates the potential for federal permitting, penalties, and responsibility surrounding every waterbody, far beyond the federal jurisdiction in *Rapanos*. North Dakota's state water quality program currently provides protections and oversees pollution events on all waters of the state including those beyond traditionally navigable waters, and that authority must remain intact.

2. The definition of tributary in the proposed rule is expansive and unacceptable to the State of North Dakota.

The proposed rule attempts to establish a chain of nexus extending up endless orders of streams into ephemeral flows in washes, drains, and ditches feeding the higher order navigable streams. This federal jurisdictional claim violates the intent of the court outlined in *Rapanos*. Instead of regulating the water quality effects of distant tributaries on the navigable streams, EPA proposes regulating water quality within tributaries themselves.

Take, for example, if federal water quality standards specify that a certain nutrient may not exceed a specific amount in a navigable stream. The proposed rule would subject influent tributaries to that same standard, rather than regulating the tributary's contribution to the standard in the navigable stream. Next, the lower order tributary influent to the first tributary is regulated not by the effect on the navigable water, or even the first tributary, but is subjected to the same standard as the navigable water. This overreaching jurisdiction is applied up into washes, ditches, and drains, which are themselves subjected to the standard applied to the navigable waterbody itself.

The cumulative effect of the above outlined water bodies on receiving navigable water bodies is moderated by timing, freshwater influx from stream beds and seeps, and other minimally affected tributaries. These factors make it so any given individual tributary or drain may have little final impact on the major receiving waterbody. To claim authority and apply the same standard within a flowing agricultural or municipal drain as is applied to an interstate water--without reference to intervening moderating effects--allows federal micromanagement and interference with virtually all human enterprises and a blank check to apply standards in any manner it chooses. EPA and

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[4] The Oberstar Bill attempted to expand EPA jurisdiction by separately and expansively defining "waters of the United States" as follows: "The term waters of the United States means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." (Sec. 4. Definition of waters of the United States, in H.R. 2421, CWRA of 2007, at: http://www.govtrack.us/congress/bills/110/hr2421/text, accessed Oct. 2, 2014). By separately defining "waters of the United States," the Clean Water Act attempted to separate EPA jurisdiction from the navigable constraint to be inclusive of virtually all waters.

cooperating federal agencies are appropriating for themselves the authority to become the arbiter of all economic enterprises and the power to impede or vet them at will.

EPA must limit its federal jurisdictional claims to a nexus that is defined by proximity, not remote connectivity.

3. The proposed rule is unnecessary because states already protect all state waters.

The fact that some waters that are not included within the CWA's current definition of WOTUS does not mean they are left unprotected. These state-only waters have traditionally been under state control. States have historically exhibited the ability to appropriately regulate them and address statewide and local concerns.

In North Dakota, the Legislature established a policy to protect all waters of the state, regardless of whether they fall within federal jurisdiction. N.D.C.C. § 61-28-01. Waters of the state is defined broadly and includes all surface and groundwater in the state. N.D.C.C. § 61-28-02(15).

North Dakota law not only protects more types of waters than the CWA, it also places greater protections on those waters. For instance, it is unlawful in North Dakota to pollute or place wastes where they are likely to pollute any of these waters. N.D.C.C. § 61-28-06. And protections are included for waters involved in water transfers. N.D.C.C. § 61-28-09.

The NDDH goes above and beyond merely implementing the federal CWA programs delegated to it by EPA. NDDH also implements a comprehensive state program to protect all waters of the state, addressing the protection of beneficial uses as defined in state law. As part of this program, NDDH has adopted extensive regulations to prevent and control water pollution. See N.D. Admin. Code art. 33-16. A person violating the state's water pollution control laws and rules is subject to an NDDH enforcement action, including the potential of substantial penalties. N.D.C.C. § 61-28-08.

4. The category of other waters[5] is expansive and confusing.

The attempts to classify other waters gives EPA and the Corps the ability to superimpose federal jurisdiction over state jurisdiction virtually at will. Rather than providing clarity, this catch-all classification establishes a platform for unending federal versus state litigation. North Dakota does not support attempts to classify other waters as federally jurisdictional.

5. The redefinition of WOTUS will be used by all federal agencies, not just EPA and the Corps, multiplying the jurisdictional overreach and leading to unanticipated consequences.

Not only is North Dakota concerned with the scope of jurisdiction EPA and the Corps could have under this rule, but the expansive definition of WOTUS will have ramifications far beyond EPA's water quality mandates. The proposed rule broadly defines federal jurisdiction, and that will likely be used or relied on by all other federal agencies, including the United States Fish and Wildlife Service (USFWS), Bureau of Land Management (BLM), and others. The combined jurisdictional applications will exceed EPA's actions in exponential ways that are unanticipated in the proposed rule's impacts analysis.[6]

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[5] 79 Fed. Reg. 22188, 22211-22212.

[6] 79 Fed. Reg. 22188, 22219-22222.

For example, North Dakota farmers are concerned that the USFWS could use the expanded definition of WOTUS to impose greater regulation on North Dakota farmland. During the last half of the 20th century, the USFWS obtained in-perpetuity waterfowl management rights easements for wetlands on thousands of acres of North Dakota farms. These easements were purchased for a pittance, a few dollars per acre, under a promise not to drain. The demonstrable understanding of farmers and the hydrologic paradigm of the time was of literal drainage, not water use through pumpage, and with the understanding that the wetlands were relatively stable in our semi-arid climate. The potential future impacts of the federal easements were not understood until the 1990s when larger degrees of climatic variation were experienced in North Dakota and the large rains came.

USFWS now uses these easements in ways not anticipated by farmers. After unprecedented flooding began in 1993, USFWS refused to allow farmers to restore their newly flooded land. USFWS had written the easements to include all surface waters on the quarter section, but had not defined or delineated the boundaries. On this basis, USFWS claimed all of the newly flooded lands – assuming control over large tracts of land for which USFWS had paid nothing. They used federal legal strength to intimidate and sue landowners attempting to restore boundaries, access, and productivity. These actions caused severe financial burden on the farmers and strained the relationship between the local farming community and the USFWS.

Additionally, the BLM could use the proposed rule to deny grazing permits and limit access to grazing lands. Grazing lands contain a multitude of ephemeral waterways. This proposed rule makes producer access to lands questionable at best. Under this rule, it is conceivable that if grazing lands are within a floodplain, have tributaries in them as defined in the proposed rule, or are adjacent to a WOTUS, the BLM could deny permits and unnecessarily restrict the use of natural resources for agriculture.

Many federal agencies use the CWA's definitions for their own purposes. It is unclear how this rule will impact the way agencies conduct their operations and use the rule to regulate their interests. North Dakota is concerned that other agencies could co-opt these definitions without providing notice and opportunity for comment. Even if the rule specified that the definition of WOTUS can only be used within jurisdiction of the CWA, other agencies could use CWA-related claims to advance their jurisdictions. For example, it may be claimed that lowering a water table through pumping will have a water quality effect, and the EPA would then become involved in local groundwater use issues raised by other agencies. Even if found insignificant, the regulatory burden of delays will add severe hardship to water-using enterprises and solutions to farm management problems.

The ambiguities created by this rule and the unknown exponential impacts through use by other federal agencies is further reason that the EPA definition of WOTUS must be discarded. Additionally, if any other federal agencies wish to establish a definition of waters under their jurisdiction, it should be done under separate rule making processes pertaining only to individual agencies.

6. The connectivity report is insufficient to establish significant nexus on a local and situational scale.

In proposing this rule, EPA and the Corps inappropriately rely on the connectivity report to establish a significant nexus on a local and situation scale. There are several problems with relying on the document this way, including:

- It lacks specific spatial points of reference to clearly move from state jurisdiction of waters of the state to a transitional point of water with federal jurisdiction;

- It does not outline a set of standards, chemical or biological, that determine at what level a connection becomes relevant;
- There are no clear means for evaluating the situational relevance of the document's findings in a real world setting.

The connectivity report is a general literature review of a fundamental truism of hydrology and environmental science – that everything is connected to everything else. But in reference to real-world application and significant nexus interpretation, it says nothing of the situational significance of any given waterbody or the circumstances under which the proposed jurisdictional shift from State to federal jurisdiction is appropriate. The document demonstrates connection, but does so abstractly. It does little to quantify significance with respect to any specific hydrologic system or point of reference. In effect, the connectivity report is little more than an expansive, unpacked version of the federal jurisdictional justification cited in the findings of the failed Oberstar's Clean Water Restoration Act (CWRA).[7]

Contrary to EPA's claims, the connectivity report does not provide an appropriately scaled assessment of sufficient scale and depth that could be applied *a' priori* to local situations (i.e., the water quality significance of specific tributaries to their receiving bodies). The connectivity report also fails to consider the temporal and spatial variance effecting connectivity, which is a major factor within the wide climatic swings of the northern Great Plains and the natural hydro-chemical effects in the region.

7. The Prairie Pothole Region (PPR) experiences wide climactic swings that lead to variability of water levels and more uncertainty under this rule.

a. Prairie potholes should not be considered *per se* federally jurisdictional.

Under the proposed rule, small, ephemeral, prairie pothole wetlands are considered *per se* federally jurisdictional. In the PPR, these wetlands are situated throughout agricultural land, as well as the rest of the landscape. They pose a federal jurisdictional problem because of their variable nature. The proposed rule is not clear on how depressional prairie pothole wetlands that fill and spill into jurisdictional waters would be regulated by the Corps and how the Corps will determine if prairie pothole wetlands have subsurface flow to federal jurisdictional waters. The preamble states, "[w]ater connected to such flows originate from adjacent wetland or open water, travels to the downstream jurisdictional water, and is connected to those downstream waters by swales or other directional flowpaths on the surface. Surface hydrologic connections via physical features or discrete features described above allow for confined, direct hydrologic flow between adjacent water and (a)(1) through (a)(5) water that it neighbors."[8] This verbiage captures many prairie pothole wetlands as federally jurisdictional. The preamble cites research conducted on prairie pothole wetlands in North Dakota to support the decision.

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[7] The "Findings" of the Oberstar CWRA stated the following to justify the bill's definition of virtually all waters as waters of the United States (see Footnote 3 above for CWRA definition). "(4) Water is transported through interconnected hydrologic cycles, and the pollution, impairment, or destruction of any part of an aquatic system may affect the chemical, physical, and biological integrity of other parts of the aquatic system… (6)The regulation of discharges of pollutants into interstate and intrastate waters is an integral part of the comprehensive clean water regulatory program of the United States. (7)Small and intermittent streams, including ephemeral, and seasonal streams, and their start reaches comprise the majority of all stream and river miles in the conterminous United States. These waters reduce the introduction of pollutants to larger rivers and streams, affect the life cycles of aquatic organisms and wildlife, and impact the flow of higher order streams during floods." And other statements in Sec. Findings, of H.R. 2421, CWRA of 2007, at: http://www.govtrack.us/congress/bills/110/hr2421/text, accessed Oct. 2, 2014.

[8] Fed. Reg. 22188, 22208

The wide climatic swings and trends of the central plains, including an approximate 200-year cycle, causes conditions where many surface depressions are functionally dry uplands[9] or isolated wetlands for most of the period of record, but then connect and coalesce during extended wet periods. Many of these are remote from currently jurisdictional waters and connect only through a series of water bodies. The attenuated connections render the probability of water quality effects on the federally jurisdictional water negligible.

North Dakota does not accept federal jurisdiction over water bodies only remotely and indirectly connected to waters navigable in the traditional sense based on the concept of fill and spill. Only those wetlands that are abutting or adjacent to navigable waters as defined by *Rapanos* should be considered federally jurisdictional. Prairie pothole wetlands that fill and spill or have a subsurface hydrological connection are currently not considered jurisdictional by the North Dakota Corps Regulatory Office. The proposed rule will dramatically increase the wetland acreage and basins considered jurisdictional in the PPR of North Dakota and throughout the United States.

The hydrologic expansion and contraction, spillage, flooding, and disappearance of prairie potholes has a large influence on farming. Prairie potholes require special management, and making these wetlands per se federally jurisdictional will prevent farmers from managing these waters on their land. This will prevent weed control, pest control, and could impede input applications. Prairie potholes are abundant in this region, and during the extremely wet climate cycles that we are currently experiencing - this rule will only compound existing management problems.

b. The rule's inclusion of recreational use or potential future recreational use as jurisdictional will have unduly large effects in the PPR.
Virtually any pothole that could float a duck boat could be claimed as a potential future commercial waterborne recreation resource. Although EPA specifies that claims must be substantial, the mere filing of claims for federal jurisdiction would provide a tool for special interests to interfere with local water and land management. Further, there is inherent ambiguity in the term substantial.

8. The proposed rule's treatment of wetlands is inconsistent and overly broad, making virtually all wetlands jurisdictional.

Connectivity of wetlands under federal jurisdiction should be limited to those immediate or proximate to major flowing water bodies that are navigable in the traditional sense. Extended connections should be exempted.

a. When defined as tributaries with ephemeral flow, the widely varying climactic regimes in North Dakota will inevitably make almost all wetlands jurisdictional.
The proposed expansive definition of tributaries includes anything with a bed and banks and ordinary high water mark that ever sends any flow, and waters that contribute flow – either directly or through another water – even if the flow is ephemeral.[10] The chain of waters included under the tributary definition[11] is expanded even further by including adjacent

[9] Ex. Tappen Slough in Kidder County was hayland with dugouts for horse watering during the 1930s – it is several feet underwater today. Many converted lands, farmed as dryland for many years, have wetlands on them since the mid-1990s.
[10] 79 Fed. Reg. 22188, 22263.
[11] 79 Fed. Reg. 22188, 22198 ("All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or tributary.").

waters and including other waters [12] by situation. This expansive definition means that almost all surface waters will be jurisdictional under various climactic scenarios. Under these proposed definitions, few wetlands would be exempt in a realistic field setting.

Depending on the year, climactic changes allow wetlands to overtop and connect with waters that would be tributaries or are completely dry. There are many large prairie potholes that in the 1930s were mostly dry and disconnected from any outlet. During the half century following the 1930s multi-decadal drought, many wetlands remained isolated. Following the wet shift in the 1990s, these wetlands have increasingly coalesced or connected with other wetlands and to larger water bodies. Which waters are connected varies depending on time and the current climate regime.

Under EPA's proposed rule, recent climatic events would authorize broad federal authority over depressional areas that are often isolated from the navigable water or even dry, but periodically connected. As above, it would be one thing to regulate a water quality component at the point of entry to a clearly navigable water during the time of physical connection. To use that temporary connection as a pretense to redefine that waterbody itself permanently as WOTUS represents a massive inflation of federal jurisdictional claims.

b. **Wetlands on flood plains should not be in themselves regulated as WOTUS unless a clear, substantial, and ongoing effect on the flowing waterbody can be demonstrated.** EPA refers to the appropriateness of its federal jurisdiction in relation to wetland effects on flooding.[13] In flat areas like the Red River Valley, virtually all wetland and depressional areas are connected with the Red River of the North or its tributaries during the frequent flood events of recent years. Virtually all wetlands in the Valley would be under EPA jurisdiction.

Depressional areas on vast expanses of land are connected with rivers during floods of varying magnitude in almost all of the Red River Valley. This is not to say their potential effect on major flowing water bodies should not be regulated – rather, they themselves should not be included as WOTUS, subject to the same federal jurisdiction as the major body itself. In effect, wetlands should not be considered *de facto* adjacent waters under the proposed rule.

9. **EPA's adjacent waters definition is overly simplistic for the prairie pothole and central plains regions, creating federal jurisdiction where it is impractical to determine water boundaries and define connectivity.**

a. **EPA does not provide meaningful clarification on how adjacent waters will be determined.**

The preamble fails to indicate how the agencies will determine if a shallow subsurface flow exists for adjacent waters. The examples provided on page 22208 of the preamble are speculative, stating "shallow subsurface connections may be found both within the ordinary root zone and below the ordinary root zone (below 12 inches) where other wetland delineation factors may not be present" (emphasis added).[14] The preamble continues: "a combination of physical factors may reflect the presence of a shallow subsurface connection, including (but not limited to) stream hydrography (for example, when the hydrograph

[12] Id. ("d.1. 79, No. 76/Monday, April 21, 2014/Proposed Rules, impoundment, impoundmenttate water, the territorial seas, impoundmentcluding wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas").

[13] 79 Fed. Reg. 22188, 22191, and 22193.

[14] 79 Fed. Reg. 22188, 22208.

indicates an increase in flow in an area where no tributaries are entering the stream), soil surveys (for example, exhibiting indicators of high transmissivity over an impermeable layer), and information indicating the water table in the stream is lower the in the shallow subsurface"[15] (emphasis added). No field indicators are required to make this determination.

The Natural Resource Conservation Service (NRCS) soil survey web site states that soil surveys can be used for general farm, local, and wider area planning. NRCS soil surveys are considered an Order 3 soil survey and are made for land uses that do not require precise knowledge of small areas or detailed soils information. Such survey areas are usually dominated by a single land use and have few subordinate uses. The information can be used in planning for range, forest, recreational areas, and in community planning. But this is not a tool that will be accurate to determine a subsurface flow connection from wetlands to federal jurisdictional waters.

b. Using floodplains to create *per se* federal jurisdiction is ill-defined and will result in expansive federal jurisdictional claims.

Floodplains vary across the country based on climate and geography. In parts of the west, floodplains may be limited to the bed and bank of the flooding body where this regulation could possibly make more sense. However, in the Red River Valley of North Dakota and Minnesota, the flatness of the land allows the floodplain to be miles wide. Using a vague definition of floodplain would allow the EPA and Corps to have federal jurisdiction over miles of land after the flood recedes; not to mention the potholes, wetlands, and streams filled by the flood.

Defining floodplains by a set number of years event is also ineffective because floodplains can change dramatically with climactic and meteorological changes. Rather, water in floodplains should only be jurisdictional within the riparian area of the flooded zone. This pragmatic approach acknowledges that flood spillovers can cause pollution problems, but also realizes that large realms of federal jurisdiction are not the solution.

c. The rule's supposed ditch exemptions are unrealistic and negate the purpose of ditches.

Section 328.3(b)(3) states, "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" would not be WOTUS. However section 328.3(b)(4) states, "[d]itches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a) (1) through (4) of this section" would also not be WOTUS. As written, paragraph three of the proposed rule excludes qualifying ditches yet, if those same ditches contribute flow, they would be not be exempt under paragraph four. These conflicting examples demonstrate the uncertainty of the proposed rule's ditch exemptions.

In an effort to provide clarification, the rule explains that ditches are not jurisdictional if they are "excavated in uplands, rather than in wetlands or other types of waters, [and] for their entire length are not tributaries."[16] In North Dakota, there are very few ditches that would not intersect water at some point in their path due to our wide stretches of agricultural land and flat topography. This exclusion could be interpreted very literally, such that any downstream connection – no matter how miniscule or indirect – would prevent the exclusion from being applied. Ditches are designed to drain – this requirement makes the above exemptions useless, especially in an agriculture or transportation scenario.

[15] 79 Fed. Reg. 22208

[16] 79 Fed. Reg. 22188, 22203.

In an agriculture scenario, if ditches cross between or within farm fields, pastures, or grazing lands, farmers could be forced into a situation where they need to get a CWA permit for insect and weed control or certain farm activities (left ambiguous by the poorly written Interpretive Rule)[17] if there is a discharge in or near an ephemeral drain, ditch, or low spot.

In a transportation setting, all highway ditches that take stormwater runoff somewhere would potentially meet the definition of WOTUS under the proposed rule. If applied or interpreted in this manner, the permitting requirements for highway construction and maintenance activities would be unduly burdensome.

In addition, few ditches draining only uplands for any purpose are confined only to uplands. To do so floods other lands. Almost all drains go somewhere and release water to navigable streams at some point. Since they do, they would be included in the definition of a tributary, and therefore jurisdictional in the same sense as the navigable water itself. As with wetlands discussed above, the presence of perennial flow is dependent on climate regime and fluctuations in normal rainfall. There are many drains with perennial flow now that were not perennial 25 years ago.

The effect of a drain on a navigable water is an area of possible legitimate federal jurisdiction. But the water within the drain above that confluence should not be. The drain should only be jurisdictional at the point of confluence with a navigable water and within a clearly defined set of standards. The drain itself should remain within state jurisdiction and should not be treated as a tributary.

10. The shallow groundwater connection criteria is not appropriate.

If EPA and the Corps retain the shallow groundwater connection criterion, it will inevitably result in federal interference in state water appropriations and agricultural land management.

a. The inclusion of wetlands connected through shallow groundwater in the proposed rule is highly invasive of state water-management authority and needs to be removed.

The relationship between ponded waters overlying shallow unconfined aquifers and surface waters is strongly mediated by the management of the intervening waters. This management can include disconnection – or partial/total depletion by pumping. All pumped ground water in these aquifers must be recovered from discharge to rivers or evapotranspiration. Pumping in some cases may remove poor quality waters, as when waters from evaporative discharge areas are drawn toward wells. Discharge areas may be converted to recharge areas by pumping. Moreover, the effects of management will vary with fluctuations in the climatic regime, which may enhance, moderate, or negate management impacts. These shallow aquifers are major sources of water for irrigation, towns, and industries in the northern Great Plains – in fact, one of the largest sources.

Given past attempts by federal agencies in attempting to control water-table surfaces, it is highly probable that federal agencies will attempt to interfere with state groundwater appropriation using the proposed rule as justification. They will simply assert that the state has the right to appropriate groundwater for pumping and beneficial use, but local water table exposures are all WOTUS by virtue of groundwater connection with gaining streams they

[17] North Dakota's concerns with the Interpretive Rule and its effect on agriculture are explained in more detail in the comments from the North Dakota Department of Agriculture submitted to the Interpretive Rule docket on July 7, 2014.

claim to be jurisdictional, and their water-levels cannot be altered by pumping – a hydrologic impossibility. Definition of these waters as WOTUS will inevitably result in federal incursion on state groundwater appropriation jurisdiction, either through direct intervention of agencies using the WOTUS claim or indirect intervention through appeal for EPA involvement.[18]

In short, federal involvement through indirect claimed jurisdiction can be expected in almost all state water appropriations from shallow systems in North Dakota. This would render the aquifers virtually unavailable for beneficial use. Shallow unconfined glacial aquifers are a major source of water for irrigation, homes, industries, and municipalities in North Dakota and other states. State groundwater appropriation jurisdiction will mean nothing if permit holders are threatened by federal intervention if they pump. This is not to say that wetlands of major importance overlying aquifers should never be protected – the State does consider and implement protective measures for major resources like the Chase Lake refuge – only that these decisions belong to the State.

b. Using shallow groundwater connections to claim a nexus would allow EPA to inappropriately intervene in agricultural management.

Due to the rapidly changing climate and frequent spring flooding in agriculture areas, North Dakota farmers need to frequently pursue temporary ditching and manipulation of the land to enhance water movement and allow for planting. Most of these areas contain shallow, unconfined aquifers that are connected with streams or drainageways to streams. This means that virtually any ponded area overlying shallow unconfined aquifers, which are major areas of agriculture, could be considered jurisdictional when EPA or other agencies decide so. A dangerous opportunity for EPA intervention, to the harm of the farmers, is created in the proposed rule.

A generic definition of all waterbodies connected through ground water as WOTUS is a large and unjustified federal jurisdictional encroachment.

c. The connected surface water through shallow groundwater inclusion must be removed from this rule, disallowing EPA and the Corps from using these connections to determine federal jurisdiction.

EPA and other agencies cannot interfere with state authority to not only appropriate ground water, but assure the use of the water appropriated. The shallow groundwater nexus can only apply to the confluence of a surface waterbody with a navigable stream. In addition, these waters are protected through state jurisdiction.

11. The proposed rule would result in unprecedented federal intervention in agricultural management and practice.

a. The expanded tributary definition does not provide clarity and could act as a roadblock to normal agricultural practices.

The definitions of tributaries and their riparian lands are so expansive, that vast areas of agricultural land will be contained within areas defined as jurisdictional. The statement that EPA is not managing land is nonsensical. The most fundamental management practice of agriculture is water management – its retention, conservation, or removal. This rule claims

[18] The U.S. Fish and Wildlife Service during the 1990s challenged virtually every water permit application for ground-water pumping in Kidder County, ND and other areas based on what they considered to be unallowable impacts on their wetland easements. They were essentially claiming the right to control the water table, hence the aquifer itself.

jurisdiction over anything from fields to tributary drains at field outlets, and leverages authority over agricultural practices smaller than field scale. Conditions and climatic events that impact farmers are highly variable and even erratic, making state jurisdiction appropriate over federal.

For example, North Dakota has experienced a wet cycle during the last two decades in which water lying in fields drastically changes throughout the year. In the eastern part of the state, where the landscape is flat, water may sit in a field from April through June, and then dry up for the end of the planting season. Under the proposed rule, this depressed area – if it develops a bed, bank, and ordinary high water mark or reaches an actual navigable water – could be considered a WOTUS. This could be anything from a tire track that sits with water too long to a low area where rainwater channels.

Additionally, the federal jurisdictional inclusion of intermittent streams and tributaries and ephemeral streams means agriculture management will be further impeded, as farmers will not know which water on their lands is jurisdictional. The broad scope of these regulations creates a scenario where the farmer is going to have to prove that they did not discharge rather than federal agencies proving that there is a problem. This is a backwards scenario. If there is a discharge into upstream waters, it is regulated by the state and is appropriately handled at the state level. It is the state's responsibility to address pollution events until they impact waters within EPA's jurisdiction as defined by the Supreme Court. Current state oversight makes it unnecessary and unjustified for EPA to regulate all waters as a just-in-case senario.

b. Agriculture drains should not be regulated as WOTUS; rather, states jurisdiction should address pollution concerns.

The agriculture drainage exemption conflicts with the inclusion of ditches as tributaries. Similarly, exemptions of drains wholly in uplands or that do not discharge into EPA's expansively defined tributaries are trivial. Agricultural waters flow into drains that invariably go somewhere. For example, the exemption of subsurface drains as claimed by EPA is trivial because subsurface drains generally flow directly into surface drains that are claimed jurisdictional in the proposed rule. Very seldom do drains, including tile drains, flow into a waterbody that would not be considered tributary under the proposed expansive definitions. If use of the drains themselves is impaired by regulatory overreach by EPA or others with respect to drains, exemption of water removal at the land location will have little meaning.

Agricultural drains should not be regulated as WOTUS. While the cumulative effect of drains on navigable interstate waters at discharge points should be subjected to state-based requirements, the oversight should not be on the drain. Instead, states should be allowed to focus on the receiving waterbody if there is a pollution problem.

c. The storm water runoff exemption is ill-defined.

EPA needs to clarify if the stormwater runoff exemption refers to tile and surface drainage practices that remove those waters. If not, the exemption provides little protection to agriculture producers. It is important to understand that EPA's definition of tributary would not only authorize it to regulate water quality or limit discharge of agricultural chemicals (as with a TMDL) into a major natural waterway affecting downstream interests, but within the drain itself – within which waters would be under direct EPA jurisdiction. This offers an opportunity for micromanagement of the land itself at the field exit point, discounting downstream dissipation factors within the ditch or intervening wetlands.

North Dakota is particularly concerned with the impact to farmers during the current wet cycle. Within the wet climate scenario, many depressional areas flood. North Dakota is currently dealing with situations that involve the expansion of waters into farmsteads, farm fields, and towns. Many of these would be connected naturally under some scenarios; others would need to be artificially connected (drained) to protect the flooded parties. This authority would offer a powerful tool for federal interests to interfere with farmland water management, causing farmers hardship and delay as they are forced to spend more money and time on the permitting process.

12. Most fundamentally, EPA's definition of nexus makes no sense with respect to actual federal jurisdiction over remote waterbodies.

The significant nexus criterion makes sense in recognizing a federal jurisdiction over the quality of tributary water or neighboring waters at the confluence with navigable waters related to interstate commerce, and which affect the quality of those waters. EPA's proposed definitions do not provide jurisdictional clarity, they only expand jurisdiction.

However, it is difficult to argue that CWA jurisdiction does not allow federal regulatory limitations (with reference to specific standards) on entry of pollutants into clearly delineated federal (navigable) waters at the confluence of the tributary with those waters. It is quite another matter, however, to claim federal jurisdiction over the influent tributary upstream of the confluence, and apply the same standards to that waterbody as to the navigable stream – and then subsequently expand the federal jurisdiction and the same standards to tributaries feeding the influent tributary in a chain of dependent jurisdictions all the way up to and including agricultural ditches. It is the cumulative effect of upstream management, which affects navigable streams related to interstate commerce and which affects federal interests, not the individual upstream tributaries themselves. Upstream tributaries, which are not directly influent to navigable waters, belong under State jurisdiction to allow for flexibility in managing upstream water-use impact problems and their effects on State and local priorities.

13. North Dakota requests that the WOTUS rule be withdrawn. At a minimum, the states must be consulted, the rule must be amended, and then the rule must be put out for a second round of comments.

North Dakota believes the EPA and the Corps must withdraw the proposed rule. This rule was proposed before the final connectivity report was published, failing to give EPA and interested parties the chance to understand any science that may support the definitions.

If the EPA and Corps insist on proposing new definitions, a new draft and a second round of comments is needed following outreach with the state co-regulators and affected agencies. While EPA did conduct hearings, webinars, and meetings on this rule, states should have been consulted prior to the rule's release to avoid instances of federal overreach and to gain an understanding of what water features are like in different regions. Further compounding this problem is that the Corps, an issuing agency of the rule, did no outreach on this rulemaking process. The Corps has authority over determining what is federally jurisdictional. If this is the agency that is going to be issuing guidance and be on the ground during implementation, they need to hear from affected individuals, groups, and industries to fully understand the extent of the harm the rule as proposed could cause and how it can be made better in the future.

A new draft appropriately considering the constraints of proximity to waterbodies specified in the plurality decision of *Rapanos* is needed.

EPA has admitted in regional and national conference calls and webinars that many mistakes were made in this rulemaking process. Reopening a draft for comments will help states, their constituents, and industries know that EPA is listening to concerns and willing to work in a manner that will get this rule right.

Furthermore, throughout the public comment period, the federal agencies have continually released new documents, blog posts, Q&A documents, and webinars, offering explanations of key terms and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this new information is inconsistent with material provided in the official rulemaking docket. These additions inhibit public comment as the agencies keep changing their story and adding new (and often conflicting) information as the comment period progressed.

For example, the term upland is not defined in the proposed rule, but is necessary when determining whether a ditch is exempt. Throughout the comment period, the agencies acknowledged that they do not have a proposed definition of upland. Now, a recent Q&A document, issued by the agencies on September 9, 2014, provides a new definition of upland: "Under the rule, 'upland' is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction." This new definition of upland is not included anywhere in the rulemaking docket. The public cannot adequately comment on a proposed rule if critical components continually change and are not posted in the Federal Register.

THE STATE'S POSITION

The proposed rule does not simplify CWA applications for the regulated population. Rather it increases confusion by proposing a one-size-fits-all framework that glosses over the real complexities of local hydrologic systems and enables federal micromanagement where it is inappropriate and problematic. The proposed rule also raises broader issues concerning the boundaries of jurisdiction between elected governments of states and the legitimate limits within which federal bureaus and agencies can define their own jurisdictions over state resources, and thereby the economies of states. The proposed rule needs to be withdrawn and reconsidered. A major rewrite and structural modification of the proposed rule is needed to resolve the critical issues described above.

To summarize the State's position, the Constitution of the State of North Dakota, Article XI, states that: "All flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigation and manufacturing purposes."

It is North Dakota's position that waters within its boundaries belong to the State and are allocated and protected under state jurisdiction. Within these waters, those related to interstate commerce under the commerce clause of the U.S. Constitution may be subject to additional federal protection under the CWA. As discussed briefly in the introduction to this letter and as reviewed in depth in the joint letter of the States' Attorneys General, the Supreme Court has clearly ruled that EPA has overreached its authority and must retract to limitations closely connected to waters navigable in the traditional sense. Waters beyond these are under state jurisdiction, a real jurisdiction not subsidiary to federal control. It is the State's position that EPA and the Corps have ignored Court mandates and attempted to use the rule making process to make a massive, dangerous, and illegal claim of federal jurisdiction over the waters of the state – a claim that extends far beyond any reasonable extension of nexus related to jurisdictional allowances of the Court.

The State of North Dakota, through its laws and agencies, is responsible for and protects the waters of the state, both surface water and groundwater, under provisions that prevent degradation below the level

related to the highest potential use. Pollution prevention and correction are conducted under state water quality regulations administered by the NDDH and by agricultural chemical restrictions administered by the Department of Agriculture. In addition, water quality impacts of stream depletions are considered in both NDDH discharge standards and water appropriation evaluations administered by the State Engineer. The water quality impacts on major wetland resources and wildlife refuges are also considered and weighed in the water appropriation process, but not so completely weighted as to lock up the use of aquifers, which comprise one of the most vital sources of water for the State's citizens. It is the State, through its close proximity and intimate knowledge of both State resources and the needs of its people, that is best positioned to weigh, balance, and implement water quality protection measures in a sensible and effective manner, without unnecessary and undo harm to the State's citizens.

It is the State's position that EPA and the Corps must retract their proposed rules. If the EPA and Corps continue to propose new definitions, this must be done in consultation with the states, be respectful of state jurisdictions, and be in conformance with Court rulings.

In conclusion, both state and federal agencies understand the importance of environmental water quality and protecting our vital water resources against pollution that will render it unsafe or unusable for wildlife, recreation, and human consumption and use. State interests also understand the collective responsibility for stewardship of waters that affect downstream users and resources and the importance of local contributions toward efforts in their protection. However, the Constitution of the United States, the State Constitution, and two centuries of legal precedent have long established that states have jurisdiction over their waters and are not just a subsidiary executive functioning for federal agencies and bureaus.

We look forward to working cooperatively with EPA in delineating the appropriate boundary of federal and state jurisdiction and developing programs to adequately protect both WOTUS and waters of the state, both within and across jurisdictions.

Sincerely,

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Governor

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Attorney General

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Agriculture Commissioner

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October 8, 2014

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Washington, D.C. 20310

Submitted electronically via Regulations.gov

Re: Comments Of The Attorneys General Of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, And South Dakota And The Governors Of Iowa, Kansas, Mississippi, Nebraska, North Carolina, And South Carolina On The Proposed Definition Of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880)

Dear Administrator McCarthy and Secretary McHugh,

As leaders in our States, we write to express our serious concerns regarding the Proposed Rule issued by the Army Corps of Engineers ("the Corps") and the Environmental Protection Agency ("EPA") (collectively "the Agencies"), which impermissibly seeks to broaden federal authority under the Clean Water Act ("CWA") and which we believe will impose unnecessary barriers to advancing water quality initiatives nationwide. 79 Fed. Reg. 22,188 (Apr. 21, 2014) ("Proposed Rule"). In enacting the CWA, Congress specifically explained that the CWA was

designed to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). Yet, the Proposed Rule violates these mandatory principles, and seeks to place the lions' share of intrastate water and land management in the hands of the Federal Government.

The Proposed Rule's scope is truly breathtaking. The Rule introduces terms such as "tributary," "riparian area," and "flood plain" and then defines these terms extremely broadly, in order to declare that large amounts of intrastate land and waters are always within the Agencies' authority. The Rule then pairs that already capacious coverage with a virtually limitless catch-all such that almost no water or occasional wet land is ever safe from federal regulation. The Rule seeks to bring within the Agencies' power every water and land that happens to lie within giant floodplains on the supposition that those waters and lands may connect to national waters after a once-in-decade rainstorm. It sweeps in roadside ditches that are dry most of the year so long as those ditches have a bank and a minimum amount of water flow at some points in the year. It captures little creeks that happen to lie within what the Agencies may define as a "riparian area" and covers many little ponds, ditches, and streams. And it gives farmers and homeowners no certainty that their farms and backyards are ever safe from federal regulation.

The Agencies should reverse course immediately. As explained below, numerous features in the Proposed Rule are illegal. Under the Supreme Court's CWA cases, these aspects of the Proposed Rule exceed the statutory requirements of the CWA, the federalism policies embodied in the CWA, and the outer boundaries of Congress' constitutional authority. The Agencies should thus withdraw the Proposed Rule and replace it with a narrow, common-sense alternative that gives farmers, developers, and homeowners clear guidance as to the narrow and clearly-defined circumstances where their actions require them to obtain a federal permit under the CWA. In order to help develop that common-sense alternative, we urge the Agencies to meet with State officials, who can help the Agencies understand the careful measures the States are already taking to protect the lands and waters within their borders.

I. Background

A. The Clean Water Act's Permitting Requirements

Under the Clean Water Act of 1972, the Agencies have regulatory authority over "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1344, 1362(7). Inclusion of a water as a "water of the United States" triggers the CWA's onerous permitting requirements. Anyone who wants to discharge a "pollutant" into "waters of the United States" must obtain a permit from either EPA or the Corps depending on the type of discharge involved. 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12). In turn, "'[t]he discharge of a pollutant' is defined broadly to include 'any addition of any pollutant to navigable waters from any point source,' and 'pollutant" is defined broadly to include not only traditional contaminants but also solids such as

"dredged spoil, . . . rock, sand, [and] cellar dirt.'" *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion) (citing 33 U.S.C. §§ 1362(12), 1362(6)).

Obtaining a discharge permit is an expensive and uncertain process, which can take years and cost tens and hundreds of thousands of dollars. *See* 33 U.S.C. §§ 1342, 1344 (describing the discharge permitting process). Discharging into the "waters of the United States" without a permit, or violating any permit condition, can subject a farmer, developer or private homeowner to criminal or civil penalties, including fines of up to $37,500 per violation, per day. 33 U.S.C. §§ 1311, 1319, 1365; 74 Fed. Reg. 626, 627 (2009).

B. Supreme Court Decisions Rejecting The Agencies' Overbroad Interpretations Of "Waters Of The United States"

The Proposed Rule involves the central issue of defining the Agencies' jurisdictional reach under the CWA: what constitutes "navigable waters," or "waters of the United States." "For a century prior to the CWA, [the Supreme Court] had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (plurality opinion) (quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871)). Accordingly, after Congress enacted the CWA, the Corps "initially adopted this traditional judicial definition for the Act's term 'navigable waters.'" *Id.* (citing 39 Fed. Reg. 12119, codified at 33 CFR § 209.120(d)(1)). After a district court ruled this definition was too narrow, the Corps went to the opposite extreme, issuing regulations that sought to define "waters of the United States" as extending to the limits of Congress' authority under the Commerce Clause. *Id.* at 724 (citing 40 Fed. Reg. 31,324-31,325 (1975); 42 Fed. Reg. 37,144 & n.2 (1977)).

While the Supreme Court in 1985 upheld a portion of those regulations to include wetlands that "actually abut[ted] on" traditional navigable waters, *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 135 (1985), the Court has since issued two significant opinions rejecting the Agencies' overbroad assertions of CWA authority:

In *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers*, 531 U. S. 159 (2001) (*SWANCC*), the Supreme Court examined the Corps' asserted jurisdiction over any waters "[w]hich are or would be used as habitat" by migratory birds. The Court held that this exceeded the Corps' CWA authority because the CWA did not reach "nonnavigable, isolated, intrastate waters" such as seasonal ponds. *Id.* at 171. The Court explained that its holding was supported by the doctrine that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result," *id.* at 172, adding that this concern is particularly important here because an overbroad interpretation of the CWA would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power," *id.* at 173. The Court explained that extending the Corps' CWA jurisdiction to isolated, seasonal ponds would raise "significant constitutional

questions" regarding Congress' constitutional authority and that there is "nothing approaching a clear statement from Congress" that it had sought to invoke the outermost limits on that authority. *Id.* at 174. To the contrary, Congress specifically chose to "'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'" *Id.* (quoting 33 U. S. C. § 1251(b)).

Then, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court further narrowed the Agencies' regulatory authority under the Act. *Rapanos* involved the Corps' attempt to assert CWA jurisdiction over several wetlands adjacent to nonnavigable tributaries of core waters. The Court's majority consisted of two opinions:

First, Justice Scalia wrote a plurality opinion on behalf of four Justices rejecting the Corps' expansive interpretation of "waters of the United States." The plurality first explained that "[i]n applying the definition of ['waters of the United States'] to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody." *Id.* at 734. The plurality then held that "'waters of the United States'' covers only ''relatively permanent, standing or continuously flowing bodies of water'' and secondary waters, which have a "continuous surface connection" to these relatively permanent waters. *See Id.* at 739-42. In contrast, "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' . . . lack the necessary connection to covered waters." *Id.* at 742.

Second, Justice Kennedy also rejected the Corps' interpretation, explaining that CWA jurisdiction was only appropriate where the waters involved are "waters that are navigable in fact or that could reasonably be so made" or secondary waters that have a "significant nexus" to in-fact navigable waters. *Id.* at 759. Writing only for himself, Justice Kennedy articulated that a "significant nexus" exists only where the wetlands, "alone or in combination with similarly situated lands in the region," "significantly affect the chemical, physical, *and* biological integrity of other covered waters understood as navigable in the traditional sense." *Id.* at 780 (emphasis added). Justice Kennedy explained that the Agencies' overbroad approach is impermissible because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778. Justice Kennedy added that an interpretation that permitted the Agencies to assert jurisdiction over a "wetlands (however remote)" or "a continuously flowing stream (however small)" would similarly fall outside of the CWA's reach. *Id.* at 776-77.

C. The Proposed Rule's Overbroad Definition Of "Waters Of The United States"

The Proposed Rule operates by first defining core waters—that is, those waters that would fall into traditional meaning of the term "navigable waters of the United States": "waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at

723 (plurality opinion) (quoting *The Daniel Ball*, 10 Wall. at 563). Under the Proposed Rule, these core waters include all waters that are currently used—or were used in the past—for interstate or foreign commerce, as well as all territorial seas. 40 C.F.R. § 230.3(s)(1)-(3). In addition, the Proposed Rule also seeks to include all "interstate waters, including interstate wetlands" within this definition of core waters, *id.*, even where such interstate waters are not navigable and thus not within the traditional definition of "waters of the United States." This last aspect of the proposed definition of core waters is problematic, as discussed below.

Beyond these core waters, moreover, the Proposed Rule seeks to define as "waters of the United States" those waters and occasional wet lands that have a relationship with core waters. While the Supreme Court has previously allowed the Agencies to expand the CWA's coverage to some secondary waters, *see Riverside*, 474 U. S. at 121, the Agencies here have attempted to expand that narrow additional authority to assert jurisdiction over extremely broad swaths of intrastate water and land. Three particular features of the Proposed Rule's coverage of secondary waters are new and particularly troubling assertions of CWA jurisdiction:

(1) The Proposed Rule declares that all "tributaries" of both core waters and impoundments of core waters (dams or reservoirs) are *always and per se* covered by the CWA. 40 C.F.R. § 230.3(s)(5). The Proposed definition of "tributaries" is extremely broad, sweeping up ponds, ephemeral streams, and usually dry channels. 40 C.F.R. § 230.3(u)(5).

(2) The Proposed Rule declares that all geographically-related "adjacent" waters are *always and per se* covered by the CWA. *Id.* § 230.3(s)(6). The Proposed Rule defines "adjacent" waters as—among other features—those waters "within the riparian area or floodplain of" core waters, impoundments, or tributaries. *Id.* § 230.3(u)(1)-(2). "Riparian area" and "floodplain" are broad, poorly defined concepts that sweep up large portions of water, wetlands, and lands usually dry for most of the year. *Id.* § 230.3(u)(3)-(4).

(3) Even for waters that escape the Agencies' capacious *per se* categories, the Proposed Rule provides that such waters are covered by the CWA on a "case-by-case basis," so long as a particular water "in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a" core water. *Id.* § 230.3(s)(7). The Rule defines this inquiry as whether these "similarly situated waters" "significantly affect[] the chemical, physical, *or* biological integrity" of a core water. *Id.* § 230.3(u)(7) (emphasis added).[1]

The sum total of these provisions is that the Proposed Rule would place virtually every river, creek, stream, along with vast amounts of neighboring lands, under the Agencies' CWA

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[1] The Proposed Rule also includes several very narrow exceptions regarding waters that the Agencies have deemed never to have a "significant nexus" to core waters. *Id.* § 230.3(t).

jurisdiction. Many of these features are dry the vast majority of the time and are already in use by farmers, developers, or homeowners.

II. Discussion

A. The Proposed Rule Needlessly Replaces State And Local Land Use Management With Top-Down, Federal Control

As the Supreme Court explained in *SWANCC*, in enacting the CWA, Congress wanted to preserve the States' historical primacy over the management and regulation of intrastate water and land management. 531 U. S. at 171-74. Congress memorialized that respect for traditional state authority by specifically stating in the CWA's text that the Agencies must "recognize, preserve, and protect the *primary responsibilities and rights of States* . . . to plan the development and use . . . . of land and water resources . . . ." 33 U. S. C. § 1251(b) (emphasis added). The States have continued to carry out this obligation dutifully since Congress enacted the CWA, protecting land and water resources consistent with local conditions and needs.

The Proposed Rule disregards the statutory requirement mandating respect for State primacy in the area of land and water preservation and instead makes the Federal Government the primary regulator of much of intrastate waters and sometimes wet land in the United States. The Agencies may not arrogate to themselves traditional state prerogatives over intrastate water and land use; after all, there is no federal interest in regulating water activities on dry land and any activities not connected to interstate commerce. Instead, States by virtue of being closer to communities are in the best position to provide effective, fair, and responsive oversight of water and land use and have consistently and conscientiously done so.

And, of course, the imposition of CWA's requirements on waters and lands far removed from interstate, navigable waters is harmful not only to the States themselves, but to farmers, developers and homeowners. As explained below, the Proposed Rule treats numerous isolated bodies of water as subject to the Agencies' jurisdiction, resulting in landowners having to seek permits or face substantial fines and criminal enforcement actions. Nor must land have water on it permanently, seasonally, or even yearly for it to be a "water" regulated under the Act. And if a farmer makes a single mistake, perhaps not realizing that his land is covered under the CWA's permit requirements, he could be subject to thousands of dollars in fines and even prison time.

B. The Proposed Rule Exceeds The Agencies' Authority Under The CWA

The Proposed Rule is also unlawful under the plain terms of the CWA. The Justices comprising the *Rapanos* majority put forward two different tests for when a secondary water can be considered a "water of the United States." Under the four-Justice plurality's test, the question is whether the water has a continuous surface connection to a core water. *See* 547 U.S. at 739-

42. Under Justice Kennedy's test, the question is whether the water has a "significant nexus" to a core water. *Id.* at 759. Under either test, the Proposed Rule is illegal in numerous respects.

1. *Per Se* Coverage Of All Tributaries

The Proposed Rule declares that all "tributaries" of core waters and impoundments of core waters are *always and per se* "waters of the United States." 40 C.F.R. § 230.3(s)(5), *see also* 79 Fed. Reg. 22,199 (April 21, 2014). The Proposed Rule then defines a "tributary" as anything with "presence of a bed and banks and ordinary high water mark...which contributes flow" into a core water, even if such a flow is "ephemeral." 40 C.F.R. § 230.3(u)(5) (emphasis added), 79 Fed. Reg. 22,201-02.

This definition of "tributary" fails the test set out by the four-Justice *Rapanos* plurality. While the plurality emphasized the requirement that the non-core water must have a "*continuous* surface connection" with a core water, the Proposed Rule's definition of "tributary" requires only *any* flow into a core water—or even an impoundment of a core water—making the proposed definition clearly overbroad. Indeed, the plurality specifically rejected CWA jurisdiction for "streams whose flow is [c]oming and going at intervals . . . [b]roken, fitful, or existing only, or no longer than, a day, diurnal . . . short-lived," which contradicts the Proposed Rule's assertion that "tributaries" are *per se* "waters of the United States." *Rapanos,* 547 U.S. at 733 n.5.

The "tributary" definition just as clearly fails Justice Kennedy's "significant nexus" test. Under the Proposed Rule, even roadside ditches or depressions that *ever* send *any* flow into core waters are "waters of the United States." This falls far short of a "significant nexus" as, under the Proposed Rule, the flow need not have any impact on "the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense." *Id.* at 780. Indeed, Justice Kennedy rejected CWA jurisdiction for any "wetlands [that] lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters" and specifically rejected an interpretation that would grant CWA jurisdiction over even a "continuously flowing stream (however small)." *Id.* at 776-79. This reasoning is directly at odds with the Proposed Rule's "tributary" definition, which includes even "ephemeral" flows.

In addition, the Proposed Rule's attempt to sweep in any tributary of an impoundment of a core water would be unlawful under Justice Kennedy's test. The inclusion of any tributary to any impoundment—that is, a dam or reservoir of a core water—is effectively a "double nexus" approach. Under Justice Kennedy's test, only one nexus is allowed: a non-core water can be covered under the Act if that non-core water has a significant nexus to a core water. But here, the Proposed Rule asserts federal jurisdiction over a chain of waters, with only the final one being a core water. Under the Proposed Rule, so long as a non-core water (like an dam or reservoir) has a "significant nexus" to a core water, any water that has a "significant nexus" to that dam or reservoir is also included in "Waters of the United States." This is directly contrary

to Justice Kennedy's approach of requiring each non-core water covered under the Act to have a "significant nexus" connection to an actual core water. *Id.* at 779.

2. *Per Se* Coverage Of All "Adjacent" Waters

The Proposed Rule declares that all waters "adjacent" to core waters, impoundments or tributaries are *always and per se* "waters of the United States." 40 C.F.R. § 230.3(s)(6), 79 Fed. Reg. 22, 199 (April 14, 2014). This is unlawful in multiple respects.

First, the Agencies' assertion that all waters "adjacent" to tributaries or impoundments are always "waters of the United States" is impermissible. This suffers from a similar problem as the Proposed Rule's inclusion of tributaries. The *Rapanos* plurality requires a "continuous" surface connection to a core water, not to a mere adjacency to the tributary or impoundment of a core water. Justice Kennedy would only permit the Agencies to extend their reach beyond core waters upon a showing that the secondary water had a "significant nexus" to actual core waters. *Rapanos*, 547 U.S. at 759. The Proposed Rule, however, does not require this significant nexus. Not all tributaries covered under the Proposed Rule have a significant nexus to core waters, as explained above. The Proposed Rule adds to this problem by then making all the waters and wetlands adjacent to tributaries or impoundments covered waters as well—even though none of these adjacent waters or wetlands may have a significant nexus itself with a core water.

Second, EPA's assertion that any water that is "bordering [or] contiguous" to core waters is automatically a "water of the United States" (40 C.F.R. § 230.3(u)(1)) is similarly unlawful. Under the approach of the *Rapanos* plurality, the bordering relationship must be one of "continuous surface connection," whereas not every water "bordering [or] contiguous" to a core water under the Proposed Rule has a "*continuous*" surface connection to a core water. Further, this aspect of the Proposed Rule is directly contrary to Justice Kennedy's explanation in *Rapanos* that CWA jurisdiction does not extend to "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream." *Rapanos*, 547 U.S. at 776. Under Justice Kennedy's reasoning, a mere water-surface connection is insufficient for CWA jurisdiction without a greater showing of impact on core waters and thus it necessarily follows that merely being "bordering" or "contiguous" cannot satisfy the "significant nexus" test on a *per se* basis.

Third, EPA's definition of "adjacent" waters that are considered *per se* waters of the United States to include any "flood plain" and "riparian area" is illegal. 40 C.F.R. § 230.3(u)(1)-(3). Under the approach of the *Rapanos* plurality, the connection between a core water and a secondary water must be "continuous," whereas by definition the "flood plains" and "riparian area" generally lack such a connection. 547 U.S. at 739-42. For example, a "flood plain" generally only has a surface connection to a water during the time of a flood.

The Agencies' attempt to regulate any "flood plain" and "riparian area" is similarly overbroad under Justice Kennedy's test. The Proposed Rule's definition of "flood plains" would

sweep in areas "inundated during periods of moderate to high water flows" without specifying how regularly such inundation must occur. This means that if an isolated pond resides in an area that would be flooded once every 100 years after an extreme storm, that pond may well become part of the "waters of the United States." A once-a-century—or even once-a-decade—connection to a core water does not significantly impact the "chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense." *Id.* at 780. Similarly, EPA's definition of "riparian area" as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area" sweeps much too broadly because the *amount* of influence for a particular area may well be *de minimis*, in violation of the "substantial nexus" test.

More broadly, that the Agencies' belief that Justice Kennedy's confined significant nexus test permits them to regulate every water and land falling into a "flood plain" and "riparian area" shows how far the Agencies' interpretation is from Justice Kennedy's. Justice Kennedy's opinion in *Rapanos* only permitted jurisdiction for wetlands that, "alone or in combination with similarly situated lands in the region," "significantly affect the chemical, physical, and biological integrity of other covered waters." *Id.* at 761. Moreover, he emphasized that wetlands did not include "simply moist patches of earth" but only "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* at 761 (citation omitted). "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 780. Attempting to regulate under the CWA any land or water in a whole flood plain or riparian area sweeps in far more territory, including territory that has only speculative or insubstantial effects on chemical, physical, and biological integrity of core waters. Whole flood plains and riparian areas, which may be largely dry or have varied and far-spread features, and only have a tangential chemical or biological connection to a core water, include far too much to be significantly connected under Justice Kennedy's careful approach.

In addition, under the Proposed Rule, the size of the "flood plain" and "riparian area" is left to "best professional judgment" of EPA, adding ambiguity on top of the impermissibly broad definitions. 79 Fed. Reg. at 22,208-09.

3.Case-by-Case Coverage Of All Other Waters

The Proposed Rule also provides that a secondary water that somehow escapes inclusion within the Proposed Rule's broad *per se* categories can still be a "water[] of the United States" if the Agencies determine—on a "case-by-case basis"—that the water "in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a" core water. The Proposed Rule then provides that this inquiry covers any water that may

"significantly affect[] the chemical, physical, *or* biological integrity" of a core water. 40 C.F.R. §§ 230.3(s)(7), 230.3(u)(7) (emphasis added).

This *ad hoc* approach clearly violates the test adopted by the *Rapanos* plurality, as it includes innumerable waters without a "continuous surface connection" to core waters. And while the Agencies have attempted to tether themselves to Justice Kennedy's *Rapanos* opinion, their approach is far broader than Justice Kennedy would permit. While Justice Kennedy would require a water to "significantly affect the chemical, physical, *and* biological integrity of other covered waters," the Proposed Rule only requires a water to "significantly affect[] the chemical, physical, *or* biological integrity" of a core water. In addition, the Agencies' conclusion that the "combination with other similarly situated waters" can take place across any "region"—combined with the unbounded discretion in EPA's description of the inquiry—threatens to swallow any remaining waters. The Proposed Rule defines "region" as "the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry," which can be extremely broad areas. 79 Fed. Reg. 22,199, n.6. This case-by-case analysis allows waters in entire watersheds and large regions to be assessed in the aggregate, thus diminishing the significance of the "nexus" any individual feature must have with a core water.

In addition and critically, the Proposed Rule's inclusion of this catch-all category defeats the claimed purpose of the Rule of bringing "transparency, predictability, and consistency" to the scope of CWA jurisdiction, such that farmers, land developers and homeowners can know where the Agencies' assertion of authority ends. 79 Fed. Reg. at 22,190. The inclusion of this vague catch-all category will leave these parties in just as much uncertainty as before the Proposed Rule regarding whether their isolated creeks, ponds, and occasional wet lands are subject to the Agencies' reach, such that a federal permit is mandatory. Accordingly, we urge in the strongest possible terms that the Agencies eliminate the catch-all from any final rule.

4.Classification Of Any Interstate Water As A Core Water

The Proposed Rule also classifies any and all "interstate waters, including interstate wetlands" as core waters. 40 C.F.R. § 230.3(s)(2). This sweeps non-navigable interstate waters into the definition of core water. With non-navigable interstate waters deemed core waters, every water or occasional wet land connected to that water under the Proposed Rule's broad tributary, adjacency and catch-all provisions will also be swept into the Agencies' jurisdiction.

This is plainly unlawful. Both *Rapanos* opinions held that core waters must be navigable waters or at least reasonably made to be so. The *Rapanos* plurality held that "a 'wate[r] of the United States,'" meant "a relatively permanent body of water connected to traditional interstate *navigable* waters," 547 U.S. at 742 (emphasis added), which would obviously not apply to non-navigable waters. Similarly, Justice Kennedy's understanding of core waters is "waters that are or were *navigable* in fact or that could reasonably be so made," 547 U.S. at 759, which similarly

excludes most non-navigable interstate waters. The Agencies' attempt to expand the categories of core waters to include non-navigable waters should thus be withdrawn.

C. The Proposed Rule Would Render The Clean Water Act In Excess Of Congress's Powers Under The Commerce Clause

In *SWANCC*, the Supreme Court rejected a previous attempt by the Corps to expansively interpret the term "waters of the United States," in part based upon the cannon of constitutional avoidance. As the Court explained, the Corps may not adopt an interpretation of the CWA that would create significant questions regarding whether the CWA exceeded Congress' constitutional authority. 531 U.S. at 174. Without deciding whether the Corp's assertion of CWA authority would exceed constitutional bounds, the Court reasoned that Congress did not intend to invoke its constitutional authority to its outermost limits, and instead "chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'" *Id.* (quoting 33 U.S.C. § 1251(b)). Both the four-Justice plurality in *Rapanos* and Justice Kennedy stressed that these concerns remain live as the Court interprets the CWA going forward. The plurality explained that "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power." *Rapanos,* 547 U.S. at 738. And Justice Kennedy noted that the significant nexus test "prevents problematic applications of the statute." *Id.* at 782.

The Court's concerns that the CWA not be interpreted to reach to the limits of Congress's Commerce Clause authority apply with special force to the Proposed Rule. While *SWANCC* and *Rapanos* involved discrete examples of the Agencies' overreach into intrastate matters, the Proposed Rule is a wholesale assertion of virtually limitless authority over broad swaths of intrastate waters and lands. For many of the proposal's applications discussed above, the waters and lands covered are entirely outside of Congress' authority under the Commerce Clause, such as non-navigable intrastate waters that lack any significant nexus to a core water, trenching upon state authority, including in areas of non-economic activity. *See generally United States v. Lopez*, 514 U.S. 549, 561 (1995); *United States v. Morrison*, 529 U.S. 598, 613 (2000). And for many other applications of the Proposed Rule, those waters and lands could only be regulated under a statute that sought to assert the full force of Congress' constitutional authority, such as application to the aggregated isolated waters the Proposed Rule includes on a case-by-case basis. The Supreme Court in *SWANCC* specifically held that the CWA is not such a statute. 531 U.S. at 173-74. Instead, the CWA—unlike the Proposed Rule—specifically respects the "primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'" 33 U. S. C. § 1251(b).

* * *

The Proposed Rule unlawfully and unconstitutionally seeks to assert federal jurisdiction over local water and land use management, while making it impossible for farmers, developers and homeowners to know when they may carry on their activities without obtaining an extremely expensive federal permit. Accordingly, we urge that the Agencies withdraw the Proposed Rule.

We also urge the Agencies to meet with State officials throughout the country, so that the Agencies can better understand the careful measures these officials are taking to protect the land and water in their respective States. After undergoing that careful consultation process, the Agencies should propose a very different rule, which respects the States' primary responsibility over the lands and waters within their borders and gives farmers, developers and homeowners clear guidance as to when the CWA's requirements apply.[2]

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[2] The States of Alaska, North Dakota, and South Dakota will also be submitting separate comment letters addressing the Proposed Rule. The other signatory States reserve the right to submit separate comment letters, should they determine such separate comment letters are appropriate.

Sincerely,

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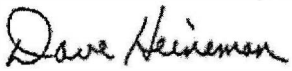
Governor Terry E. Branstad
Iowa



Governor David Heineman
Nebraska

Governor Sam Brownback
Kansas

Governor Pat McCrory
North Carolina

Governor Phil Bryant
Mississippi

Governor Nikki Haley
South Carolina

#8

House Bill 1432
House Agriculture Committee

February 5, 2015

Testimony of Bruce E. Hicks, Assistant Director—NDIC—DMR—Oil and Gas Division

HB1432 amends North Dakota Century Code Chapter 4-01 and creates an environmental impact litigation advisory committee, appropriates litigation funds, and identifies threats to the state.

Our department is neutral on this bill, but we offer the following information:

HB1432 currently identifies the following possible threats to the State

- Interpretations of the Clean Water Act including "Waters of the United States"
- Detriments pertaining to the Endangered Species Act

The Interstate Oil and Gas Compact Commission (IOGCC) is a multi-state governmental entity formed in 1935 that works to ensure our nation's oil and natural gas resources are conserved and maximized while protecting health, safety, and the environment. The NDIC meets regularly with other state regulators throughout the country to establish and share effective regulation and direction of the oil and natural gas industry.

Possible additional threats to States Identified by IOGCC as the basis for a $3 million litigation contingency fund in the Department of Mineral Resources Executive Budget recommendation

- Safe Drinking Water Act
  - BLM revised regulations for hydraulic fracturing on federal and Indian lands
    - Rule to be implemented soon
- Clean Air Act
  - BLM venting and flaring regulations expected in 2015 or 2016
    - Input sessions in Denver, Albuquerque, Dickinson, and Washington, DC
  - EPA new regulations on methane emissions
    - Cut methane emissions by 40-45% below 2012 levels by 2025
- Toxic Substances Control Act
  - EPA rulemaking on disclosure of hydraulic fracturing chemicals
    - EPA replacement of Ground Water Protection Council-IOGCC FracFocus website

A report on "Sue and Settle" was issued by the U.S. Chamber of Commerce in May 2013. Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated with no participation by other affected parties or the public. This practice has replaced the rulemaking process with private party negotiated settlements under the supervision of the federal courts. The Chamber's investigation found that many federal agencies, including the EPA, Fish and Wildlife Service, Forest Service, BLM, National Park Service, Army Corps of Engineers, Department of Agriculture, and Department of Commerce have all used the sue and settle tactic.

It is critical to have funds available to allow North Dakota representatives to be present during any negotiations that pose a potential detriment to the State of North Dakota or to industries operating within the state. If the $3 million provided as a litigation contingency in the Department of Mineral Resources budget is moved to this fund, the flexibility is still needed to respond to Safe Drinking Water Act, Clean Air Act, Toxic Substances Control Act, and tribal issues.

February 6, 2015 #1

15.0961.02002
Title.

Prepared by the Legislative Council staff for
Representative Trottier
February 5, 2015

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1432

Page 1, remove line 11

Page 1, line 12, replace "d." with "c."

Page 1, line 13, replace "e." with "d."

Page 1, line 14, replace "f." with "e."

Page 1, line 14, remove "utilization council;"

Page 1, remove line 15

Page 1, line 6, replace "One individual appointed by the North Dakota wheat commission;" with "growers association;"

Page 1, line 17, replace "i." with "f."

Page 1, after line 17, insert:

"g. One individual appointed by the North Dakota soybean growers association;"

Page 1, line 18, replace "j." with "h."

Page 1, line 18, remove "and"

Page 1, line 19, replace "k." with "i."

Page 1, line 19, after "council" insert:"; and

j. One individual appointed by the North Dakota stockmen's association"

Page 2, line 9, after "in" insert "administrative or judicial matters, including"

Page 2, line 9, after "litigation" insert an underscored comma

Renumber accordingly

February 11, 2015 #1

15.0961.03001
Title.

Prepared by the Legislative Council staff for
Representative D. Johnson
February 10, 2015

HB 1432
House Approps

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1432

Page 1, line 7, after "**impact**" insert "**litigation**"

Page 1, line 8, after "impact" insert "litigation"

Page 1, replace lines 13 through 19 with:

"e. One individual appointed by the lignite energy council;

f. One individual appointed by the North Dakota corn growers association;

g. One individual appointed by the North Dakota grain growers association;

h. One individual appointed by the North Dakota petroleum council;

i. One individual appointed by the North Dakota soybean growers association; and

j. One individual appointed by the North Dakota stockmen's association."

Renumber accordingly

HB1432
Full Approps
2/11/15
Attachment #1

NORTH DAKOTA
D M R
Department of Mineral Resources

House Bill 1432
House Agriculture Committee

February 12, 2015

Proposed Amendments
North Dakota Industrial Commission – Department of Mineral Resources – Oil and Gas Division

The Commission proposes the following amendments to HB1432 (version 15.0961.03000):

Page 2, Line 18: Addition:

c. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act.

d. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act.

e. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act.

f. Any other potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any federal or tribal act.

PREFERRED ALTERNATIVE (TO AMENDMENT ABOVE):

Page 2, Line 10, replace with:

litigation pertaining to any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any federal or tribal act.

Page 2, Lines 11-17, Delete

HB1432
Full Approps
2/11/15
Attachment #2

15.0961.03001
Title.

Prepared by the Legislative Council staff for
Representative D. Johnson
February 10, 2015
February 11, 2015

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1432

Page 1, line 7, after "**impact**" insert "**litigation**"

Page 1, line 8, after "impact" insert "litigation"

Page 1, replace lines 13 through 19 with:

"e. One individual appointed by the lignite energy council;

f. One individual appointed by the North Dakota corn growers association;

g. One individual appointed by the North Dakota grain growers association;

h. One individual appointed by the North Dakota petroleum council;

i. One individual appointed by the North Dakota soybean growers association; and

j. One individual appointed by the North Dakota stockmen's association."

Renumber accordingly

#1 Handout by Reps. Brandenburg 2/16/15

15.0961.03002
Title.

Prepared by the Legislative Council staff for
Representative Brandenburg
February 16, 2015 This will be changed

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1432

Page 1, line 7, after "**impact**" insert "**litigation**"

Page 1, line 8, after "impact" insert "litigation"

Page 1, replace lines 13 through 19 with:

"e. One individual appointed by the lignite energy council;

f. One individual appointed by the North Dakota corn growers association;

g. One individual appointed by the North Dakota grain growers association;

h. One individual appointed by the North Dakota petroleum council;

i. One individual appointed by the North Dakota soybean growers association; and

j. One individual appointed by the North Dakota stockmen's association."

Page 2, line 10, after "litigation" insert an underscored comma

Page 2, line 13, remove "and"

Page 2, line 14, after the "b." insert: "Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act of 1970, as amended, [42 U.S.C. 7401, et seq.] or any regulations implementing the Clean Air Act;

c."

Page 2, line 16, after "1973" insert ", as amended,"

Page 2, line 17, after "Act" insert ";

d. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act, as amended, [42 U.S.C. 300f, et seq.] or any regulations implementing the Safe Drinking Water Act;

e. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act, as amended, [15 U.S.C. 2601, et seq.] or any regulations implementing the Toxic Substances Control Act; and

f. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any other federal law or tribal law, or to any regulations implementing such a law"

Renumber accordingly

February 17, 2015

#1

15.0961.03003
Title.

Prepared by the Legislative Council staff for
Representative Brandenburg
February 16, 2015

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1432

Page 1, line 2, remove "to provide for a continuing"

Page 1, line 3, remove "appropriation; and"

Page 1, line 3, after "transfer" insert a semicolon

Page 1, line 3, after the second "and" insert "to provide an"

Page 1, line 7, after "**impact**" insert "**litigation**"

Page 1, line 8, after "impact" insert "litigation"

Page 1, replace lines 13 through 19 with:

"e. One individual appointed by the lignite energy council;

f. One individual appointed by the North Dakota corn growers association;

g. One individual appointed by the North Dakota grain growers association;

h. One individual appointed by the North Dakota petroleum council;

i. One individual appointed by the North Dakota soybean growers association; and

j. One individual appointed by the North Dakota stockmen's association."

Page 2, line 1, remove "**Continuing appropriation -** "

Page 2, line 7, remove "All moneys in the environmental impact litigation fund are appropriated on a continuing"

Page 2, line 8, replace "basis to the agriculture commissioner" with "Moneys in the environment impact litigation fund may be used, subject to legislative appropriations."

Page 2, line 10, after "litigation" insert an underscored comma

Page 2, line 13, remove "and"

Page 2, line 14, after the underscored period insert: "Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act of 1970, as amended, [42 U.S.C. 7401, et seq.] or any regulations implementing the Clean Air Act;

c."

Page 2, line 16, after "1973" insert ", as amended,"

Page 2, line 17, after "Act" insert: ";

d. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act, as amended, [42 U.S.C. 300f, et seq.] or any regulations implementing the Safe Drinking Water Act;

e. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act, as amended, [15 U.S.C. 2601, et seq.] or any regulations implementing the Toxic Substances Control Act; and

f. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any other federal law or tribal law, or to any regulations implementing such a law"

Page 2, after line 27, insert:

"**SECTION 4. APPROPRIATION - ENVIRONMENTAL IMPACT LITIGATION FUND - EMERGENCY COMMISSION AND BUDGET SECTION APPROVAL - TRANSFER AUTHORITY.** There is appropriated out of any moneys in the environmental impact litigation fund in the state treasury, not otherwise appropriated, the sum of $5,000,000, or so much of the sum as may be necessary, to the office of management and budget for the purpose of providing transfers to state agencies as provided in this section, for the biennium beginning July 1, 2015, and ending June 30, 2017. Subject to emergency commission and budget section approval, the office of management and budget shall transfer the funds provided in this section to state agencies for environmental impact litigation activities as recommended by the environmental impact litigation advisory committee."

Renumber accordingly

#1

North Dakota
Grain Growers Association

Your voice for wheat and barley. www.ndgga.com

North Dakota Grain Growers Association
Testimony on HB 1432
Senate Agriculture Committee
March 13, 2015

Chairman Joe Miller, members of the Senate Agriculture Committee, for the record my name is Dan Wogsland, Executive Director of the North Dakota Grain Growers Association. The North Dakota Grain Growers Association is in full support of HB 1432.

How has it come to this? How have we come to a situation where the state of North Dakota has to provide $4 million in funding to protect ourselves from ourselves? Yet sadly this is precisely the situation we find ourselves in as regulatory over-reach and federal regulatory creep threatens our agriculture industry, our energy industry as well as our business climate in the state of North Dakota. HB 1432 is before you today to provide North Dakota the means necessary to protect itself and its strong economic engines from potentially harmful regulatory efforts that would be detrimental not only to our economy but to the citizens of our state.

Let's be clear, not all federal regulatory efforts are detrimental to our state, our economy or to our people. We as a state and a nation enjoy the benefits of clean water and clean air due in part to federal regulations. Our soil is protected in part from conservation regulations designed to preserve the land for generations to come. Our wildlife are protected and preserved in part due to federal regulatory efforts. However when regulatory over-reach goes out of control we as a state must have a mechanism in place to protect our citizens and our economy from negative federal interference.

There are a host of examples of federal regulatory creep in North Dakota; every industry in the state can cite the horror stories. Proposed Waters of the United States regulations, off-site wetland determinations, pesticides and buffer zones, nutrients, endangered species, the list for agriculture alone goes on and on.

Individually, and even collectively, the economic engines of this state like agriculture, energy and business cannot match the resources of the federal government in terms of litigation. We need a partner; HB 1432 provides that partner.

Chairman Miller, members of the Senate Agriculture Committee, HB 1432 represents a proactive approach by the North Dakota legislature in asserting our state's rights in protecting our state's economic engines, our natural resources and most importantly our citizens. Therefore Chairman Miller, members of the Senate Agriculture Committee, the North Dakota Grain Growers Association appears today in support of HB 1432 and we would ask the Committee's favorable recommendation of the legislation.

HB 1432 Sen. Dotzenrod #2 3/13/15

please post on the ag policy page (replacing the second story from Wednesday), Canada top stories, recent feature articles (p. 2)

Photo:

http://cmsappprod01/netpub/server.np?original=15608&site=DTN&catalog=catalog

Cutline: Northern Wyoming farmer David Hamilton made improvements to an irrigation ditch on his farm. Although work on such ditches is exempt from the Clean Water Act, EPA and the Corps of Engineers charged Hamilton with violations. A court sided with Hamilton. (Photo courtesy of Todd Rhodes)

Web of Water - 4

Web of Water - 4

EPA Pursues Ag Practices to Seek Violations

Summary: Though the EPA touts a list of exemptions from the Clean Water Act rule for agriculture, the agency has pursued violations on practices that seemed exempt.

By Todd Neeley

DTN Staff Reporter

OMAHA (DTN) -- Farmers and ranchers at times have been caught off-guard by neighbors or regulators questioning how they work the land. Some are willing to fight it out in federal court, but it can be costly just to prove they were right.

Concerns are mounting that perhaps no agricultural practice truly is exempt. A newly proposed Clean Water Act rule defining waters of the U.S. appears to call for a significant regulatory expansion of waters coming under federal control, though EPA estimates minimal expansion of jurisdiction.

In recent years, some farmers and ranchers conducted seemingly exempted practices but the EPA slapped them with alleged CWA violations.

So, when EPA released an interpretive rule that includes 56 exempted conservation practices, suspicion grew that the agency is instead narrowing exemptions by requiring farmers to follow Natural Resource Conservation Service specifications. EPA Administrator Gina McCarthy told DTN last summer the list of agricultural conservation practices could grow or shrink over time.

In this series, "Web of Water," DTN looks at some of the concerns farmers have about the rule and how it might be implemented. Although EPA has outlined a number of agriculture-related exemptions, this fourth and final story in the series looks at the potential threats farmers face when doing seemingly normal farming operations.

CONCERNS ABOUT EPA DIRECTION

Wyoming lawyer Harriet Hageman represents farmers and ranchers on Clean Water Act cases. She said she is concerned about the direction EPA is going with the proposed rule. "What we've got to do is keep pushing back," Hageman said. "This isn't about clarification. It is actually a worse rule than you think it is."

EPA and the U.S. Army Corps of Engineers want to expand jurisdiction for a reason, and that is to control water quantity, Hageman said. If farmers and ranchers are not protected, "they can't do irrigated agriculture in the West, and I'm not being melodramatic," she said. "Water is erosional and you have to be able to maintain irrigation ditches. Can't have the federal government come in and say to move. It costs several hundreds of thousands of dollars to get a 404 permit (dredge and fill)."

EPA's legal pursuits of property owners in recent years seem to indicate the agency is searching for ways to test agriculture exemptions, largely by citing small producers.

Consider the case of West Virginia poultry farmer Lois Alt who was charged by EPA with a Clean Water Act violation for storm water coming into contact with dust, feathers and manure outside a poultry house -- although storm water on farms is exempt. EPA claimed the farm had the potential to discharge into waters of the U.S. and issued an order in 2011 for Alt to apply for a federal storm-water discharge permit. Alt appealed with the help of the American Farm Bureau Federation, which opted to intervene in the case. Environmental groups opted to intervene on the side of EPA, even though the agency finally deemed the case was a loser last year and tried to get the case dismissed. EPA tried to argue that the agricultural storm water exemption didn't apply.

"Common sense and plain English lead to the inescapable conclusion that Ms. Alt's poultry operation is 'agricultural' in nature and that the precipitation-caused runoff from her farmyard is 'storm water,'" wrote U.S. District Judge John Preston Baily as he concluded that storm-water runoff from Alt's farm is exempt from discharge permit requirements.

Yet, few property owners can stomach a legal battle and often settle with EPA on alleged violations and never make their stories public. EPA news releases announcing settlements often provide scant details about the alleged violations.

HAMILTON CASE

Hageman successfully defended Worland, Wyo., farmer David Hamilton in a case that took more than six years of legal battles. Hamilton had bought farms with old irrigation ditches that had not been maintained for some 30 years in a region that receives about 7 inches of precipitation annually.

Beginning in 2005, Hamilton started correcting erosional problems. Slick Creek was part of an irrigation system that incorporated many natural draws, and Hamilton installed head gates and diverted water in April 2005 Irrigation systems are exempt from the CWA. Hageman said he decided to stabilize the channel, pulling out junk cars, combines and other junk on site. He designed a new concrete channel.

"He made a beautiful farm out there," Hageman said. Hamilton made a number of repairs to underground drains, making improvements to allow water to drain to the creek. "He did what someone would expect to properly take care of the land," she said.

In spring 2006, he was reported to EPA and the Corps of Engineers for the work he did. In 2009, the Corps issued a notice of violation and told Hamilton to restore the creek back to its original state -- which was an environmental mess.

"He was engaging in normal farming and ranching activities," Hageman said. "Try to tell that to EPA and the Army Corps of Engineers." After six years of litigation, a jury found Hamilton not guilty of violating the Clean Water Act, ruling the irrigation ditch was exempt from the law.

"One of the things that was interesting is this was all over a battle of 2.1 acres," Hageman noted. "Even their experts could only find 2.1 acres, while the lawsuit was based on the notion that Hamilton destroyed some 8.8 acres of wetlands. You don't destroy wetlands where we get 7 inches of precipitation."

GOVERNMENT TEST CASES?

The federal government invested more than $1 million to pursue Hamilton in what Hageman said was a "test case." "They go into these communities because farmers can't afford to fight back," she said. "A jury understood what was going on here."

Hageman has been involved with water cases dating back to the early 1990s. Since then, the reach of EPA and Corps of Engineers has continued to expand, she said. "The last five years is the worst I've ever seen," Hageman said.

Many landowners undertake projects to improve their land, she said. When these kinds of cases make it to court, however, the government typically isn't interested in the improvements, said Hageman. During trial, Hageman lost a 45-minute battle arguing to the judge to allow photos of Hamilton's work to be shown to the jury.

She said the photos would have been a game-changer. "The judge wouldn't allow us to show them to the jury. This is about the environment. It doesn't matter if you've improved the environment."

WYOMING LANDOWNER FIGHTS FOR STOCK POND

In another Wyoming case, Andy Johnson continues to battle EPA for the right to keep a stock pond on his small cattle ranch. The pond is along Six Miles Creek; the creek itself was 2 feet wide and a few inches deep. With a state engineer's permit in hand, Johnson created a small dam and constructed what has become wildlife habitat that attracted geese, ducks and trout. Johnson's cattle as well as other herds used the pond throughout the year. Johnson said a neighbor reported his work to EPA.

EPA continues to maintain that the stock pond -- which is exempt from the Clean Water Act -- is not a stock pond at all. The agency has asked

Johnson to remove it or face potentially hundreds of thousands of dollars in fines.

Following an initial interview with DTN in March, Johnson hired Idaho consultant Ray Kagel who completed a wetlands analysis of the property. Kagel determined a dam created by Johnson in building the stock pond qualifies for national permit No. 18 -- and that's just one of several exemptions. According to a letter and engineer's analysis sent to EPA last May, because the dam has less than 10 cubic yards of material below the ordinary high water mark, it qualifies for the permit.

The nationwide permit allows Johnson to discharge into waters as long as it is no more than 25 cubic yards of soil. Johnson's discharge was measured far less, at 8.7. "The worse-case scenario is we still fall under the agriculture exemption," Johnson said. "We're surrounded by cattle ranches."

Contrary to EPA's claims, Kagel found Six Mile Creek runs into an irrigation canal that leads to Johnson's pond, and is not a water of the U.S. That's because it "is not a tributary to anything except an irrigation canal," according to Johnson's letter to EPA. Johnson, who sought and received approval from the state of Wyoming to build the stock pond, said EPA has yet to respond to the substance of the letter.

The public comment period for the proposed Waters of the U.S. rule ends Nov. 14. You can read the rule here, http://tinyurl.com/ns4vxbh and also see http://www2.epa.gov/uswaters

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(CC/ES/AG/CZ)

#3a
3/13/15

Good Morning Chairman MIller and members of the agriculture committee. For the record my name is Bart Schott. I am a 3rd generation farmer from Kulm, ND and am former president of the National Corn Growers Association. I currently serve on the Public Policy Committee of the North Dakota Corn Growers Association. The North Dakota Corn Growers support HB1432 that establishes an environmental litigation fund to provide protection for farmers against the federal overreach that we are encountering.

During my time serving as National President one large issue that we followed on the national level was the Chesapeake Bay Authority and the nutrient criteria modeling that they used to measure what the agricultural community was contributing to waters in the Chesapeake Bay Watershed. It became obvious that agriculture was singled out because it was much easier for high populous areas to point their finger at the minority. Through modern technology, farmers can now produce one bushel of corn using .8 lbs of Nitrogen fertilizer. Yet the Chesapeake Bay nutrient criteria modeling still uses 1.2 lbs of Nitrogen to produce a bushel of corn. We argued that if they are going to use models they need to include up to date numbers, rather than numbers from the 1980's.

The Supreme Court ruling of Rapanos and Carabell in 2006 established that threshold tests are to be used on a case by case evaluation of jurisdiction for relative flow permanence. This ruling affects these regulations:

- Intrastate waters, where their use, degradation, or destruction could affect interstate commerce
- Tributaries of above waters
- Wetlands adjacent to above waters

Recently the EPA proposed a rule under definitions of "Waters of the United States" or WOTUS. The proposed rule was very open ended and over reaching in my view. The rule defines tributary as "waters with bed and banks and an ordinary high water mark that contribute flow to traditionally navigable waters, interstate water or territorial seas." The proposed WOTUS rule also stated that adjacent waters are jurisdictional and that "adjacency applies to all waters, not just wetlands." The proposed WOTUS rule also indicates that "other waters may

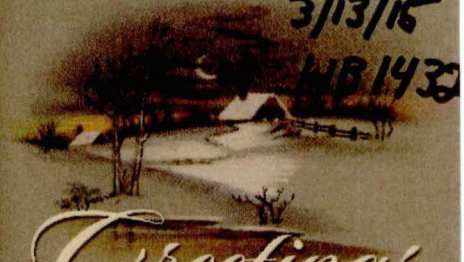
be aggregated where they perform similar functions and are located close together in the same watershed."

We have been informed that groundwater, irrigation and artificial lakes or ponds created for stock watering would be exempt from this ruling. Even though it has been stated there are exemptions, one question that you all need to ponder is who is going to be interpreting these rules? They say we will have exemptions but if you read the language "adjacency applies to all waters, not just wetlands." You could argue that a common road ditch could be regulated under this ruling if the wrong person or persons interpreted it this way.

Members of the Committee, the agricultural community needs your help. Farmers and Ranchers are among the best stewards of our resources, particularly water. We need to stop this federal overreach and these potential interpretations that could stifle production. We need sensible regulation that is science based and up to date. HB1432 sticks up for our farmers and ranchers. I would urge you to consider it.

Thank you and I would be happy to answer any questions.

#36
3/13/15
HB 1432



Greetings

From Our Home
To Yours

#4

In support of HB 1432

Senate Agriculture Committee

March 13, 2015

Chairman Miller and Committee members,

I am Larry Syverson from Mayville, I raise soybeans on my farm in Traill County, I am the Chairman of the Board of Supervisors of Roseville Township of Traill County and I am also the Executive Secretary of the North Dakota Township Officers Association. NDTOA represents the 6,000 Township Officers that serve in more than 1,100 dues paying member townships.

On December 1, 2014 the membership of the North Dakota Township Officer's Association held their annual meeting and passed the following resolution.

"Be it resolved that NDTOA opposes the new rules proposed in the Federal Clean Water Act as proposed by the Environmental Protection Agency (EPA) & the US Corps of Engineers."

Those new rules might become the weapon of choice for the enviro-activist to use against North Dakota government subdivisions, agriculture and industry. They would file suit to require that the EPA enforce the over-reaching rules with court imposed definitions, and the EPA would be forced to do so. NDTOA is very concerned that this will happen. To prepare for what seems to be nearly inevitable we feel HB 1432 is much needed legislation.

NDTOA asks that you give HB 1432 your favorable recommendation.

Thank you, Chairman Miller and Committee members.

#5
3/13/15

HB 1432

Good morning, Chairman Miller and members of the Senate Agriculture Committee. I am Julie Ellingson and I represent the Stockmen's Association. We appear here in support of HB 1432.

Farmers and ranchers are everyday environmentalists, working hard to improve the land, the water, the air and the other natural resources entrusted in our care. We do so because it is the right thing to do and how we make our living. Still, the agricultural industry continues to come under fire from activist groups and the federal government, which has imposed – and continues to propose – burdensome and costly regulations with little or no scientific evidence.

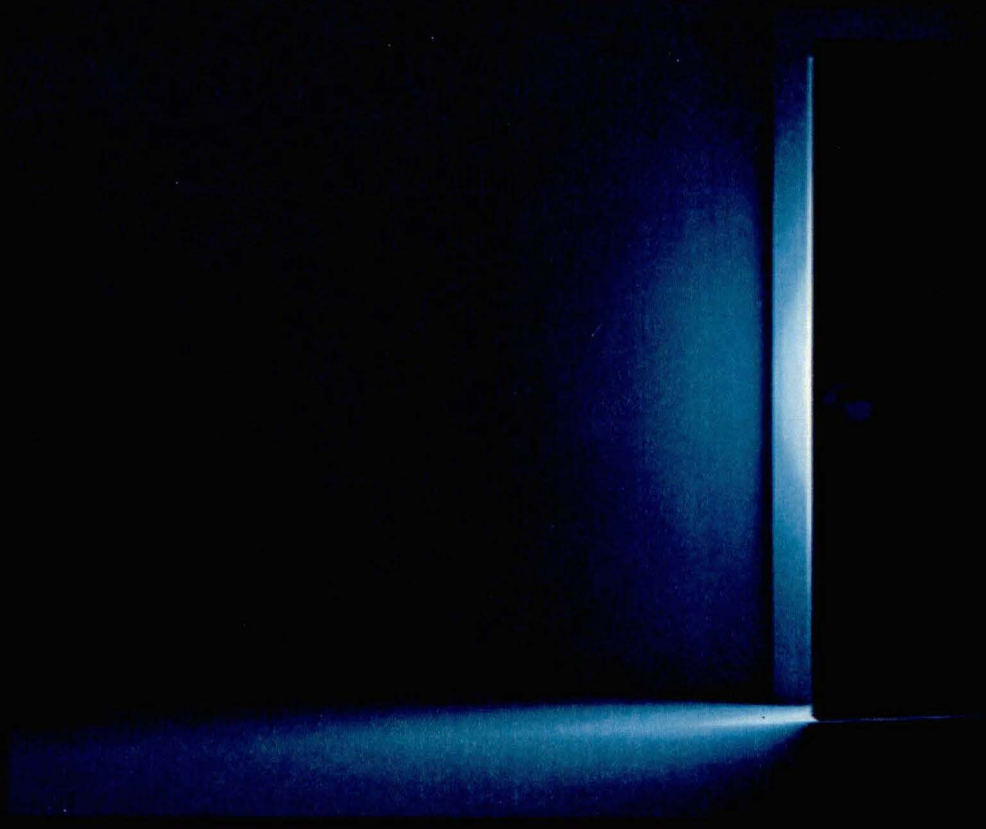
In recent years, the NDSA has actively pushed back on the Waters of the United States proposed rule, the Interpretative Rule, the Spill Prevention, Control and Countermeasure Rule and others to try and shape them so they do not have a devastating effect on the industry with little or no benefit to the environment.

The cattle industry is one of the economic pillars of the state. We appreciate Rep. Brandenburg adding one of our representatives to the Environmental Impact Litigation Advisory Committee to provide an animal agriculture perspective and stand poised and ready to serve.

Thank you for the opportunity to comment.

SUE AND SETTLE

Regulating Behind Closed Doors



U.S. CHAMBER OF COMMERCE

Reconsideration of 2008 Ozone NAAQS

$738 million

Boiler MACT Rule

Lead RRP Rule

$2.16 billion

Regional Haze Implementation Rules

Utility MACT Rule

$9.6 billion

Standards for Cooling Water Intake Structures

$90 billion

$18 billion

Florida Nutrient Standards for Estuaries and Flowing Waters

Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

$3 billion

$350 million

TMDL for Chesapeake Bay

$500 million

Oil and Natural Gas MACT Rule

$384 million

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

A Report on

SUE AND SETTLE

REGULATING BEHIND CLOSED DOORS

U.S. Chamber of Commerce

May 2013

HB 1432 #6b
3/13/15

Acknowledgments

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The lead authors and the project team are from the U.S. Chamber Environment, Technology & Regulatory Affairs Division.

Recognition

The U.S. Chamber of Commerce thanks William Yeatman, assistant director of the Center for Energy and Environment at the Competitive Enterprise Institute, for helping us formulate an additional methodology and the development of a database of sue and settle cases. The database was used to check the validity of, and supplement, the Chamber's database of cases.

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What Is Sue and Settle?

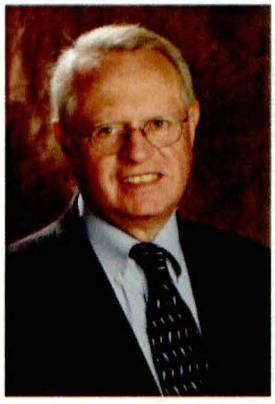
Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget and the public, and compliance with executive orders—at the critical moment when the agency's new obligation is created.

What Is the Sue and Settle Process?

Executive Summary

William L. Kovacs
U.S. Chamber Senior Vice President for Environment, Technology & Regulatory Affairs



Background

The U.S. Chamber of Commerce undertook an investigation of the sue and settle process because of the growing number of complaints by the business community that it was being entirely shut out of regulatory decisions by key federal agencies. While the U.S. Environmental Protection Agency (EPA) and the Fish and Wildlife Service have been leaders in settling—rather than defending—cases brought by advocacy groups, other agencies, including the U.S. Forest Service, the Bureau of Land Management, the National Park Service, the Army Corps of Engineers, the U.S. Department of Agriculture, and the U.S. Department of Commerce, have also agreed to this tactic.

As discussed in our report *Sue and Settle: Regulating Behind Closed Doors*, we found that under this sue and settle process, EPA chose at some point not to defend itself in lawsuits brought by special interest advocacy groups at least 60 times between 2009 and 2012.[1] In each case, it agreed to settlements on terms favorable to those groups. These settlements directly resulted in EPA agreeing to publish more than 100 new regulations,[2] many of which impose compliance costs in the tens of millions and even billions of dollars.[3]

Lack of Agency Transparency On Sue and Settle Cases

We also found that when EPA was asked by Congress to provide information about the notices of intent to sue received by the agency or the petitions for rulemaking served on EPA by private parties, the agency could not—or would not—provide the information. When such lawsuits were initiated, EPA does not disclose the notice of the lawsuit or its filing until a settlement agreement had been worked out with the private parties and filed with the court. As a result, court orders were entered, binding the agency to undertake a specific rulemaking within a specific and usually very short time period, notwithstanding whether the agency actually had sufficient time to perform the obligations imposed by the court order. In response to Congress, EPA made it clear that it is "unable to accommodate this [congressional] request to make all petitions, notices, and requests for agency action publicly accessible in one location on the

[1] A description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.
[2] *See* pages 43–45 for the list of rules and agency actions resulting from sue and settle cases.
[3] For a description of the costs of selected rules, see discussion and notes on pages 14–22.

Internet."[4] Specifically, "the EPA does not have a centralized process to individually characterize and sort all the different types of notices of intent the agency receives."[5] Imagine what would happen if a state or local government, a school district, or a publicly traded company claimed to have no knowledge about lawsuits brought against it, the number of cases settled by its lawyers, or the number of agreements that obligated it to undertake extensive new action? It is unimaginable that such an entity would be able to claim ignorance of lawsuits that significantly impact it or to be unable to provide its citizens, customers, and regulatory agencies with required information. And yet, the position of EPA has been that it would not be bothered to track settlements that impose significant new rules and requirements on the country or to notify the public about them in any systematic fashion.[6]

SUE AND SETTLE SKIRTS PROCEDURAL SAFEGUARDS ON THE RULEMAKING PROCESS

The practice of agencies entering into voluntary agreements with private parties to issue specific rulemaking requirements also severely undercuts agency compliance with the Administrative Procedure Act. The Administrative Procedure Act is designed to promote transparency and public participation in the rulemaking process. Because the substance of a sue and settle agreement has been fully negotiated between the agency and the advocacy group before the public has any opportunity to see it—even in those situations where the agency allows public comment on the draft agreement—the outcome of the rulemaking is essentially set. Sue and settle allows EPA to avoid the normal protections built into the rulemaking process, such as review by OMB, reviews under several executive orders, and reviews by the public and the regulated community. Further, the principles of federalism are also flagrantly ignored when EPA uses the conditions in sue and settle agreements to set aside state-administered programs, such as the Regional Haze program. With no public input, EPA binds itself to the demands of a private entity with special interests that may be adverse to the public interest, especially in the areas of project development and job creation. Sue and settle activities deny the public its most basic of all rights in the regulatory process: the right to weigh in on a proposed regulatory decision before agency action occurs.

SUE AND SETTLE CREATES TENSION BETWEEN THE BRANCHES OF GOVERNMENT

At its heart, the sue and settle issue is a situation in which the executive branch expands the authority of agencies at the expense of congressional oversight. This occurs with at least the implicit cooperation of the courts, which typically rubber stamp proposed settlement agreements even though they enable private parties to dictate agency policy. Congress is harmed because its control over appropriations diminishes. Sue and settle deals (and not Congress) increasingly are what drive an agency's budget concerns. Additionally, the

[4] Letter from Arvin Ganesan, EPA Associate Administrator for the Office of Congressional and Intergovernmental Affairs, to Hon. Fred Upton, Chairman, House Committee on Energy and Commerce (June 12, 2012) at 2.

[5] *Id.*

[6] It is our understanding that EPA has very recently begun to disclose on its website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be required by statute and not just be a voluntary measure. Moreover, agencies such as EPA also need to provide public notice of the filing of a complaint and/or petitions for rulemaking.

implementation of congressionally directed policies is now reprioritized by court orders that the agency asks the court to issue. Once the court approves the consent decree or settlement agreement, EPA is free to tell Congress "we are acting under court order and we must publish a new regulation."

Sue and Settle Migrates To Other Statutes?

A major concern is that the sue and settle tactic, which has been so effective in removing control over the rulemaking process from Congress—and placing it instead with private parties under the supervision of federal courts—will spread to other complex statutes that have statutorily imposed dates for issuing regulations, such as Dodd-Frank or Obamacare. On April 22, 2013, the U.S. District Court for the Northern District of California, which has been very active in sue and settle cases, issued an order in a Food Safety Modernization Act case that sets in motion a new process to bring sue and settle actions under Section 706 of the Administrative Procedure Act. In *Center for Food Safety v. Hamburg*,[7] the court recognized a statutorily imposed deadline, but also recognized that food safety is not always served by rushing a regulation to finality. In this instance, the court ordered the parties to "arrive at a mutually acceptable schedule" because "it will behoove the parties to attempt to cooperate on this endeavor, as any decision by the court will necessarily be arbitrary. The parties are hereby ORDERED to meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction." With a new structure in place that uses the Administrative Procedure Act as a basis for citizen suits, private interest groups and agencies could—without use of any other citizen suit provision—negotiate private arrangements for how an agency will proceed with a new regulation.

The Importance of Fixing the Sue and Settle Problem

Why is it so important to fix the sue and settle process? Congress's ability to act on or undertake oversight of the executive branch is diminished and perhaps eliminated through the private agreements between agencies and private parties. Rulemaking in secret, a process that Congress abandoned 65 years ago when it passed the Administrative Procedure Act, is dangerous because it allows private parties and willing agencies to set national policy out of the light of public scrutiny and the procedural safeguards of the Administrative Procedure Act.

Perhaps the most significant impact of these sue and settle agreements is that by freely giving away its discretion in order to satisfy private parties, an agency uses congressionally appropriated funds to achieve the demands of private parties. This happens even though there are congressional appropriations specifying the use of such funds. In essence, the agency intentionally transforms itself from an independent actor that has discretion to perform duties in a manner best serving the public interest into an actor subservient to the binding terms of the settlement agreements. The magnitude and serious consequences of the sue and settle problem have recently been recognized by at least one court, when it set aside a sue and settle

[7] *Center for Food Safety v. Hamburg*, No. C 12-4529 PJH, slip op. at 10 (N.D. Cal. Apr. 22, 2013).

agreement that would "promulgate a substantial and permanent amendment" to an agency rule.[8]

THE MOST EFFECTIVE SOLUTION TO SUE AND SETTLE LIES WITH CONGRESS

In the final analysis, Congress is also to blame for letting the sue and settle process take on a life free of congressional review. Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes.[9] Because citizen suit provisions were included within the environmental titles of the U.S. Code, Congress placed jurisdiction and oversight of citizen suits with congressional authorizing committees rather than with the House and Senate Judiciary Committees. Despite the fact that the sole purpose of citizen suits is to grant access to the federal courts, which is the primary jurisdiction of the Judiciary committees, jurisdiction was instead placed in committees that had no expertise in the subject matter. Accordingly, no meaningful oversight has been conducted in more than four decades over the use and abuse of citizen suit activity, such as sue and settle.

Fortunately, however, in 2012, the House Judiciary Committee began looking at the abuses of the sue and settle process. It introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012, which the House passed as part of a larger bill. Under the bill, before the agency and outside groups can file a proposed consent decree or settlement agreement with a court, the proposed consent decree or settlement has to be published in the *Federal Register* for 60 days to allow for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. It is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

[8] *Conservation Northwest v. Sherman*, No. 11-35729, slip op. at 15 (9th Cir. Apr. 25, 2013) ("Because the consent decree in this case allowed the Agencies effectively to promulgate a substantial and permanent amendment to [a regulation] without having followed statutorily required procedures, it was improper.").

[9] *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Resource Conservation and Recovery Act, 42 U.S.C. § 6972.

SUE AND SETTLE

REGULATING BEHIND CLOSED DOORS

May 2013

INTRODUCTION

Over the past several years, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements as a technique to shape agencies' regulatory agendas. The overwhelming majority of instances of sue and settle actions from 2009 to 2012 have occurred in the environmental regulatory context. These actions were primarily brought under the citizen suit provisions of the Clean Air Act, the Clean Water Act, and the Endangered Species Act.[10] The citizen suit provisions in environmental statutes such as the Clean Air Act provide advocacy groups with the most direct and straightforward path to obtain judicial review of an agency's failure to meet a statutory deadline or perform such other duty a plaintiff group believes is necessary and desirable.[11] From a new wave of endangered species listings to the EPA's federalization of the Chesapeake Bay cleanup program, to the federal takeover of regional haze programs, recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interest groups.

Beginning in 2011, the U.S. Chamber of Commerce began working to better understand the full scope and consequences of the sue and settle issue. We set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. Compiling information on sue and settle agreements turned out to be labor intensive and time consuming. Many such agreements are not clearly disclosed to the

[10] Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Endangered Species Act, 16 U.S.C. §1540(g).

[11] Interest groups have traditionally also obtained judicial review of agency action (or inaction) through section 706 of the Administrative Procedure Act (APA), even where the underlying statute does not contain an explicit citizen suit provision. *See, e.g., Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971)(Court of Appeals for the D.C. Circuit holds that an agency's compliance with NEPA is reviewable, and that the agency is not entitled to assert that it has wide discretion in performing the procedural duties required by NEPA). APA-based citizen suits to enforce or expand the requirements of regulatory programs developed under recent laws such as Dodd-Frank and the Affordable Care Act, and the potential for advocacy group-driven sue and settle agreements in areas like financial regulation, healthcare, transportation, and immigration are a growing likelihood. *See Center for Food Safety v. Hamburg*, No. C 12-4529 (PJH)(N.D. Cal. Apr. 22, 2013)(nonprofit group sued the Food and Drug Administration under section 706 of the APA to compel a rulemaking on a specific deadline. Despite agency's assertion that the "issuance of the required regulations on a rushed or hurried basis would not help protect human health and safety," the court ordered the parties to "meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction.").

public or other parties until after they have been signed by a judge and the agency has legally bound itself to follow the settlement terms. Even then, agencies do not maintain lists of their sue and settle cases that are publicly available.

Using a combination of approaches, the Chamber was able to compile a database of sue and settle cases and their subsequent rulemaking outcomes. This combined database, which is summarized at the end of this report, indicates the sue and settle cases for the current administration. The Chamber also developed data on the use of the tactic during earlier administrations.

WHAT IS SUE AND SETTLE?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.[12]

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget (OMB) and other agencies, reviews under executive orders, and review by other stakeholders—at the critical moment when the agency's new obligations are created.

Because sue and settle lawsuits bind an agency to meet a specified deadline for regulatory action—a deadline the agency often cannot meet—the agreement essentially reorders the agency's priorities and its allocation of resources. These sue and settle agreements often go beyond simply enforcing statutory deadlines and the agreements themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public. The realignment of an agency's duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

WHAT DID OUR RESEARCH REVEAL?

By using the methodologies described in Appendix A and Appendix B, the Chamber was able to compile a list of sue and settle cases that occurred between early 2009 and 2012. Because agencies are not required to notify the public when they receive notices from outside groups of

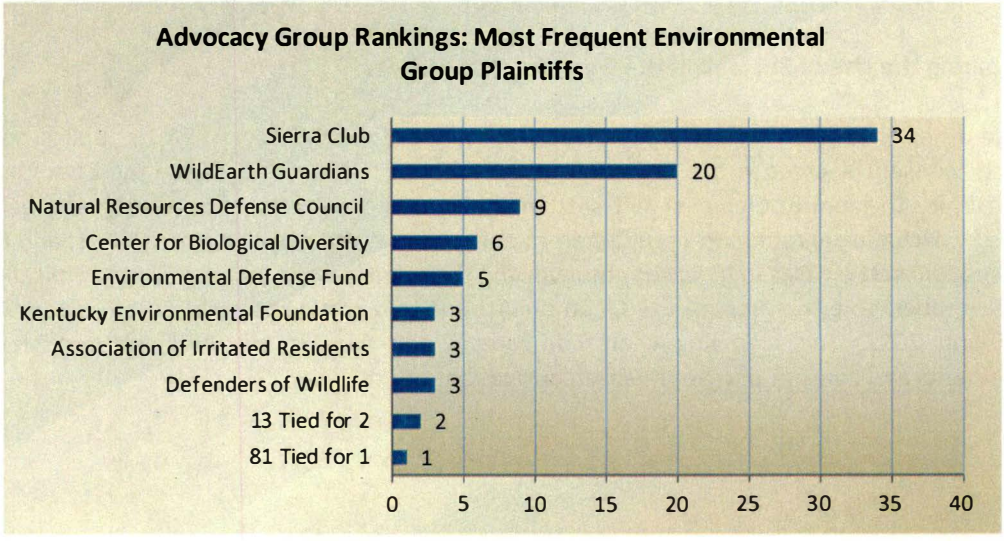
[12] The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with the court *on the same day* the advocacy group filed its complaint against EPA. *See Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C. Cir. Apr. 23, 2013).

their intent to sue, or, in many cases, when they reach tentative settlement agreements with the groups, it is often extremely difficult for an interested party (e.g., a state, a regulated business, the public) to know about a settlement until it is final and has legally binding effect on the agency. For this reason, we do not know if the list of cases we have developed is a truly complete list of recent sue and settle cases. Only the agencies themselves and the Department of Justice[13] really know this.

Number of Sue and Settle Cases

Our investigation shows that from 2009 to 2012, a total of 71 lawsuits (including one notice of intent to sue) were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber's definition. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service (FWS) settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules with estimated compliance costs of more than $100 million annually.

Which Advocacy Groups Use the Sue and Settle Process the Most?

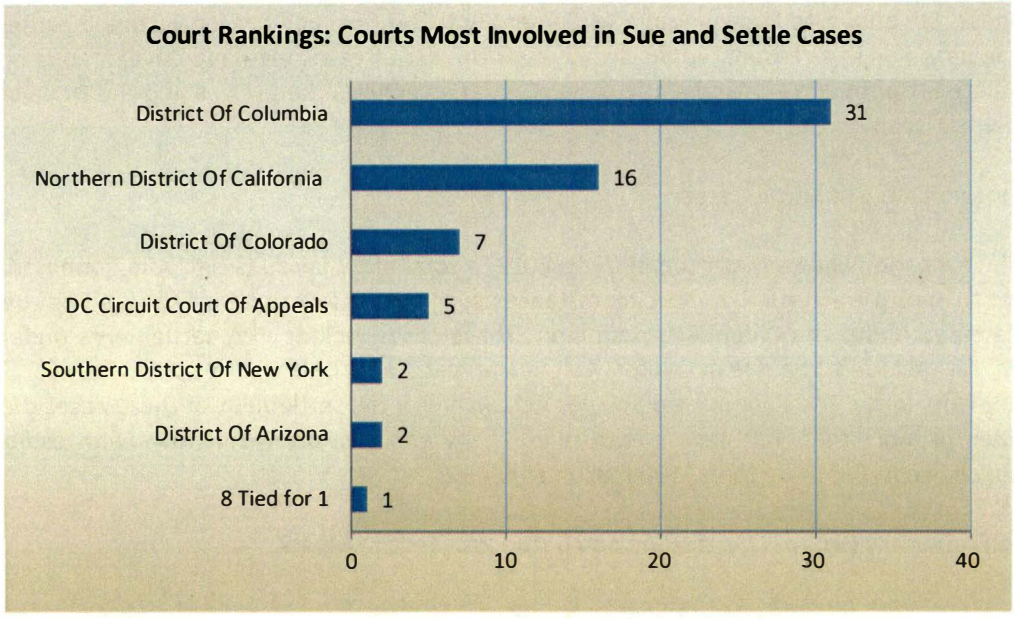


Several environmental advocacy groups have made the sue and settle process a significant part of their legal strategy. By filing lawsuits covering significant EPA rulemakings and regulatory initiatives, and then quickly settling, these groups have been able to circumvent the normal rulemaking process and effect immediate regulatory action with the consent of the agencies themselves.[14]

[13] Virtually all lawsuits against federal agencies are handled by U.S. Department of Justice attorneys. In all of the sue and settle cases the Chamber found, the Department of Justice represented the agency.

[14] Although the Chamber was not able to compile a complete database on the extent to which advocacy groups receive attorney's fees from the federal government, a review of a portion of the Chamber's database revealed that attorney's fees

Which Courts Handle the Most Sue and Settle Cases?

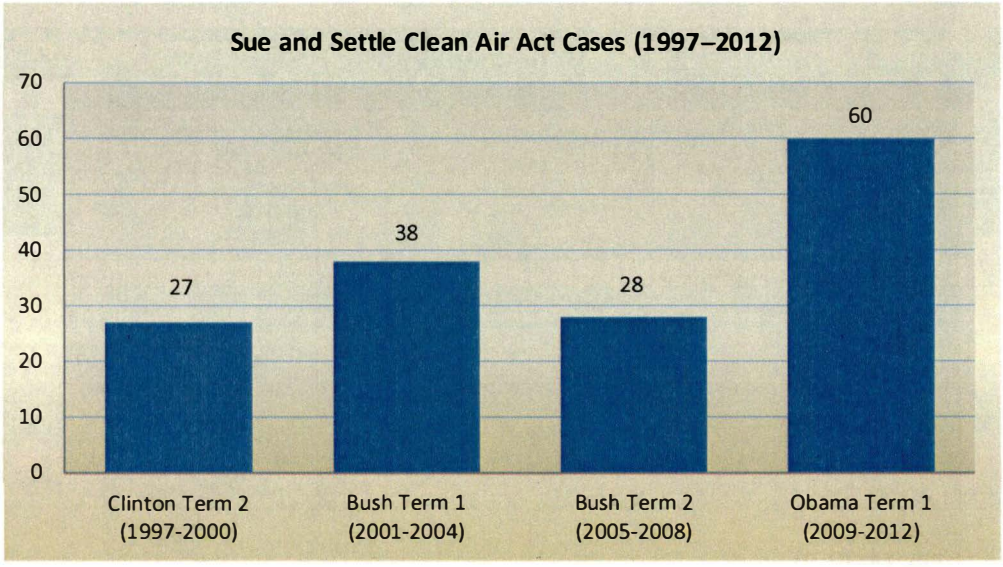


Comparing the Use of Sue and Settle Over the Past 15 Years

Unlike other environmental laws, the Clean Air Act specifically requires EPA to publish notices of draft consent decrees in the *Federal Register*.[15] These public notices gave the Chamber the opportunity to identify Clean Air Act settlement agreements/consent decrees going back to 1997. By excluding agreements resulting from enforcement actions, permitting cases, and other non-sue and settle cases (e.g., cases not involving the issuance of rules of general applicability), we have been able to compare the Clean Air Act sue and settle cases that occurred between 1997 and 2012. The following chart compares Clean Air Act sue and settle settlement agreements and consent decrees finalized during that period.

were awarded in at least 65% (49 of 71) of the cases. These fees are not paid by the agency itself, but are paid from the federal Judgment Fund. In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas.

[15] Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), provides that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . the Administrator shall provide a reasonable opportunity by notice in the *Federal Register* to persons who are not named as parties or intervenors to the action or matter to comment in writing." Of all the other major environmental statutes, only section 122(i) of the Superfund law, (42 U.S.C. § 9622(i)) requires an equivalent public notice of a settlement agreement.



The results show that sue and settle is by no means a recent phenomenon[16] and that the tactic has been used during both Democratic and Republican administrations. To the extent that the sue and settle tactic skirts the normal notice and comment rulemaking process, with its procedural checks and balances, agencies have been willing for decades to allow sue and settle to vitiate the rulemaking requirements of the Administrative Procedure Act.[17] Moreover, our research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA action. While advocacy groups have used sue and settle much more often in recent years, both interest groups and industry have taken advantage of the tactic.

WHAT ARE THE ECONOMIC IMPLICATIONS OF OUR FINDINGS?

Since 2009, regulatory requirements representing as much as $488 billion in new costs have been imposed by the federal government.[18] By itself, EPA is responsible for adding tens of billions of dollars in new regulatory costs.[19] Significantly, more than 100 of EPA's costly new rules were the product of sue and settle agreements. The chart below highlights just ten of the most significant rules that arose from sue and settle cases:

[16] The sue and settle problem dates back at least to the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice policy memorandum, referred to as the "Meese Memo," addressing the problematic use of consent decrees and settlement agreements by the government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. *See* Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986).

[17] 5 U.S.C. Subchapter II.

[18] Sam Batkins, American Action Forum, "President Obama's $488 Billion Regulatory Burden" (September 19, 2012).

[19] *Id*. Mr. Batkins estimates the regulatory burden added by EPA in 2012 alone to be $12.1 billion.

Ten Costly Regulations Resulting From Sue and Settle Agreements		
1.	Utility MACT Rule	Up to $9.6 billion annually
2.	Lead Renovation, Repair and Painting (LRRP) Rule	Up to $500 million in first-year
3.	Oil and Natural Gas MACT Rule	Up to $738 million annually
4.	Florida Nutrient Standards for Estuaries and Flowing Waters	Up to $632 million annually
5.	Regional Haze Implementation Rules	$2.16 billion cost to comply
6.	Chesapeake Bay Clean Water Act Rules	Up to $18 billion cost to comply
7.	Boiler MACT Rule	Up to $3 billion cost to comply
8.	Standards for Cooling Water Intake Structures	Up to $384 million annually
9.	Revision to the Particulate Matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)	Up to $350 million annually
10.	Reconsideration of 2008 Ozone NAAQS	Up to $90 billion annually

1. Utility MACT Rule

In December 2008, environmental advocacy groups sued EPA, seeking to compel the agency to issue maximum achievable control technology (MACT) air quality standards for hazardous air pollutants from power plants.[20] In October 2009, EPA lodged a proposed consent decree.[21] The intervenor in the case, representing the utility industry, argued that MACT standards such as those proposed by EPA were not required by the Clean Air Act.[22]

Utility MACT (also known as the Mercury Air Toxics Standard, or MATS) is a prime example of EPA taking actions, in the wake of a sue and settle agreement, that were not mandated by the Clean Air Act. Ironically, even in this situation, where an affected party was able to intervene, EPA and the advocacy groups did not notify or consult with them about the proposed consent decree. Moreover, even though the District Court for the District of Columbia expressed some concern about the intervenor being excluded from the settlement negotiations, the court still approved the decree in the lawsuit.[23] The extremely costly Utility MACT Rule, which EPA was not previously required to issue, is estimated by EPA to cost $9.6 billion annually by 2015.[24]

2. Lead Renovation, Repair and Painting Rule for Residential Buildings

In 2008, numerous environmental groups sued EPA to challenge EPA's April 22, 2008, Lead Renovation, Repair and Painting Program (LRRP) Rule, and these suits were consolidated in the

[20] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC) (D.D.C.), filed December 18, 2008.
[21] *American Nurses Ass'n*, Defendant's Notice of Lodging of Proposed Consent Decree (Oct. 22, 2009).
[22] *American Nurses Ass'n*, Motion of Defendant-Intervenor Utility Air Regulatory Group for Summary Judgment (June 24, 2009)(Defendant-Intervenors argued that the proposed consent decree improperly limited the government's discretion because it required EPA to find that MACT standards under section 112(d) of the Clean Air Act were required, rather than issuing less burdensome standards or no standards at all).
[23] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).
[24] 77 Fed. Reg. 9,304, 9306 (Feb. 16, 2012); *see also* Letter from President Barack Obama to Speaker John Boehner (August 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."

D.C. Circuit Court of Appeals. EPA chose not to defend the suits and settled with the environmental groups on August 24, 2009. As part of the settlement agreement, EPA agreed to propose significant and specific changes to the rule, including the elimination of an "opt-out" provision that had been included in the 2008 rule. The opt-out authorized homeowners without children under six or pregnant women residing in the home to allow their contractor to forgo the use of lead-safe work practices during the renovation, repair, and/or painting activity. Removing the opt-out provision more than doubled the amount of homes subject to the LRRP rule—to an estimated 78 million—and increased the cost of the rule by $500 million per year.[25] To make matters worse, EPA underestimated the number of contractors who would have to be trained to comply with the new rule and failed to anticipate that there were too few trainers to prepare contractors by the rule's deadline.

3. Oil and Natural Gas MACT Rule

In January 2009, environmental groups sued EPA to update federal regulations limiting air emissions from oil- and gas-drilling operations. EPA settled the dispute with environmentalists on December 7, 2009. The settlement required EPA to review and update three sets of regulations: (1) new source performance standards (NSPS) for oil and gas drilling, (2) the Oil and Gas MACT standard, and (3) the air toxics "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. Despite concerns by the business community that EPA had rushed its analysis of the oil and gas industry's emissions and relied on faulty data, EPA issued final rules on August 16, 2012. These rules are estimated by the agency to impose up to $738 million in additional regulatory costs each year.[26]

4. Florida Nutrient Standards for Estuaries and Flowing Waters

Environmental groups sued EPA in July 2008 to set water quality standards in Florida that would cut down on nitrogen and phosphorous in order to reduce contamination from sewage, animal waste, and fertilizer runoff. EPA entered into a consent decree with the plaintiffs in August 2009—a consent decree that was opposed by nine industry intervenors. As part of the settlement, EPA agreed to issue numeric nutrient limits in phases. Limits for Florida's estuaries and flowing waters were proposed on December 18, 2012. Final rules are required by September 30, 2013. EPA recently approved Florida's proposed nutrient standards as substantially complying with the federal proposal. The estimated cost of the federal standards is up to $632 million per year.[27]

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[25] 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).

[26] *See* Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector – New Source Performance Standards and NESHAPS," RIN: 2060-AP76, at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2060-AP76.

[27] EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters, November 2012, at http://water.epa.gov/lawsregs/rulesregs/upload/floridafaq.pdf.

5. Regional Haze Implementation Rules

EPA's regional haze program, established decades ago by the Clean Air Act, seeks to remedy visibility impairment at federal national parks and wilderness areas. Because regional haze is an aesthetic requirement, and not a health standard, Congress emphasized that states—and not EPA—should decide which measures are most appropriate to address haze within their borders.[28] Instead, EPA has relied on settlements in cases brought by environmental advocacy groups to usurp state authority and federally impose a strict new set of emissions controls costing 10 to 20 times more that the technology chosen by the states. Beginning in 2009, advocacy groups filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state regional haze plans. In five separate consent decrees negotiated with the groups and, importantly, without notice to the states that would be affected, EPA agreed to commit itself to specific deadlines to act on the states' plans.[29] Next, on the eve of the deadlines it had agreed to, EPA determined that each of the state haze plans was in some way procedurally deficient. Because the deadlines did not give the states time to resubmit revised plans, EPA argued that it had no choice but to impose its preferred controls federally. EPA used sue and settle to reach into the state haze decision-making process and supplant the states as decision makers—despite the protections of state primacy built into the regional haze program by Congress.

As of 2012, the federal takeover of the states' regional haze programs is projected to cost eight states an estimated $2.16 billion over and above what they had been prepared to spend on visibility improvements.[30]

6. Chesapeake Bay Clean Water Act Rules

On January 5, 2009, individuals and environmental advocacy groups filed a lawsuit against EPA alleging that the agency was not taking necessary measures to protect the Chesapeake Bay.[31] On May 10, 2010, EPA and the groups entered into a settlement agreement that would require EPA to establish stringent total maximum daily load (TMDL) standards for the Bay. EPA also agreed to establish a new stormwater regime for the watershed. The U.S. District Court for the District of Columbia signed the settlement agreement on May 19, 2010.[32] The agency later cited the binding agreement as the legal basis for its expansive action on TMDLs and stormwater.[33]

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[28] *See* 42 U.S.C. § 7491 (b)(2)(A).

[29] The five consent decrees are: *Nat'l Parks Cons. Ass'n, et al. v. Jackson*, No. 1:11-cv-01548 (D.D.C. Aug 18, 2011); *Sierra Club v. Jackson*, No. 1-10-cv-02112-JEB (D.D.C. Aug. 18, 2011); *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743-CMA-MEH (D.Col. June 16, 2011); *WildEarth Guardians v. Jackson*, No. 4-09-CV02453 (N.D.Cal. Feb. 23, 2010); *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218-REB-BNB (D.Col. Oct. 28, 2010).

[30] *See* William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012)(Oklahoma was ultimately forced to comply with federally mandated SO2 controls rather than implementing fuel switching; costs for the SO2 controls were estimated to at $1.8 billion). The report is available at http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf.

[31] *Fowler v. EPA*, case 1:09-00005-CKK, Complaint (Jan. 5, 2009).

[32] *Fowler v. EPA*, Settlement Agreement (May 19, 2010).

[33] *See Clouded Waters: A Senate Report Exposing the High Cost of EPA's Water Regulations and Their Impacts on State and Local Budgets*, U.S. Senate Committee on Environment and Public Works, Minority Staff, at pp. 2-3 (June 30, 2011), available at http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f.

Several lawmakers, in a 2012 letter, argued that EPA was taking this substantive action even though it was not authorized to do so under law.[34] Further, they also argued that EPA was improperly using settlements as the regulatory authority for other Clean Water Act actions:

> We are concerned that EPA has demonstrated a disturbing trend recently, whereby EPA has been entering into settlement agreements that purport to expand federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature.
>
> One example of this practice is EPA's out-of-court settlement agreement with the Chesapeake Bay Foundation in May 2010. EPA has referred to that settlement as a basis for its establishment of a federal total maximum daily load (TMDL) for the entire 64,000 square-mile Chesapeake Bay watershed and EPA's usurpation of state authority to implement TMDLs in that watershed. EPA also has referred to that settlement as a basis for its plan to regulate stormwater from developed and redeveloped sites, which exceeds the EPA's statutory authority.[35]

The sweeping new federal program for the Chesapeake Bay is major in its scope and economic impact. The program sets land use–type limits on businesses, farms, and communities on the Bay based upon their calculated daily pollutant discharges. EPA's displacement of state authority is estimated to cost Maryland and Virginia up to $18 billion[36] to implement.

The federal takeover of the Chesapeake Bay program is unprecedented in its scope; however, by relying on the settlement agreement as the source of its regulatory authority for the TMDLs and stormwater program, EPA did not have to seek public input, explain the statutory basis for its actions in the Clean Water Act, or give stakeholders an opportunity to evaluate the science upon which the agency relies. Because the rulemakings resulted from a settlement agreement that set tight timelines for action, the public never had access to the information, which would have been necessary in order to comment effectively on the modeling and the assumptions EPA used.

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[34] Letter to EPA Administrator Lisa Jackson from House Transportation and Infrastructure Committee Chairman John L. Mica, House Water Resources and Environment Subcommittee Chairman Bob Gibbs, Senate Environment and Public Works Committee Ranking Member James Inhofe, and Senate Water and Wildlife Subcommittee Ranking Member Jeff Sessions, January 20, 2012. The date of the letter is based on the press release date, http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f and this project Vote Smart page, http://votesmart.org/public-statement/663407/letter-to-lisa-jackson-administrator-of-environmental-protection-agency-epa.

[35] "House, Senate Lawmakers Highlight Concerns with EPA Sue & Settle Tactic for Backdoor Regulation," United States Senate Committee on Environment & Public Works, Minority Office, January 20, 2012 at http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f.

[36] *See* Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (Apr. 2011); *CHESAPEAKE BAY JOURNAL*, January 2011, available at www.bayjournal.com/article.cfm?article=4002.

7. Boiler MACT Rule

In 2003, EPA and Sierra Club entered into a consent agreement that required EPA to set a MACT standard for major- and area-source boilers. In 2006, the U.S. District Court for the District of Columbia issued an order detailing a schedule for the rulemaking. On September 10, 2009, April 3, 2010, and September 20, 2010, EPA and Sierra Club agreed to extend the deadline for the rule. Sierra Club subsequently opposed EPA's request to further extend the deadline from January 16, 2011, to April 13, 2012, despite declarations by EPA officials that the agency could not meet the January 2011 deadline because of the time necessary to consider and respond to all of the public comments on the proposed rule. The D.C. District Court ruled that EPA had had enough time and gave the agency only an additional month to finalize the rule. EPA knew the final rule it had been ordered to issue would not survive court challenge. Accordingly, EPA published a notice of reconsideration the same day it finalized the rule: March 21, 2011. Based on comments it received from the public as well as additional data, EPA issued final reconsidered rules on January 31, 2013, and February 1, 2013. The cost of the 2012 Boiler MACT Rule that EPA had to issue prematurely was estimated by the agency to be $3 billion.[37]

8. Standards for Cooling Water Intake Structures

On November 17, 2006, environmental advocacy groups sued EPA, claiming that the agency had failed to use "Best Technology Available" when it issued a final rule setting standards for small, existing cooling water intake structures under section 316(b) of the Clean Water Act.[38] EPA defended against this lawsuit. On July 23, 2010, EPA and the groups agreed to a voluntary remand of the 2006 cooling water intake rule. On November 22, 2010, EPA entered into a settlement agreement with the environmental groups to initiate a new rulemaking and to take public comment on the appropriateness of subjecting small, existing facilities to the national standards developed for larger facilities. EPA published the proposed rule on April 20, 2011. The proposal would increase dramatically the cost to smaller facilities—such as small utilities, pulp and paper plants, chemical plants, and metal plants—by more than $350 million each year.[39]

9. Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

EPA entered into a consent decree with advocacy groups and agreed to issue a final rule by December 14, 2012, revising the NAAQS for fine particulate matter ($PM_{2.5}$). Even by EPA's own admission, this deadline was unrealistic. In a May 4, 2012, declaration filed with the U.S. District Court of the District of Columbia, Assistant Administrator for Air Regina McCarthy stated that EPA would need until August 14, 2013, to finalize the $PM_{2.5}$ NAAQS due to the many technical and complex issues included in the proposed rulemaking.[40] Despite this recognition of the time

[37] Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."
[38] 71 Fed. Reg. 35,046 (Jun. 16, 2006).
[39] "2012 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," rule web page for "Criteria and Standards for Cooling Water Intake Structures," RIN: 2040-AE95, available at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=2040-AE95.
[40] *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 20.

constraints, EPA agreed in the original consent decree to a truncated deadline, promising to finish the rule in only half the time it believed it actually needed to do the rulemaking properly. The final rule is estimated to cost as much as $382 million each year.[41]

10. Reconsideration of the 2008 Ozone NAAQS

On May 23, 2008, environmental groups sued EPA to challenge the final revised ozone NAAQS, which the agency had published on March 27, 2008. The 2008 rule had lowered the eight-hour primary ground-level ozone standard from 84 parts per billion (ppb) to 75 ppb. On March 10, 2009, EPA filed a motion requesting that the court hold the cases in abeyance to allow time for officials from the new administration to review the 2008 standards and determine whether they should be reconsidered. On January 19, 2010, EPA announced that it had decided to reconsider the 2008 ozone NAAQS.[42] Although EPA did not enter into a settlement agreement or consent decree with the environmental group, it readily accepted the legal arguments put forth by the group despite available legal defenses.[43] The agency announced its intention to propose a reconsidered standard ranging between 70 ppb and 65 ppb.[44] Although the reconsidered ozone NAAQS was not published—and was withdrawn by the administration on September 2, 2011—EPA had estimated that the reconsidered standard would impose up to $90 billion of new costs per year on the U.S. economy.[45]

Other Sue and Settle-Based Rulemakings of Particular Note

Revisions to EPA's Rule on Protections for Subjects in Human Research Involving Pesticides

In 2006, EPA issued a final rule on protecting human subjects in research involving pesticides.[46] Various advocacy groups sued EPA, alleging that the rule did not go far enough.[47] In November 2010, EPA and the advocacy groups finalized a settlement agreement that required EPA to include specific language for a new proposed rule.

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[41] "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter)," Environmental Protection Agency (2012), *see* http://www.epa.gov/pm/2012/decfsoverview.pdf.

[42] 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).

[43] Most of the sue and settle cases identified in this report involve a consent decree or settlement agreement. However, there is a variation of this standard type of sue and settle case that contains many of the same problems that these cases contain, but do not involve a consent decree or settlement agreement. In these cases, advocacy groups sue agencies and then the agencies take the desired action sought by the advocacy groups without any consent decrees or settlement agreements.

[44] 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).

[45] Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More." EPA's intention to revise the 2008 Ozone NAAQS Rule less than two years after it had been finalized—which was unprecedented—and the standard's staggering projected compliance costs, caused tremendous public outcry, which lead to the planned rule being withdrawn at the order of the White House on September 2, 2011. EPA is expected to propose the revised ozone NAAQS in late 2013 or early 2014.

[46] 71 Fed. Reg. 6,138 (Feb. 6, 2006).

[47] *Natural Resources Defense Council v. EPA*, No. 06-0820-ag (2d Cir.). NRDC filed a petition for review on February 23, 2006. Other plaintiffs filed petitions shortly thereafter. The case was consolidated into this case before the Second Circuit.

The advocacy group's influence on the substance of the rules is reflected in the fact that their desired regulatory changes were directly incorporated into the proposed rule. In the preamble of the 2011 proposed rule,[48] EPA wrote:

> EPA also agreed to propose, at a minimum, amendments to the 2006 rule that are substantially consistent with language negotiated between the parties and attached to the settlement agreement.... Although the wording of the amendments proposed in this document [2011 proposed rule] differs in a few details of construction and wording, they are substantially consistent with the regulatory language negotiated with Petitioners, and EPA considers these amendments to address the Petitioners' major arguments.[49]

In fact, there are entire passages from the settlement agreement that are identical to the language included in the 2011 proposed rule.[50] EPA was not mandated by statute to take any action on the human-testing rule and certainly was not required to "cut and paste" the language sought by the advocacy groups. If EPA was concerned that the rule needed to be changed, it should have gone through a normal notice and comment rulemaking rather than writing the substance of the proposed rule behind closed doors.

U.S. Fish and Wildlife Service (FWS) Endangered Species Act Listings and Critical Habitat Designation

FWS agreed in May and July 2011, to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act.

FWS used a settlement in 2009 to designate a large critical habitat area under the Endangered Species Act.[51] In 2008, environmental advocacy groups sued FWS to protest the exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the endangered Hine's emerald dragonfly under the Endangered Species Act.[52] Initially, FWS disputed the case; however, while the case was pending, the new administration took office, changed its mind, and settled with the plaintiffs on February 12, 2009.[53] FWS doubled the size of the critical habitat area from 13,000 acres to more than

[48] 76 Fed. Reg. 5,735, 5,740 (February 2, 2011).
[49] Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820, (2nd Cir.), November 3, 2010. *See also* 76 Fed. Reg. 5,735, 5,740-5,741 (February 2, 2011).
[50] *See* Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820 (2nd Cir.), November 3, 2010, and the proposed rule at 76 Fed. Reg. 5735, 5740. Much of the language in 26.1603(b) and (c) of the proposed rule is identical to the language set forth in the settlement agreement.
[51] *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, (N.D. Ill.), Stipulated Settlement Agreement and Order of Dismissal (February 12, 2009).
[52] *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, Complaint for Declaratory and Injunctive Relief, March 10, 2008 (N.D. Ill.).
[53] *Supra*, note 37.

26,000 acres, as sought by the advocacy groups.[54] Thus, FWS effectively removed a large amount of land from development without affected parties having any voice in the process. Even the federal government did not think FWS was clearly mandated to double the size of the critical habitat area, as evidenced by the previous administration's willingness to fight the lawsuit.

Moreover, FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group, requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act.[55] Agreeing to list this many species all at once imposes a huge new burden on the agency. According to the director of FWS, in FY 2011, FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency spent more than 75% of this allocation ($15.8 million) taking the substantive actions required by court orders or settlement agreements resulting from litigation.[56] In other words, sue and settle cases and other lawsuits are effectively driving the regulatory agenda of the Endangered Species Act program at FWS.

THE PUBLIC POLICY IMPLICATIONS OF SUE AND SETTLE

By being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use sue and settle to dictate the policy and budgetary agendas of an agency. Instead of agencies being able to use their discretion on how best to utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

According to the director of the FWS, in FY 2011 the FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency spent more than 75% of this allocation ($15.8) taking the substantive actions required by court orders or ***settlement agreements*** *resulting from litigation.*

Through sue and settle, advocacy groups also significantly affect the regulatory environment by getting agencies to issue substantive requirements that are not required by law. Even when a regulation is required, agencies can use the terms of a sue and settle agreement as a legal basis for allowing special interests to dictate the discretionary terms of the regulations. Third parties have a very difficult time challenging the agency's surrender of its discretionary power because they typically cannot intervene, and the courts often simply want the case to be settled quickly.

[54] *See, e.g.*, 75 Fed. Reg. 21,394 (August 30, 2010).

[55] Stipulated Settlement Agreements, *WildEarth Guardians v. Salazar* (D.D.C. May 10, 2011) and *Center for Biological Diversity v. Salazar* (D.D.C. July 12, 2011). The requirement to add more than 720 candidates for listing as endangered species would significantly add to the existing endangered species list that contains 1,118 plant and animal species, which could significantly expand the amount of critical habitat in the U.S. This would be a nearly two-thirds expansion in the number of listed species. Fish and Wildlife Species Reports, at http://ecos.fws.gov/tess_public/pub/Boxscore.do.

[56] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011).

Likewise, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the rulemaking process can suffer greatly. Dates for regulatory action are often specified in statutes, and agencies like EPA are typically unable to meet the majority of those deadlines. To a great extent, these agencies must use their discretion to set resource priorities in order to meet their many competing obligations. By agreeing to deadlines that are unrealistic and often unachievable, the agency lays the foundation for rushed, sloppy rulemaking that often delays or defeats the objective the agency is seeking to achieve. These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations, or court-ordered remands to the agency. Ironically, the process of issuing rushed, poorly developed rules and then having to spend months or years to correct them defeats the advocacy group's objective of forcing a rulemaking on a tight schedule. The time it takes to make these fixes, however, does not change a regulated entity's immediate obligation to comply with the poorly constructed and infeasible rule.

Instead of agencies being able to use their discretion on how best to utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

Moreover, if regulated parties are not at the table when deadlines are set, an agency will not have a realistic sense of the issues involved in the rulemaking (e.g., will there be enough time for the agency to understand the constraints facing an industry, to perform emissions monitoring, and to develop achievable standards?). Especially when it comes to implementation timetables, agencies are ill-suited to make such decisions without significant feedback from those who actually will have to comply with a regulation.

By setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking. These requirements include the Regulatory Flexibility Act (RFA)[57] and the Unfunded Mandates Reform Act.[58] In addition to undermining the protections of these statutory requirements, rushed deadlines can limit the review of regulations under the OMB's regulatory review under executive orders,[59] among other laws. This short-circuited process deprives the public (and the agency itself) of critical information about the true impact of the rule.

Unreasonably accelerated deadlines, such as with $PM_{2.5}$ NAAQS, have adverse impacts that go well beyond the specific rule at issue. As Assistant Administrator McCarthy noted in her declaration before the court in the $PM_{2.5}$ NAAQS case discussed above, an unreasonable deadline for one rule will draw resources from other regulations that may also be under

[57] Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612.

[58] Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501 et seq.

[59] *See, e.g.*, Executive Order 12,866, "Regulatory Planning and Review" (September 30, 1993); Executive Order 13132, "Federalism" (August 4, 1999); Executive Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001); Executive Order 13,563 "Improving Regulation and Regulatory Review" (January 18, 2011).

deadlines.[60] When there are unrealistic deadlines, there will be collateral damage on these other rules, which will invite advocacy groups to reset EPA's priorities further when they sue to enforce those deadlines.

In fact, one of the primary reasons advocacy groups favor sue and settle agreements approved by a court is that the court retains jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. For its part, the agency cannot change any of the terms of the settlement (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promise, regardless of the consequences for the agency or regulated parties.

Because a settlement agreement directs the structure (and sometimes even the actual substance) of the agency rulemaking that follows, interested parties have a very limited ability to alter the subsequent rulemaking through comments.

For all of these reasons, sue and settle violates the principle that if an agency is going to write a rule, then the goal should be to develop the most effective, well-tailored regulation. Instead, rulemakings that are the product of sue and settle agreements are most often rushed, sloppy, and poorly conceived. They usually take a great deal of time and effort to correct, when the rule could have been done right in the first place if the rulemaking process had been conducted properly.

Notice and Comment Allowed After a Sue and Settle Agreement Does Not Give the Public Real Input

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, is not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement—even after it receives adverse comments.[61]

[60] "This amount of time [requested as an extension by EPA] also takes into account the fact that during the same time period for this rulemaking, the Office of Air and Radiation will be working on many other major rulemakings involving air pollution requirements for a variety of stationary and mobile sources, many with court-ordered or *settlement agreement deadlines.*" *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 15 (emphasis added).

[61] In the $PM_{2.5}$ NAAQS deadline settlement agreement discussed above, for example, the timetable for final rulemaking action remained unchanged despite industry comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself agreed that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance[62]) of the agency rulemaking that follows, interested parties usually have a very limited ability to alter the design of the subsequent rulemaking through their comments.[63] In effect, the "cement" of the agency action is set and has already hardened by the time the rule is proposed, and it is very difficult to change it. Once an agency proposes a regulation, the agency is restricted in how much it can change the rule before it becomes final.[64] Proposed regulations are not like proposed legislation, which can be very fluid and go through several revisions before being enacted. When an agency proposes a regulation, they are not saying, "let's have a conversation about this issue," they are saying, "this is what we intend to put into effect unless there is some very good reason we have overlooked why we cannot." By giving an agency feedback during the early development stage about how a regulation will affect those covered by it, the agency learns from all stakeholders about problems before they get locked into the regulation.

Rather than hearing from a range of interested parties and designing the rule with a panoply of their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through sue and settle, advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

Sue and settle agreements cut this critical step entirely out of the process. Rather than hearing from a range of interested parties and designing the rule with a panoply of their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through sue and settle, advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

SUE AND SETTLE IS AN ABUSE OF THE ENVIRONMENTAL CITIZEN SUIT PROVISIONS

Congress expressed concern long ago that allowing unlimited citizen suits under environmental statutes to compel agency action has the potential to severely disrupt agencies' ability to meet their most pressing statutory responsibilities.[65] Matters are only made worse when an agency

[62] *See* discussion of the Human Testing Rule, *supra* on page 21.

[63] EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately promulgated largely as they had been proposed. As EPA Assistant Administrator for Air McCarthy recently noted, "[m]y staff has made me aware of some instances in which EPA changed the substance of Clean Air Act settlement agreements in response to public comments. For example, after receiving adverse comments on a proposed settlement agreement [concerning hazardous air standards for 25 individual industries] EPA modified deadlines for taking proposed or final actions and clarified the scope of such actions for a number of source categories before finalizing the agreement. However, I am not aware of every instance in which EPA has made such a change." McCarthy Response to Questions for the Record submitted by Senator David Vitter to Assistant Administrator Gina McCarthy, Senate Environment and Public Works Committee April 8, 2013, Confirmation Hearing at 24. The Chamber is not aware of any other instances where EPA has made such a change in response to public comments.

[64] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974) ("logical outgrowth doctrine" requires additional notice and comment if final rule differs too greatly from proposal).

[65] The Court of Appeals for the District of Columbia noted in 1974 that "While Congress sought to encourage citizen suits, citizen suits were specifically intended to provide only 'supplemental ... assurance that the Act would be implemented and

does not defend itself against sue and settle lawsuits, and when it willingly allows outside groups to reprioritize its agenda and deadlines for action.

Most of the legislative history that gives an understanding of the environmental citizen suit provision comes from the congressional debate on the 1970 Clean Air Act. There is little legislative history beyond the Clean Air Act.[66] The addition of the citizen suit provision in later statutes was perfunctory, and the statutory language used was generally identical to the Clean Air Act language.[67]

The inclusion of a citizen suit provision was far from a given when it was being considered in the Clean Air Act. The House version of the bill did not include a citizen suit provision.[68] The Senate bill did include such a provision,[69] but serious concern was expressed during the Senate floor debate. Senator Roman Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed two major concerns about the citizen suit provision: the limited opportunity for Senators to review the provision and the failure to involve the Senate Judiciary Committee:

> Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best course of action to follow.
>
> Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.[70]

Senator Hruska entered into the record a memo written by one of his staff members. It reiterated the problem of ignoring the Judiciary Committee:

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enforced.' *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Congress made 'particular efforts to draft a provision that would not reduce the effectiveness of administrative enforcement, ... nor cause abuse of the courts while at the same time still preserving the right of citizens to such enforcement of the act.' Senate Debate on S. 3375, March 10, 1970, *reprinted in* Environmental Policy Division of the Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1970, Vol. I. at 387 (1974) (remarks of Senator Cooper)." *Friends of the Earth, et al. v. Potomac Electric Power Co.*, 546 F. Supp. 1357 (D.D.C. 1982); "[T]he agency might not be at fault if it does not act promptly or does not enforce the act as comprehensively and as thoroughly as it would like to do. Some of its capabilities depend on the wisdom of the appropriation process of this Congress. It would not be the first time that a regulatory act would not have been provided with sufficient funds and manpower to get the job done.... Notwithstanding the lack of capability to enforce this act, suit after suit after suit could be brought. The functioning of the department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the act." (Sen. Hruska arguing against the citizen suit provision of the Clean Air Act during Senate debate on S.4358 on Sept. 21, 1970).

[66] *See, e.g.*, Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. New Eng. L. Rev. 311 (1998) at 318.

[67] *Id.* at 313–314, 318.

[68] *See, e.g.*, "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.

[69] *Id.*

[70] Senate debate on S. 4358 at 277.

> The Senate Committee on the Judiciary has jurisdiction over, among other things, "(1) Judicial proceedings, civil and criminal, generally.... (3) Federal court and judges...." The Senate should suspend consideration of Section 304 [the citizen suit provision] pending a study by the Judiciary Committee of the section's probable impact on the integrity of the judicial system and the advisability of now opening the doors of the courts to innumerable Citizens Suits against officials charged with the duty of carrying out the Clean Air Act.[71]

Senator Griffin (R-MI), also a member of the Senate Judiciary Committee, noted the lack of critical feedback that was received regarding the provision:

> [I]t is disturbing to me that this far-reaching provision was included in the bill without any testimony from the Judicial Conference, the Department of Justice, or the Office of Budget and Management concerning the possible impact this might have on the Federal judiciary.[72]

The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees. The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later. There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.

The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees.[73] The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.[74] There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.[75]

Fortunately however, in 2012, during the 112th Congress, the House Judiciary Committee began looking at the abuses of the sue and settle process. Representative Ben Quayle (R-AZ) introduced H.R. 3862, the Sunshine for Regulatory Decrees and Settlements Act of 2012. This bill became Title III of H.R. 4078, the Red Tape Reduction and Small Business Job Creation Act, which passed the House of Representatives on July 24, 2012, by a vote of 245 to 172. As part of the development of the Sunshine for Regulatory Decrees

[71] *Id.* at 279.
[72] *Id.* at 350.
[73] "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980; The legislative history was also searched using Lexis.
[74] "A Legislative History of the Water Pollution Control Act Amendments of 1972, Together with a Section-By-Section Index," Library of Congress, U.S. Govt. Print. Off., 1973-1978; The legislative history was also searched using Lexis.
[75] In 1985, the Senate Judiciary Committee held a hearing on the Superfund Improvement Act of 1985 that among other things discussed citizen suits (S. Hrg. 99-415). The hearing covered a wide range of issues, such as financing of waste site clean-up, liability standards, and joint and several liability. To find hearing information, a comprehensive search was conducted using ProQuest Congressional at the Library of Congress. The search focused on hearings from 1970-present that addressed citizen suits.

and Settlements Act, the House Judiciary Committee held extensive hearings on sue and settle and issued a committee report on July 11, 2012. Under the bill, which passed the House as Title III of H.R. 4078, before a court could sign a proposed consent decree between a federal agency and an outside group, the proposed consent decree or settlement must be published in the *Federal Register* for 60 days for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement. The agency would also have to inform the court of its other mandatory duties and explain how the consent decree would benefit the public interest. Unfortunately, the Senate never took action on its version of the sue and settle bill, also called the Sunshine for Regulatory Decrees and Settlements Act of 2012, which was introduced by Senator Chuck Grassley on July 12, 2012.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. The 2013 Act is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

RECOMMENDATIONS

The regulatory process should not be radically altered simply because of a consent decree or settlement agreement. There should not be a two-track system that allows the public to meaningfully participate in rulemakings, but excludes the public from sue and settle negotiations which result in rulemakings designed to benefit a specific interest group. There should not be one system where agencies can use their discretion to develop rules and another system where advocacy groups use lawsuits to legally bind agencies and improperly hand over their discretion.

- **Notice**

Federal agencies should inform the public immediately upon receiving notice of an advocacy group's intent to file a lawsuit.[76] This public notice should be provided in a prominent location, such as the agency's website or through a notice in the *Federal Register*.[77] By having this advanced notice, affected parties will have a better opportunity to intervene in cases and also prepare more thoughtful comments.

- **Comments and Intervening**

Federal agencies should be required to submit a notice of a proposed consent decree or settlement agreement before it is filed with the court. This notice should be published in the *Federal Register* and allow a reasonable period for public comment (e.g., 45 days).

[76] The Department of Justice also should provide public notice of the filing of lawsuits against agencies, as well as settlements the agencies agree to.

[77] It is our understanding that EPA recently began to disclose on this website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be statutorily required, not just a voluntary measure.

Currently, because it is so difficult for third parties to intervene in sue and settle cases, courts should presume that it is appropriate to include a third party as an intervenor. The intervenors should only be excluded if this strong presumption could be rebutted by showing that the party's interests are adequately represented by the existing parties in the action. Given that intervenors presently can be excluded from settlement negotiations, *sometimes without even being notified of the negotiations*, there should be clarification that all parties in the action, including the intervenors, should have a seat at the negotiation table.

- **Substance of Rules**

Agencies should not be able to cede their discretionary powers to private interests, especially the power to issue regulations and to develop the content of rules. This problem does not exist in the normal rulemaking process. Yet, since courts readily approve consent decrees that legally bind agencies in the sue and settle context, the decree itself becomes a vehicle for agencies to give up their discretionary rulemaking power—and even to develop rules with questionable statutory authority.

Courts should review the statutory basis for agency actions in consent decrees and settlement agreements in the same manner as if they were adjudicating a case. For example, they should ensure that an agency is required to perform a mandatory act or duty, and, if so, that the agency is implementing the act or duty in a way that is authorized by statute.

- **Deadlines**

Federal agencies should ensure that they (and their partners, including states and other agencies) have enough time to comply with regulatory timelines. The public also should be given enough time to meaningfully comment on proposed regulations, and agencies should themselves take enough time to adequately conduct proper analysis. This would include agency compliance with the RFA, executive orders, and other requirements designed to promote better regulations. This is particularly important because recent rulemakings are often more challenging to evaluate in terms of scope, complexity, and cost than earlier rules were.

- **The Sunshine for Regulatory Decrees and Settlements Act of 2013**

Fortunately, there is a simple, noncontroversial way to address the sue and settle problem that currently undermines the fundamental protections that exist within our regulatory system. Passage of the Sunshine for Regulatory Decrees and Settlements Act of 2013 would solve the sue and settle problem and restore the protections of the Administrative Procedure Act to all citizens and stakeholders.

Catalog of Sue and Settle Cases

Sue and Settle Cases Resulting in New Rules and Agency Actions[78] (2009–2012)

Case	Agency	Issue and Result
***American Petroleum Institute v. EPA* (petroleum refineries NSPS)** 08-1277 (D.C. Cir.) Settled: 12/23/2010 (date is from EPA website)	EPA	**Issue**: Greenhouse gas (GHG) New Source Performance Standards (NSPS) for petroleum refineries **Result**: EPA agreed to issue the first-ever NSPS for GHG emissions from petroleum refineries.
***American Lung Association v. EPA* (consolidated with *New York v. Jackson*)** 12-00243 (consolidated with 12-00531) (D.D.C.) Settled: 6/15/2012	EPA	**Issue**: National ambient air quality standards (NAAQS) for particulate matter **Result**: EPA agreed to sign a final rule addressing the NAAQS for particulate matter. In January 2013, EPA published a final rule making the standard more stringent.
American Nurses Association v. Jackson 08-02198 (D.D.C.) Settled: 10/22/2009	EPA	**Issue**: Maximum achievable control technology (MACT) emissions standards for hazardous air pollutants (HAP) from coal- and oil-fired electric utility steam generating units (EGUs) **Result**: EPA entered into a consent decree requiring the agency to issue MACT standards under Section 112 of the Clean Air Act for coal- and oil-fired electric utility steam generating units (known as the "Utility MACT" rule). The rule was finalized in February 2012.
***Association of Irritated Residents v. EPA et al.* (2008 $PM_{2.5}$ SIP)** 10-03051 (N.D. Cal.) Settled: 11/12/2010	EPA	**Issue**: CA state implementation plan (SIP) submission regarding 1997 $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on the 2008 $PM_{2.5}$ San Joaquin Valley Unified Air Control District Plan for compliance with 1997 $PM_{2.5}$ NAAQS. The final action was taken in November 2011.
***Association of Irritated Residents v. EPA et al.* (SIP revisions)** 09-01890 (N.D. Cal.) Settled: 10/21/2009	EPA	**Issue**: CA SIP revision regarding two rules amended by the San Joaquin Valley Unified Air Pollution Control District **Result**: EPA agreed to take final action on the SIP revision and specifically the two rules amended by the San Joaquin Valley Unified Air Pollution Control District (Rule 2020 "Exemptions" and Rule 2020 "New and Modified Stationary Source Review Rule"). The final action was taken in May 2010.
***Center for Biological Diversity et al. v. EPA* (kraft pulp NSPS)**	EPA	**Issue**: Kraft pulp NSPS

[78] For a description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.

Case	Agency	Issue and Result
11-06059 (N.D. Cal.) Settled: 8/27/2012		**Result**: EPA agreed to review and, if applicable, revise the kraft pulp NSPS air quality standards.
Center for Biological Diversity v. EPA 09-00670 (W.D. Wash.) Settled: Settlement agreement (parties entered into it on 3/10/10). Notice of voluntary dismissal, 3/11/10. Notice discusses settlement agreement.	EPA	**Issue**: GHGs and ocean acidification under the Clean Water Act **Result**: In a settlement agreement, EPA agreed to take public comment and begin drafting guidance on how to approach ocean acidification under the Clean Water Act. On November 15, 2010, in guidance, EPA urged states to identify waters impaired by ocean acidification under the Clean Water Act and urged states to gather data on ocean acidification, develop methods for identifying waters affected by ocean acidification, and create criteria for measuring the impact of acidification on marine ecosystems.
Center for Biological Diversity v. U.S. Department of Agriculture 08-03884 (N.D. Cal.) Settled: 12/15/2010	Dept. of Agriculture, U.S. Forest Service	**Issue**: Southern California Forest Service Management Plans **Result**: Conservation groups sued U.S. Forest Service over a forest management plan for four California national forests. The challenged plans designated more than 900,000 roadless acres for possible road building or other development. In 2009, a federal district court agreed with the groups, ruling that the plans violated the National Environmental Policy Act (NEPA). The parties entered into a settlement agreement that withholds more than 1 million acres of roadless areas from development. Further, the agency allowed the advocacy groups to participate in a collaborative process to, among other things, identify a list of priority roads and trails for decommissioning and/or restoration projects.
Center for Biological Diversity v. U.S. Dept. of the Interior (DOI) 10-00952 (D.D.C.) Settled: 1/14/2011	DOI, Dept. of Agriculture, BLM, U.S. Forest Service	**Issue**: Grazing fees on federal lands; environmental groups wanted the fees raised **Result**: In a settlement agreement, agencies agreed to respond to the plaintiffs' petition by January 18, 2011, and determine whether a NEPA environmental impact statement was required to issue new rules for the fee grazing program. The agencies ultimately declined to revise the rules for the fee grazing program, citing other high-priority efforts that took precedence.
Coal River Mountain Watch. et al. v. Salazar et al. 08-02212; A related case is National Parks Conservation Association v. Kempthorne: 09-001 15; Settlement agreement: 09-00115 (D.D.C) (D.D.C.) Settled: 3/19/2010	EPA and DOI	**Issue**: Stream Buffer Zone Rule **Result**: The 1983 stream buffer rule restricted mining activities from impacting resources within 100 feet of waterways. The Bush administration revised the rule to allow activity inside the buffer if it was deemed impractical for mine operators to comply. Environmental groups want the Obama administration to undo that change and declare that the stream buffer zone rule prohibits "valley fills." Environmental groups sued DOI in 2008 over the changes. Secretary Salazar tried to revoke the rule in April 2009, but a court held that OSM must go through a full rulemaking process. OSM agreed to amend or replace the stream buffer rule.
Colorado Citizens Against Toxic Waste, Inc. et al. v. Johnson 08-01787 (D. Colo.) Settled: 9/3/2009	EPA	**Issue**: National emission standards for radon emissions from operating mill tailings **Result**: EPA agreed to review and, if appropriate, revise national emission standards for radon emissions from operating mill tailings. EPA also agreed to certain public participation stipulations.

Case	Agency	Issue and Result
Colorado Environmental Coalition v. Salazar 09-00085 (D. Colo.) Settled: 2/15/2011	DOI	**Issue**: Bureau of Land Management (BLM) decision to amend resource management plans (RMPs), which opened 2 million acres of federal lands for potential oil shale leasing; plaintiffs alleged failure to comply with NEPA and other statutes **Result**: BLM agreed to consider amending each of the 2008 RMP decisions. As part of the amendment process, BLM agreed to consider several proposed alternatives, including alternatives that would exclude lands with wilderness characteristics and core or priority habitat for the imperiled sage grouse from commercial oil shale leasing. BLM also agreed to delay any calls for commercial leasing, but retained the right to continue nominating parcels for Research, Development, and Demonstration (RD&D) leases and to convert existing RD&D leases to commercial leases.
***Comite Civico del Valle, Inc. v. Jackson et al.* (CA SIP)** 10-00946 (N.D. Cal.) Settled: 6/11/2010	EPA	**Issue**: CA SIP regarding measures to control particulate matter emissions from beef feedlot operations within the Imperial Valley **Result**: EPA agreed to take final action on the SIP revision regarding particulate matter emissions from beef feedlot operations within the Imperial Valley. The final rule was published on November 10, 2010.
***Comite Civico del Valle, Inc. v. Jackson et al.* (Imperial County 1)** 09-04095 (N.D. Cal.) Settled: 11/10/2009	EPA	**Issue**: CA SIP revision regarding Imperial County Air Pollution Control District Rules 800-806 (addressing PM_{10}) **Result**: EPA agreed to take final action on the Imperial County Air Pollution Control District's Rules 800-806 (addressing PM_{10}) that revise the CA SIP. A proposed rule was published on January 7, 2013.
***Comite Civico del Valle, Inc. v. Jackson et al.* (Imperial County 2)** 10-02859 (N.D. Cal.) Settled: 10/12/2010	EPA	**Issue**: CA SIP revision regarding Imperial County Air Pollution Control District Rules 201, 202, and 217 **Result**: EPA agreed to take final action on Imperial County Air Pollution Control District Rules 201, 202, and 217 that revise the CA SIP.
Defenders of Wildlife v. Jackson 10-01915 (D.D.C.) Settled: 11/5/2010, 11/8/10 moved for entry same day the complaint was filed (see page 3 of the 3/18/12 memorandum opinion), 3/18/12 (ordered)	EPA	**Issue**: Effluent Limitation Guidelines for Steam Electric Power Generating Point Source **Result**: EPA agreed to sign a notice of proposed rulemaking regarding revisions to the effluent guidelines for steam electric power plants, followed by a final rule. In this case, the advocacy group's complaint was filed on the same day that the parties moved to enter the consent decree.
El Comite Para El Bienestar De Earlimart et al. v. EPA et al. 11-03779 (N.D. Cal.) Settled: 11/14/2011	EPA	**Issue**: CA SIP submission regarding fumigant rules in San Joaquin Valley **Result**: EPA agreed to take final actions on the Pesticide Element SIP Submittal and the Fumigant Rules Submittal. A final rule was published on October 26, 2012.
Environmental Defense Fund v. Jackson 11-04492 (S.D.N.Y.) Settled: 7/6/2012	EPA	**Issue**: NSPS for municipal solid waste landfills **Result**: EPA agreed to review and, if applicable, revise the NSPS for municipal solid waste landfills.

Case	Agency	Issue and Result
Florida Wildlife Federation v. Jackson 08-00324 (N.D. Fla.) Settled: 8/25/2009	EPA	**Issue**: Numeric nutrient criteria for waters in FL **Result**: Environmental groups sued EPA in July 2008 to develop numeric nutrient criteria for FL. EPA entered into a consent decree with the plaintiffs in 2009. As part of the consent decree, EPA agreed to issue limits in phases. Limits for FL's inland water bodies outside South FL were finalized on December 6, 2010; the limits for estuaries and coastal waters, and South FL's inland flowing waters were proposed on December 18, 2012. Final rules, by consent decree, are required by September 30, 2013.
Fowler v. EPA 09-00005 (D.D.C.) Settled: 5/10/2010	EPA	**Issue**: Clean Water Act regulatory regime for Chesapeake Bay **Result**: EPA agreed to establish a Total Maximum Daily Load for the Chesapeake Bay. The settlement requires EPA to develop changes to its storm water program affecting the Bay.
Friends of Animals v. Salazar 10-00357 (D.D.C.) Settled: 7/21/2010	DOI	**Issue**: DOI non-action on plaintiff's petitions to list 12 species of parrots, macaws, and cockatoos as endangered or threatened under the Endangered Species Act **Result**: DOI agreed to issue 12-month findings on the 12 species contained in the petition.
In re Endangered Species Act Section 4 Deadline Litigation **(This case relates to Center for *Biological Diversity v. Salazar*, 10-0230, and 12 different WildEarth Guardians complaints)** 10-00377 (D.D.C.) Settled: Wildlife Guardians: 5/10/2011 CBD: July 12, 2011	DOI	**Issue**: WildEarth Guardians cases: 12 lawsuits seeking to designate 251 species as threatened or endangered under the Endangered Species Act. CBD case: Seeking 90-day findings for 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and 403 southeast aquatic species. **Result**: WildEarth: U.S. Forest Service agreed to make a final determination on Endangered Species Act status for 251 candidate species on or before September 2016. CBD: FWS agreed to make requested findings no later than the end of 2011 (this covers 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and the 403 southeast aquatic species). Note: There are additional actions required for both settlements.
Kentucky Environmental Foundation v. Jackson **(Huntington-Ashland SIP)** 10-01814 (D.D.C.) Settled: 8/4/2011	EPA	**Issue**: KY SIP revision addressing 1997 $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on the Kentucky SIP addressing 1997 $PM_{2.5}$ NAAQS for the Huntington-Ashland area. The final rule was published in April 2012.
Kentucky Environmental Foundation v. Jackson **(Louisville SIP)** 11-01253 (D.D.C.) Settled: 2/27/2012	EPA	**Issue**: KY SIP regarding 1997 $PM_{2.5}$ NAAQS **Result**: EPA had already taken actions by the time the agreement was made. EPA did agree to take final action on the $PM_{2.5}$ emissions inventory for the Louisville SIP.
Louisiana Environmental Action Network v. Jackson 09-01333 (D.D.C.) Settled: 11/23/2010	EPA	**Issue**: LA SIP for 1997 ozone NAAQS **Result**: LEAN brought the case to compel EPA to take action on ozone standards in the Baton Rouge area. As part of the settlement, LEAN agreed to ask the court to hold the litigation in abeyance and EPA agreed to take action if the Baton Rouge area does not come into attainment.
Mossville Environmental	EPA	**Issue**: New MACT standards for polyvinyl chloride (PVC) manufacturers

Case	Agency	Issue and Result
Action NOW v. Jackson 08-01803 (D.D.C.) Settled: 10/30/2009		**Result**: Environmental groups previously litigated and won a decision overturning EPA's 2002 decision not to make the MACT standards for PVC makers more stringent. Environmental groups brought this case in 2008 to compel EPA to set new MACT standards. In 2009, there was a settlement agreement between EPA and the plaintiffs. The agreement called upon EPA to finalize the new MACT standards. EPA issued a final rule in April 2012.
***National Parks Conservation Association v. Jackson* (Regional haze FIPS and SIPs)** 11-01548 (D.D.C.) Settled: 11/9/2011	EPA	**Issue**: Regional haze FIPs and SIPs **Result**: EPA agreed to deadlines to promulgate proposed and final regional haze FIPs and/or SIPs (or partial FIPs and SIPs).
Natural Resources Defense Council et al. v EPA 09-60510 (5th Cir.) Settled: 5/25/2010	EPA	**Issue**: Reporting requirements for concentrated animal feeding operations (CAFOs) **Result**: EPA agreed to create publicly available guidance to assist in the implementation of NPDES permit regulations and Effluent Limitation Guidelines and Standards for CAFOs. The agency also agreed to publish a proposed rule regarding reporting requirements for CAFOs. A proposed rule was published in October 2011 and later withdrawn in July 2012.
Natural Resources Defense Council v. EPA 06-0820 (2d Cir.) Settled: 6/17/2010 (see EarthJustice press release), Finalized on 11/3/10 (see proposed rule)	EPA	**Issue**: Pesticide human testing consent rule **Result**: A 2006 human-testing rule required subjects of paid pesticide experiments to provide "legally effective informed consent." Environmental groups challenged the rule. A June 2010 settlement required EPA to propose amendments to the rule to make it stricter. The settlement required EPA to incorporate specific language in the rule. The new rules were proposed on February 2, 2011. The final rule was published on February 14, 2013 and includes the negotiated language.
***Natural Resources Defense Council v. EPA* (California SIP)** 10-06029 (C.D. Cal.) Settled: 12/13/2010	EPA	**Issue**: CA SIP submission for 1997 ozone and $PM_{2.5}$ NAAQS **Result**: EPA agreed to take action on SIPs as they apply to $PM_{2.5}$ and ozone for California's South Coast Air Basin.
Natural Resources Defense Council v. Salazar 10-00299 (D.D.C.) Settled: 6/18/2010	Fish and Wildlife Service (FWS); DOI	**Issue**: Listing of whitebark pine tree as an endangered species under the Endangered Species Act as a result of climate change **Result**: On July 19, 2011, FWS found that the whitebark pine tree should be listed as threatened or endangered under the Endangered Species Act as a result of climate change. It was the first time the federal government has declared a widespread tree species in danger of extinction because of climate change.
New York v. EPA 06-1322 (D.C. Cir.) Settled: 12/23/2010 (see EPA settlement page)	EPA	**Issue**: GHG NSPS for power plants **Result**: On April 13, 2012, EPA proposed the first-ever NSPS for GHG emissions from new coal- and oil-fired power plants. This came about as a result of a settlement of a 2006 lawsuit challenging power plant NSPS.
Northwoods Wilderness Recovery v. Kempthorne 08-01407 (N.D. Ill.)	FWS; DOI	**Issue**: FWS's exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the Hine's emerald dragonfly under the Endangered Species Act

Case	Agency	Issue and Result
Settled: 1/13/2009		**Result**: FWS agreed to a remand without vacatur of the critical habitat designation in order to reconsider the federal exclusions from the designation of critical habitat for the Hine's emerald dragonfly. FWS doubled the size of the critical habitat from 13,000 acres to more than 26,000. The final rule was published in April 2010.
Portland Cement Assn. v. EPA 07-1046 (D.C. Cir.) Settled: 1/6/2009 (This date is based on when DOJ signed the settlement agreement)	EPA	**Issue**: MACT standards for cement kilns **Result**: EPA settled a lawsuit seeking to force the agency to control mercury emissions from cement kilns. The settlement was between EPA and numerous petitioners that challenged the 2006 cement MACT rule. The petitioners included environmental groups, states, and the cement industry. The final cement MACT rule was published in the Federal Register on September 9, 2010; environmental groups and cement industry petitioned for reconsideration of the 2010 rule. EPA denied in part and amended in part the petitions to reconsider. EPA published a new final rule on February 12, 2013. The reconsidered rule relaxed some aspects of the 2010 rule, and allowed cement companies more time to comply.
Riverkeeper v. EPA 06-12987 (S.D.N.Y.) Settled: 11/22/2010	EPA	**Issue**: Clean Water Act 316(b) standards on cooling water intake structures **Result**: The EPA agreed to propose and finalize a rule regulating cooling water intake structures under 316(b), and to consider the feasibility of more stringent technical controls.
***Sierra Club et al. v. Jackson* (ozone NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA)** 10-04060 (N.D. Cal.) Settled: 8/12/2011 (Date that court ordered Joint Motion to Stay All Deadlines. This motion was filed with the Notice of Proposed Settlement)	EPA	**Issue**: Action on 1997 ozone NAAQS revisions for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA **Result**: EPA agreed to take final action on 1997 Ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA.
***Sierra Club et al. v. Jackson et al.* (CA RACT SIP)** 11-03106 (N.D. Cal.) Settled: 1/6/2012	EPA	**Issue**: CA SIP submissions regarding reasonably available control technology demonstration **Result**: EPA agreed to take final action on the CA RACT SIP.
***Sierra Club et al. v. Jackson et al.* (San Joaquin Valley)** 10-01954 (N.D. Cal.) Settled: 11/8/2010	EPA	**Issue**: CA SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on the 8-hour ozone plan submitted by the San Joaquin Valley Air Pollution Control District, the purpose of which is to achieve progress toward attainment of 1997 ozone NAAQS. A final rule was published on March 1, 2012.
***Sierra Club et al. v EPA* (lead case)** 08-1258 (D.C. Cir.) Settled: 8/24/2009 (see also the amended settlement	EPA	**Issue**: Lead Renovation, Repair and Painting Program **Result**: In 2008, numerous environmental groups commenced lawsuits against EPA to challenge the Lead Renovation, Repair, and Painting Program Rule, and these suits were consolidated in the DC Circuit Court of Appeals.

Case	Agency	Issue and Result
agreement referring to this date)		As part of this settlement agreement, EPA agreed to propose significant and specific changes to the rule that were outlined in the settlement agreement. Significantly, EPA agreed to drop an "opt-out" provision that would allow millions of homes without children or pregnant women to waive the lead restrictions.
Sierra Club filed a notice of intent to file a lawsuit NOTICE OF INTENT Settled: 12/19/2011	EPA	**Issue**: Attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, MO and other areas **Result**: EPA agreed to make attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, and MO. The "other areas" were not included because EPA and plaintiffs agreed that EPA had already addressed the issues for those areas.
***Sierra Club v. EPA* (Nitric Acid)** 09-00218 (D.D.C.) Settled: 11/3/2009	EPA	**Issue**: Nitric acid plants NSPS **Result**: EPA agreed to review NSPS for nitric acid plants. As a result of this review, EPA proposed NSPS for nitric acid plants in October 2011. The final rule was published in August 2012.
***Sierra Club v. EPA et al.* (clay ceramics)** 08-00424 (D.D.C.) Settled: 11/20/2012	EPA	**Issue**: Brick MACT **Result**: EPA agreed to issue final rules setting MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
***Sierra Club v. EPA et al.* (TX ozone PM SIP)** 10-01541 (D.D.C.) Settled: 9/13/2011	EPA	**Issue**: TX SIP submission regarding 1997 ozone and $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on certain infrastructure components of TX SIP submissions for 1997 ozone and $PM_{2.5}$ NAAQS.
***Sierra Club v. Jackson* (21 states)** 10-00133 (D.D.C.) Settled: 4/29/2010 (EPA lodged consent decree with court on this date)	EPA	**Issue**: 21 states' SIPs submissions for 1997 ozone NAAQS **Result**: EPA agreed to approve or disapprove the 1997 8-hour ozone NAAQS Infrastructure SIPs for ME, RI, CT, NH, AL, KY, MS, SC, WI, IN, MI, OH, LA, KS, NE, MO, CO, MT, SD, UT, and WY.
***Sierra Club v. Jackson* (28 different MACT)** 09-00152 (N.D. Cal.) Settled: 7/6/2010	EPA	**Issue**: MACT standards for 28 industry source categories **Result**: Sierra Club sued EPA on January 13, 2009—seven days prior to the change in administration—to review and revise Clean Air Act MACT standards for 28 different categories of industrial facilities, including wood furniture manufacturing, Portland Cement, pesticides, lead smelting, secondary aluminum, pharmaceuticals, shipbuilding, and aerospace manufacturing. On July 6, 2010, EPA lodged a consent decree that required EPA to revise MACT standards for all 28 categories.
***Sierra Club v. Jackson* (AL and GA SIPs)** 11-02000 (D.D.C.) Settled: 7/20/2012	EPA	**Issue**: AL SIP submission for 1997 $PM_{2.5}$ NAAQS and GA SP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on "numerous SIP submittals" by AL for the 1997 $PM_{2.5}$ NAAQS and GA for the 1997 8-hour ozone NAAQS.
***Sierra Club v. Jackson* (AR Regional Haze)**	EPA	**Issue**: AR Regional Haze SIP

Case	Agency	Issue and Result
10-02112 (D.D.C.) Settled: 8/3/2011		**Result:** EPA agreed to sign a notice of final rulemaking to approve or disapprove the AR Regional Haze SIP.
***Sierra Club v. Jackson* (Boiler MACT and RICE rule)** 01-01537 (D.D.C.) Settled: RICE and Boiler MACT: 5/22/03 (consent decree). For RICE: 11/15/07 amendment to change deadlines; 11/9/09 amendment to change deadlines; 2/10/10 was a third modification to the deadline.	EPA	**Issue:** MACT standards for boilers and stationary reciprocating internal combustion engines (RICE) **Result:** In 2003, EPA and Sierra Club entered into a consent decree that required MACT standards for boilers and RICE. There were other MACT standards requirements as well. For Boiler MACT: The rule history is extremely complicated. In 2006, the DC District court issued an order detailing a schedule. EPA and Sierra Club both agreed multiple times to extend the deadline to finalize rules. However, Sierra Club opposed EPA's motion to extend a January 16, 2011 deadline that was established in a September 20, 2010, order, from January 16, 2011 to April 13, 2012. EPA realized that it needed much more time for the final rules. Judge Paul Friedman of the DC District Court decided that enough was enough and gave EPA only one month to issue the rules. EPA did in fact issue the rule on March 21, 2011, and that same day published a notice of reconsideration. The final rules based on the reconsideration were published on January 31, 2013, and February 1, 2013. For the RICE rule: In 2007, 2009, and 2010, EPA and Sierra Club modified the deadline dates for final action as required in the decree. EPA agreed to take additional comment on the RICE rule in June and October 2012, and published the final RICE rule in January 2013.
***Sierra Club v. Jackson* (DSW Rule)** 09-1041 Consol. with 09-1038 (D.C. Cir.) Settled: 9/7/2010 (see also proposed rule that says this date, pp. 44, 102)	EPA	**Issue:** Revisions to the Definition of Solid Waste under RCRA **Result:** Sierra Club challenged the 2008 "Definition of Solid Waste" rule, which established requirements for recycling hazardous secondary materials. To settle the lawsuit, EPA agreed it would review and reconsider the rule. In July 2011, EPA published a proposed rule, significantly tightening the types of materials that can be recycled under RCRA.
***Sierra Club v. Jackson* (Houston-Galveston-Brazoria)** 12-00012 (D.D.C.) Settled: 6/21/2012	EPA	**Issue:** TX SIP submission for 1997 ozone NAAQS **Result:** EPA agreed to take final action on the SIP for the Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas.
***Sierra Club v. Jackson* (Kentucky Regional Haze)** 10-00889 (D.D.C.) Settled: 10/29/2010	EPA	**Issue:** KY SIP submissions for 1997 ozone NAAQS and Regional Haze **Result:** EPA agreed to the following: By April 15, 2011, EPA would take final action on ozone SIP submittals for various Kentucky ozone maintenance areas; by March 15, 2012, EPA would take final action on KY's Regional Haze SIP.
***Sierra Club v. Jackson* (MA, CT, NJ, NY, PA. MD, and DE SIPs)** 11-02180 (D.D.C.) Settled: 7/23/2012	EPA	**Issue:** SIP submissions for certain NAAQS by MA, CT, NJ, NY, PA, MD, and DE **Result:** EPA agreed to take final actions on SIPs for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE.
***Sierra Club v. Jackson* (ME, MO, IL, and WI SIPs)** 11-00035 (D.D.C.) Settled: 11/30/2011	EPA	**Issue:** SIP submissions for 1997 ozone NAAQS by ME, MO, IL, and WI **Result:** EPA agreed to take final action on the SIPs for certain areas of IL, ME, and MO. Wisconsin was not included because the issue was already

Case	Agency	Issue and Result
		resolved.
***Sierra Club v. Jackson* (NC and SC SIPs)** 12-00013 (D.D.C.) Settled: 6/28/2012	EPA	**Issue**: NC and SC SIP submissions regarding 1997 ozone NAAQS **Result**: EPA agreed to take final actions on North Carolina and South Carolina SIPs for Charlotte-Gastonia-Rock Hill.
***Sierra Club v. Jackson* (OK SIP)** 12-00705 (D.D.C.) Settled: 10/15/2012	EPA	**Issue**: OK SIP revision regarding excess emissions **Result**: EPA agreed to ake final action on a revision to the OK SIP regarding excess emissions.
***Sierra Club v. Jackson* (ozone TX, CT, MD, NY, NJ, MA, and NH)** 11-00100 (D.D.C.) Settled: 9/12/2011	EPA	**Issue**: Attainment determinations for 1-hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH **Result**: EPA agreed to make attainment determinations for 1 hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH.
***WildEarth Guardians et al. v. Jackson* (ozone AZ, NV, PA, and TN)** 10-04603 (N.D. Cal.) Settled: 3/23/2011 (Date found in the notice of proposed settlement)	EPA	**Issue**: Nonattainment of 1997 ozone NAAQS for areas in AZ, NV, PA, and TN **Result**: EPA agreed to set a deadline for issuing findings of failure to submit SIPs for the 1997 ozone NAAQS for areas in NV and PA. Other actions addressed concerns in two other states.
***WildEarth Guardians v. Jackson* (2008 ozone NAAQS)** 11-01661 (D. Ariz.) Settled: 12/12/2011	EPA	**Issue**: Area designations for 2008 ground level ozone NAAQS **Result**: EPA agreed to sign for publication in the Federal Register a notice of the Agency's promulgation of area designations for the 2008 ground-level ozone NAAQS.
***WildEarth Guardians v. Jackson* (2nd suit for Phoenix)** 11-02205 (N.D. Cal.) Settled: 6/7/2011	EPA	**Issue**: AZ SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take action on AZ SIP submission pertaining to Phoenix-Mesa's plan to achieve progress toward attainment of 1997 ozone NAAQS. EPA issued a final rule on June 13, 2012.
***WildEarth Guardians v. Jackson* (CO, UT, MT, and NM SIPs)** 09-02148 (D. Colo.) Settled: 2/1/2010	EPA	**Issue**: Final action on 22 SIP submissions from CO, UT, and MT **Result**: EPA agreed to take final action on 22 SIP submissions from CO, UT, and MT, and then added 19 SIP submissions from NM, for a total of 41 SIP submissions.
***WildEarth Guardians v. Jackson* (oil and gas)** 09-00089 (D.D.C.) Settled: 12/3/2009	EPA	**Issue**: Clean Air Act Regulations on Oil and Gas Drilling Operations **Result**: In January 2009, environmental groups sued EPA to update federal regulations limiting air pollution from oil and gas drilling operations. EPA settled with environmentalists on December 3, 2009. The settlement required EPA to review and update three sets of regulations: (1) NSPS for oil and gas drilling; (2) MACT standards for hazardous air pollutant emissions; (3) and "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. On August 16, 2012, EPA issued final rules covering NSPS, MACT, and residual risk for the oil and gas sector.

Case	Agency	Issue and Result
***WildEarth Guardians v. Jackson* (ozone)** 09-02453 (N.D. Cal.) Settled: 2/18/2010	EPA	**Issue**: SIP submissions for 1997 8-hour ozone and $PM_{2.5}$ NAAQS by CA, CO, ID, NM, ND, OK, and OR **Result**: EPA agreed to decide, for each state, whether to approve or deny SIPs for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, or whether to instead force the states to comply with a federal implementation plan.
***WildEarth Guardians v. Jackson* ($PM_{2.5}$)** 11-00190 (N.D. Cal.) Settled: 8/25/2011	EPA	**Issue**: SIP submissions for 2006 $PM_{2.5}$ MAAQS infrastructure by 20 states **Result**: EPA agreed to sign a final action to approve or disapprove the 2006 $PM_{2.5}$ NAAQS infrastructure SIPs for AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY,NV, AR, NH, SC, MA, AZ, GA, and WV.
***WildEarth Guardians v. Jackson* (CO, WY, MT, and ND SIPs)** 11-00001 (Consolidated with 11-00743) (D. Colo.) Settled: 6/6/2011	EPA	**Issue**: CO, WY, MT, and ND SIP submissions for Regional Haze and excess emissions standards **Result**: EPA agreed to decide for each state whether to approve or deny the SIP submissions.
***WildEarth Guardians v. Jackson* (Utah breakdown provision)** 09-02109 (D. Colo.) Settled: 11/23/2009	EPA	**Issue**: Utah SIP revision regarding breakdown provision **Result**: EPA agreed to take a final action regarding the "Utah breakdown provision," which allows sources to exceed their permitted air pollution limits during periods of "unavoidable breakdown." In April 2011, EPA found the breakdown provision inadequate and called on the state to revise its SIP.
***WildEarth Guardians v. Jackson* (Utah SIP)** 10-01218 (D. Colo.) Settled: 10/28/2010	EPA	**Issue**: Utah SIP submissions for Regional Haze and PM_{10} NAAQS **Result**: EPA agreed to sign a final action approving or disapproving, in whole or in part, Utah's request to redesignate Salt Lake City's attainment status for PM_{10} NAAQS. EPA also agreed to take final action on Utah's Regional Haze submission.
***WildEarth Guardians v. Jackson, et al.* (Utah Salt Lake and Davis Counties SIP)** 12-00754 (D. Colo.) Settled: 7/11/2012	EPA	**Issue**: Deadline for action on Utah SIP for 1997 NAAQS for ozone regarding Salt Lake and Davis Counties **Result**: EPA agreed to sign a notice of final action regarding Utah's proposed SIP revision for maintenance of the 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties.
WildEarth Guardians v. Kempthorne 08-00689 (D. Ariz.) Settled: 4/29/2009	DOI	**Issue**: Critical habitat designation for the Chiricahua leopard frog **Result**: DOI under the Bush administration listed the leopard frog as threatened under the Endangered Species Act but declined to designate a critical habitat because doing so would not be "prudent," as is permitted by the Endangered Species Act. WildEarth Guardians sued to challenge this decision, and the Obama administration's DOI settled the case. The terms of the settlement provided that DOI would reconsider its prudency determination. On March 20, 2012, DOI finalized a rule that reversed its prudency decision and designated approximately 10,346 acres as critical habitat for the Chiracahua leopard frog.
WildEarth Guardians v. Locke 10-00283 (D.D.C.)	Dept. of Commerce	**Issue**: Alleged failure by National Marine Fisheries Service (NMFS) to set Endangered Species Act protections for sperm whales, fin whales, and sei

Case	Agency	Issue and Result
Settled: 6/25/2010		whales **Result**: NMFS agreed to issue recovery plans for sperm whales, fin whales, and sei whales by the end of 2011.
***WildEarth Guardians v. Salazar* (674 species)** 08-00472 (D.D.C.) Settled: 3/13/2009	DOI	**Issue**: DOI non-action on plaintiff's petitions to list 674 plant and animal species as threatened under the Endangered Species Act **Result**: DOI agreed to issue decisions on hundreds of species for which no finding had already been made.
***WildEarth Guardians v. Salazar* (Wright's marsh thistle)** 10-01051 (D.N.M.) Settled: 6/2/2010	DOI	**Issue**: DOI non-action on petition to list the Wright's marsh thistle as endangered or threatened under the Endangered Species Act **Result**: DOI agreed to issue a decision on whether to list the the Wright's marsh thistle. FWS listed the Wright's marsh thistle as endangered or threatened on November 4, 2010 (it was a 12-month petition finding).

Most sue and settle cases are resolved through a consent decree or settlement agreement. However, there is a comparable type of case in which the case is resolved by agency action in response to the legal challenge, as opposed to resolving the case with a consent decree or settlement agreement. Like with the "standard" sue and settle cases, special interests bring legal actions to compel agencies to take their desired actions. A common thread between the cases is the special interests are able to change policy affecting the general public without the public having sufficient notice or opportunity to change agency actions.

Case	Agency	Issue and Result
California v. EPA 08-1178 (D.C. Cir.) Settled: 6/30/2009 (EPA granted the waiver; see also EPA waiver web page)	EPA	**Issue**: Grant of California GHG Waiver **Result**: EPA, California, environmental groups and the automobile industry negotiated a settlement of a multi-party lawsuit requesting that EPA set Clean Air Act Title II emissions limitations on GHG emissions from automobiles, and granting California a waiver to set its own automobile GHG standards. EPA had previously denied the waiver in 2008; a lawsuit followed. In January, 2009, California asked for reconsideration of the waiver request. EPA granted the waiver in June 2009 (the notice was published in the Federal Register on July 8, 2009).
Center for Biological Diversity v. Kempthorne 08-05546 (lead case--a consolidated case is NRDC v. DOI, 08-05605) (N.D. Cal.) Settled: 5/14/2009	DOI, NMFS, Dept. of Commerce	**Issue**: December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act **Result**: While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
Greater Yellowstone Coalition v. Kempthorne 08-02138 (D.D.C.) Settled: 11/2/2009	National Park Service, DOI	**Issue**: December 2008 rule allowing limited recreational snowmobile use (720 snowmobiles per day) inside Yellowstone National Park **Result**: While the lawsuit was pending, the National Park Service

Case	Agency	Issue and Result
		announced, on October 15, 2009, a new winter rule superseding the December 2008 rule of which the plaintiffs complained. The plan reduced snowmobile usage to 318 snowmobiles per day, which is less than half the allowed number under the prior rule.
League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Kevin Martin 09-01023 (D. Or.) Settled: Stipulation of Dismissal, 12/30/2009	U.S. Forest Service	**Issue**: Whether authorization of the Wildcat Fuels Reduction and Vegetation Management Project in the Umatilla National Forest violates NEPA and Administrative Procedure Act **Result**: U.S. Forest Service agreed to withdraw its decision notice for the project, which would have allowed timber to be harvested from the National Forest. The parties then agreed to dismiss the case.
***Mississippi v. EPA* (ozone case)** 08-1200 (D.C. Cir.) Settled: 1/19/2010 (This is the publication date of the proposed ozone standards)	EPA	**Issue**: Ozone NAAQS Reconsideration **Result**: Earthjustice sued EPA in 2008 challenging the NAAQS for ground-level ozone, which were lowered at the time from 84 parts per billion (ppb) to 75 ppb. In 2009, EPA announced it would reconsider the rule, and Earthjustice agreed to place its lawsuit on hold as long as EPA imposed stricter ozone NAAQS. EPA proposed new NAAQS somewhere in the range of 60 and 70 ppb. The Obama Administration put the planned rule on hold. However, the rule is expected to be proposed in late 2013.
Natural Resources Defense Council v. Federal Maritime Commission 08-07436 (C.D. Cal.) Settled: 9/11/2009	Federal Maritime Comm'n	**Issue**: Federal Maritime Commission (FMC) decision to terminate portions of the Port of Los Angeles' and Long Beach's Clean Trucks Programs **Result**: While the lawsuit was pending, FMC ended its administrative investigation against the Ports of Los Angeles and Long Beach related to their clean trucks programs, and in a related case, FMC's attempt to block implementation of the ports' clean trucks program was dismissed.
Natural Resources Defense Council v. DOI 08-05605 (N.D. Cal.) Settled: 5/15/2009	DOI, NMFS, Dept. of Commerce	**Issue**: December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act **Result**: While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
Ohio Valley Environmental Coalition v. Army Corps of Engineers 09–247 (R46–024) (U.S.) Settled: 7/30/2010 (Memo that effectively settled the case)	EPA	**Issue**: Clean Water Act Guidance for Mountaintop Removal Mining Permits **Result**: Environmental groups challenged Clean Water Act permitting for mountaintop removal mining, saying EPA did not account for the impact on stream function. EPA issued this "guidance" while suit was pending in the U.S. Supreme Court, which effectively settled the case.
***Sierra Club v. EPA* (emission case)** 09-1063 (D.C. Cir.) Settled: 6/15/2010 EPA revoked the rule	EPA	**Issue**: Emission-Comparable Fuels (ECF) conditional exclusion reconsideration **Result**: EPA issued a December 2008 rule creating a category of Emission-Comparable Fuels (ECF) wastes that could be burned in industrial boilers without triggering RCRA combustion requirements, as long as the resulting

Case	Agency	Issue and Result
		emissions were comparable to those produced by burning fuel oil. Environmental groups sued, and EPA proposed a rule that would withdraw this conditional exclusion for ECF. In June, 2010, EPA published a final rule that revoked this conditional exclusion.
Southern Appalachian Mountain Stewards v. Anninos 09-00200 (Complaint, Army Corps Joint Status Report (stating decision to suspend NWP 21 permit), Stipulation of Dismissal) Settled: 6/18/2010 (This date is based on a 6/30/10 status report explaining the suspension of permits as of 6/18/10)	Army Corps	**Issue**: Decision to issue a streamlined nationwide Clean Water Act permit for surface coal mining **Result**: Army Corps suspended the use of Nationwide Permit 21, which authorized discharges of dredged or fill material into waters of the United States for surface coal mining activities. As a result, coal mining companies must obtain costly, time-consuming individual dredge and fill permits from the Corps.
Taylor v. Locke 09-02289 (D.D.C.) Settled: 7/19/2010	National Marine Fisheries Service (NMFS)	**Issue**: Atlantic Herring Fishery Revocation of Exemption **Result**: Settlement removes exemption that allowed herring industrial trawlers to release small amounts of fish that remain after pumping without federal inspection. The new final rule by NMFS, published in 2010, requires federal accounting and inspection for all fish brought on board.

List of Rules and Agency Actions

Rules and Agency Actions Resulting From Sue and Settle Cases (Pending or Final) 2009–2012

Air

- The Environmental Protection Agency (EPA) agreed to propose the first-ever greenhouse gas (GHG) regulations for power plants.
- EPA agreed to propose the first-ever GHG regulations for petroleum refineries.
- EPA issued Maximum Achievable Control Technology (MACT) standards for cement kilns.
- EPA revoked rule that made it easier to burn Emission Comparable Fuel wastes.
- EPA proposed stricter ozone standards (withdrawn, but could be published at any time).
- EPA issued a rule that made the National Ambient Air Quality Standards (NAAQS) for particulate matter more stringent.
- EPA issued MACT standards for hazard air pollutants for coal- and oil-fired electric utility steam generating units (Utility MACT).
- EPA granted waiver to CA to set its own limitations on GHG emissions from automobiles.
- EPA to increase regulations on oil- and gas-drilling operations regulations, including:
  - New Source Performance Standards (NSPS) for oil and gas drilling
  - MACT standards for hazardous air pollutant emissions
  - Residual Risk Standards
- EPA finalized new MACT standards for polyvinyl chloride manufacturers.
- EPA agreed to set MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
- EPA imposed a Federal Implementation Plan (FIP) on OK impacting three coal-fired power plants.
- EPA imposed an FIP on ND impacting seven coal-fired power plants.
- EPA imposed an FIP on NM impacting one coal-fired power plant.
- EPA imposed an FIP on NE impacting one coal-fired power plant.
- EPA agreed to review kraft pulp NSPS.
- EPA revised NSPS for nitric acid plants.
- EPA agreed to review national emissions standards for radon emissions from operating mill tailings.
- EPA agreed to review NSPS for municipal solid waste landfills.
- EPA issued MACT standards for boilers (Boiler MACT).
- EPA issued MACT standards for stationary reciprocating internal combustion engines (RICE rule).

EPA issuing MACT standards for:

- Marine tank vessel loading operations
- Pharmaceuticals production
- Printing and publishing industry
- Hard and decorative chromium electroplating and chromium anodizing tanks
- Steel pickling—HCL process facilities and hydrochloric acid regeneration plants
- Group I polymers and resins
- Shipbuilding and ship repair
- Ferroalloys production—ferromanganese and silicomanganese
- Wool fiberglass manufacturing
- Secondary aluminum production
- Pesticide active ingredient production
- Polyether polyols production
- Group IV polymers and resins
- Flexible polyurethane foam production
- Generic MACT—acrylic and modacrylic fibers

- Wood furniture manufacturing operations
- Primary lead smelting
- Secondary lead smelting
- Pulp and paper production industry
- Aerospace manufacturing and rework facilities
- Mineral wool production
- Primary aluminum reduction plants
- Portland cement manufacturing industry
- production
- Generic MACT—polycarbonate production
- Off-site waste and recovery operations
- Phosphoric acid manufacturing
- Phosphate fertilizers production plants
- Group III polymers and resins—manufacture of amino/phenolic resins

EPA agreed to take action on the following proposals related to State Implementation Plans (SIPs):

- CA SIP revision regarding San Joaquin Valley (SJV) 1997 $PM_{2.5}$ attainment plan
- CA SIP revision regarding rule changes for SJV Unified Air Pollution Control District
- CA SIP revision regarding particulate matter from beef feedlot operations
- CA SIP revision regarding PM_{10} emissions in Imperial County
- CA SIP revision regarding air quality rules in Imperial County
- Pesticide Element SIP submittal and the Fumigant Rules submittal
- KY SIP submission regarding 1997 $PM_{2.5}$ NAAQS for the Huntington-Ashland area
- KY SIP submission regarding 1997 $PM_{2.5}$ NAAQS emissions inventory for Louisville
- EPA agreed to issue a federal plan if Louisiana regulators do not attain 1997 ozone standards in Baton Rouge
- CA SIP revisions addressing 1997 $PM_{2.5}$ and ozone NAAQS for South Coast Air Basin
- 1997 ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA
- CA SIP submission demonstrating RACT for SJV
- CA SIP submission for 1997 ozone NAAQS plan for SJV
- 1997 ozone NAAQS submission by NY, NJ, CT, MA, IL, and MO
- TX SIP submission addressing 1997 ozone and $PM_{2.5}$ NAAQS
- EPA required to approve or disapprove ozone NAAQS SIPs for 21 states
- AL SIP for 1997 $PM_{2.5}$ NAAQS and GA SIP for 1997 8-hour ozone NAAQS
- AR regional haze SIP
- TX SIP submission for Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas
- KY SIP submission addressing 1997 ozone NAAQS in 3 counties
- SIP submission for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE
- SIPS for certain areas of IL, ME, and MO
- NC and SC SIP submissions for 1997 ozone NAAQS
- OK SIP submission regarding excess emissions
- Determination of 1-hour ozone attainment designations for areas in TX, CT, MD, NY, NJ, MA, and NH
- 1997 ozone NAAQS for areas in NV and PA
- Determination of area designations for the 2008 ground-level ozone NAAQS
- AZ SIP submission regarding plan for 1997 NAAQS attainment in Phoenix-Mesa
- 41 SIP submissions by CO, UT, MT, and NM
- SIP submissions for 1997 8-hour ozone and $PM_{2.5}$ NAAQS by CA, CO, ID, NM, ND, OK, and OR
- 2006 $PM_{2.5}$ NAAQS Infrastructure SIP submissions by AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY, NV, AR, NH, SC, MA, AZ, GA, and WV
- SIP submissions regarding regional haze and excess emissions standards in CO, WY, MT, and ND
- UT SIP revision regarding the "breakdown provision"
- Two UT SIP submissions, including one on regional haze
- 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties (UT)
- UT SIP submission addressing PM_{10} NAAQS designations for Salt Lake County, Utah County, and Ogden City

Land

- U.S. Forest Service (USFS) considering blocking 1 million acres in CA federal parks from development.
- EPA considering revisions to "definition of solid waste."
- Office of Surface Mining agreed to consider restricting mining activities near waterways (Stream Buffer Zone Rule).
- The Bureau of Land Management agreed to consider amending 12 resource management plans that opened 2

million acres of federal lands for potential oil shale leasing.
- National Park Service reduced snowmobile usage inside Yellowstone National Park.
- USFS agreed to withdraw its decision notice regarding the "Wildcat" project on the Umatilla National Forest.

Plants and Animals

- National Marine Fisheries Service (NMFS) imposed inspection requirements for Atlantic Herring Fishery.
- Fish and Wildlife Service (FWS) doubled size of critical habitat of Hine's emerald dragonfly to more than 26,000 acres in MI and MO.
- The Department of the Interior (DOI) designated about 10,386 acres of critical habitat for Chiracahua leopard frog.
- DOI agreed to issue decisions that had not already been made on hundreds of plant and animal species from list of 674 species.
- FWS listed the whitebark pine tree as an endangered species as a result of climate change.
- NMFS agreed to issue recovery plans for sperm plans, fin whales, and sei whales.
- DOI agreed to issue 12-month findings under the Endangered Species Act on 12 species of parrots, macaws, and cockatoos.
- USFS agreed to make final determinations under the Endangered Species Act for 251 species.
- FWS agreed to make findings under the Endangered Species Act for at least 477 species.
- DOI agreed to issue a decision whether to list Wright's marsh thistle.

Water

- New water quality standards for FL (inland).
- New water quality standards for FL (coastal).
- Guidance for mountaintop removal mining permits.
- EPA issued guidance on how states should address ocean acidification under the Clean Water Act.
- Army Corps of Engineers suspended nationwide surface coal mining permit.
- EPA finalizing rule regulating cooling water intake structures.
- EPA agreed to issues rules that revise steam electric effluent guidelines.
- EPA agreed to establish a total maximum daily load for the Chesapeake Bay.
- EPA agreed to develop changes to its stormwater regulations nationally.

Other

- EPA issued stricter pesticide human-testing consent rule.
- EPA agreed to issue specific changes to the Lead Renovation, Repair and Painting Program Rule.
- Federal Maritime Commission ended its administrative investigation of the ports of Los Angeles and Long Beach related to their clean trucks program.

Appendix A

Methodology I for Identifying Cases in the Sue and Settle Database

To identify the cases included in the current version of the sue and settle database, the following approaches were used:

The database was *only* designed to capture examples of major sue and settle cases. To accomplish this, a multijurisdictional federal court search was conducted in 2011 using Lexis-Nexis looking at cases 2.5 years before the start of the Obama administration and 2.5 years after (through June 2011). The names of numerous environmental groups were used and dockets of cases were identified.

For those cases identified that were still open, they were not pursued any further because an open case is by its nature not a sue and settle case. If the case was closed, then the case was searched on PACER (www.pacer.gov). If there was a settlement, relevant cases were included in a larger database that included challenges to projects. In the current version of the database, challenges to projects were excluded.

To add major cases or cross-check the existing database:

- A search was conducted in the Fall Unified Agendas for 2009–2012.[79] Economically significant active, completed, and long-term actions were searched. If a consent decree or settlement agreement was listed as being connected to a specific rule, a case search was conducted to verify this information.
- House Report 112-593, which is the House Report for the Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862), included information on sue and settle cases. These cases were either added or cross-checked with the database, as was information from the following House testimony: *Addressing Off Ramp Settlements: How Legislation Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity*, Testimony of Roger R. Martella, Jr. before the House Committee on the Judiciary, Feb. 2, 2012; and *The Use and Abuse of Consent Decrees in Federal Rulemaking*, Testimony of Andrew M. Grossman before the House Committee on the Judiciary, Feb. 2, 2012.
- The following GAO report was used: GAO, *Environmental Litigation: Cases Against EPA and Associated Costs Over Time* GAO-11-650 (Washington, D.C.: August, 2011). The U.S. Chamber's report on regional haze and sue and settle was also used: *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs, Chamber of Commerce of the United States*, William Yeatman (August 2012). In addition,

[79] Since only one Unified Agenda was published in 2012, which was in December, this agenda was used for 2012.

environmental groups announce settlements and lawsuits on their websites—this information served as a resource.

The database includes environmental-related cases, regardless of federal agency or federal statute; however, actions that were not of general applicability (except for some FOIA cases) were excluded, such as enforcement actions and Title V permit cases.

Appendix B

Methodology II for Identifying Cases in the Sue and Settle Database

Clean Air Act

Clean Air Act settlement agreements and were compiled using a database search of the *Federal Register*. Pursuant to Clean Air Act section 113(g), all settlement agreements and consent decrees must be announced in the *Federal Register*. The search terms were:

- Agency: "Environmental Protection Agency"
  Title: "Settlement Agreement" or "Consent Decree"
  Dates: Between "1/20/2009" and "1/20/2013"

All settlement agreements and consent decrees pursuant to a Title V challenge or an enforcement action were removed in order to ensure that the settlement agreement or consent decree had a general applicability.

It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using www.pacer.gov.

Clean Water Act

Clean Water Act settlement agreements pursuant to citizen deadline suits are not announced in the *Federal Register*. Two techniques were used to find them.

The first was a database search of "Inside EPA," and used two sets of search terms:

- "Clean Water Act" and "Settlement Agreement"
  "Clean Water Act" and "Consent Decree"

The second was a database search of the *Federal Register*. Instead of searching for announcements of settlement agreements (as had been done for the Clean Air Act), regulations pursuant to Clean Water Act settlement agreements or consent decrees were searched. The search terms were as follows:

- Agency: "Environmental Protection Agency"
  Title: "Clean Water Act"
  Full Text or Metadata: "Settlement Agreement" or "Consent Decree"
  Dates: Between "1/20/2009" and "1/20/2013"

As with the Clean Air Act methodology, all settlement agreements and consent decrees pursuant to an enforcement action were removed to ensure that the settlement agreement or consent decree had general applicability. It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using www.pacer.gov.

Reconsideration of 2008 Ozone NAAQS

Boiler MACT Rule

Lead RRP Rule

$2.16 billion

Regional Haze Implementation Rules

Utility MACT Rule

$9.6 billion

Standards for Cooling Water Intake Structures

$90 billion

$18 billion

Florida Nutrient Standards for Estuaries and Flowing Waters

$3 billion

Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

$350 million

$500 million

TMDL for Chesapeake Bay

Oil and Natural Gas MACT Rule

$384 million

U.S. CHAMBER OF COMMERCE

Environment, Technology & Regulatory Affairs Division

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#6c

House Bill 1432
Testimony of Kari Cutting
Senate Agriculture Committee
March 13, 2015

Senator Miller and members of the committee, my name is Kari Cutting, vice president of the North Dakota Petroleum Council. The North Dakota Petroleum Council (NDPC) represents more than 550 companies directly employing 65,000 employee in North Dakota 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 support of House Bill 1432.

House Bill 1432 will be instrumental in maintaining the rights of the State of North Dakota and its citizens against the onslaught of sue and settle activity that continues to force Federal agencies into actions and deadlines without appropriate citizen input. Sue and Settle cases affect many North Dakota industries, while predominantly threatening to have the greatest impact on Agriculture in our state. For background information on sue and settle, I submit the U.S. Chamber of Commerce report on the subject, its implications and costs to the American taxpayer.

Chairman Miller and members of the committee, NDPC applauds your actions to establish this committee and to appropriate funds to assist in their important work. NDPC suggests an alternative use of funding rather than direct litigation may also be appropriate, as I stated earlier what is lacking when agencies are forced to settle is the scientific data to support push back. Funding for biological surveys, habitat and population studies, for example will be just as effective in this fight against a listing as direct litigation. NDPC suggests the committee name be changed from Environmental Impact Litigation Committee to Environmental Impact Research Committee.

#7
3/13/15

House Bill 1432
Testimony of J. Roger Kelley
Senate Agriculture Committee
March 12, 2015

Continental Resources, Inc. (NYSE: CLR) is a Top 10 independent oil producer in the United States and a leader in America's energy renaissance. Based in Oklahoma City, Continental is the largest leaseholder and one of the largest producers in the nation's premier oil field, the Bakken play of North Dakota and Montana. The Company also has significant positions in Oklahoma, including its SCOOP Woodford and SCOOP Springer discoveries and the Northwest Cana play. With a focus on the exploration and production of oil (along with natural gas), Continental has unlocked the technology and resources vital to American energy independence and is a strong free market advocate in favor of lifting of the domestic crude oil export ban. In 2015, the Company will celebrate 48 years of operations.

Through our interactions in North Dakota and other states in the Union, we have gained an appreciation and respect for the need to preserve the rights of private land owners in the use of their land. Over the past few years, the Federal Government has advanced efforts in many areas that challenge that right. Two of those areas that are cited in this bill include the Federal Water Pollution Control Act of 1977 or the Clean Water Act (CWA) and the Endangered Species Act of 1973 (ESA). Granted both of the statutes have been in effect for many years, but over the past six (6) years, efforts set forth under the assumed authority of both of these acts have been been tremendously exaggerated and I might say, have exasperated the situation.

Under the CWA, the U.S. Environmental Protection Agency has proposed to define, again, the "Waters of the United States" (WOTUS) to become more inclusive than ever before. In fact the proposed definition goes so far as to creat a Federal nexus to groundwater. Over the years since the inception of the CWA, this definition has been changed multiple times by policy and by court decision.

If the WOTUS definition is accepted as currently proposed, then any water on a property or any surface of a property can be considered the WOTUS such that an activity from building a barn or a feeder to the clearing of land for any agricultural purposes, or the preparation of a drilling pad and building of roads pursuant to energy development, would require the acquisition of a Section 404 permit from the Corp of Engineers. These permits trigger a myriad of regulatory requirements that can add time and expense to the construction process. In fact, the delay could be sufficient on some situations that the oil lease could actually expire before the process is completed and the reserves could be lost.

The ESA can have even a greater impact on private land use. Under the authority of the ESA, the U.S Fish and Wildlife Service of the Department of the Interior (FWS) can designate a species as a candidate species for threatened or endangered threatened status based on minimal science. Once a species is accepted as a candidate, the FWS can then designate critical habitat for that species and propose habitat restrictions that will be imposed if the critter is listed as threatened or endangered. These restrictions will apply to all land within that critical habitat, both public and private and can restrict any use of that land with no consideration or input form

the landowner. In fact, once a critter is listed as threatened or endangered, the state that has held and protected that species in trust no longer has jurisdiction over its fate. Of course any conservation efforts by the state or any other entity will be considered, but they are all subject to approval and acceptance by the FWS.

Now I give you these examples to make one point, and that is that these two issues represent a significant threat to the state of North Dakota in general and to the agricultural/landowner and energy community in particular. They both challenge the use of private land and they also challenge the right of the state of North Dakota to manage their own affairs. The underlying attitude of the Federal Government on this and all regulatory issues is that the Federal agencies know what is best for your state and that your state government does not. Our industry has been in a battle with the FWS in many states in different parts of the country and has found this same attitude throughout the country. We do not doubt that some species warrant protection, but we do not necessarily agree that the Federal government is the only one that can perform that function.

HB 1432 provide a vehicle by which North Dakota can organize its efforts on these two issues. It is critical that states become organized and take control of these and similar environmental and regulatory issues so that we can demonstrate to Congress and this administration that the states can develop programs to conduct the necessary conservation and environmental protection under the authority of these federal statutes. All states need to put forth this same effort and be proactive in doing so.

House Bill 1432
Testimony of J. Roger Kelley
Senate Agriculture Committee
March 12, 2015

HB 1432 places the leadership of this advisory committee under the authority of the Commissioner of Agriculture who is also one of the three members of the NDIC. The Ag Commissioner can foster this symbiotic relationship between the agricultural/landowner community and the energy sector. We have found that the needs of both of these groups are very similar and can be simultaneously satisfied in most situations.

HB 1432 is styled as a litigation fund bill. And as it is written it provides for monies that can be used, for example, in conducting the research that is necessary to prepare the conservation agreements and supporting documentation required to keep the trust species of North Dakota off the Federal Endangered Species list and under the care and jurisdiction of the State of North Dakota. Or the funded efforts may involve research into connectivity studies and data collection on water sources to support the state's case regarding the waters of the united states.

Continental therefore recommends a Do Pass on HB1432 and suggests that doing so will prove beneficial to this state and to the advancement of states rights in so dealing with the Federal issues.

#8

North Dakota AG COALITION

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MEMBERS

AmeriFlax
BNSF Railway Company
Garrison Diversion Conservancy District
Independent Beef Association of ND
Landowners Association of ND
Milk Producers Association of ND
Minn-Dak Farmers Cooperative
ND Ag Aviation Association
ND Ag Consultants
ND Agricultural Association
ND Agri-Women
ND Association of Agricultural Educators
ND Association of Soil Conservation Districts
ND Barley Council
ND Beef Commission
ND Corn Growers Association
ND Corn Utilization Council
ND Crop Improvement and Seed Association
ND Dairy Coalition
ND Department of Agriculture
ND Dry Bean Council
ND Dry Edible Bean Seed Growers
ND Elk Growers
ND Ethanol Council
ND Farm Credit Council
ND Farmers Union
ND Grain Dealers Association
ND Grain Growers Association
ND Irrigation Association
ND Lamb and Wool Producers
ND Oilseed Council
ND Pork Producers
ND Soybean Council
ND Soybean Growers Association
ND State Seed Commission
ND Stockmen's Association
ND Wheat Commission
NDSU Agricultural Affairs
Northern Canola Growers Association
Northern Food Grade Soybean Association
Northern Plains Potato Growers Association
Northern Pulse Growers Association
Northwest Landowners Association
Red River Valley Sugarbeet Growers
US Durum Growers Association

Fred Helbling

North Dakota Ag Coalition Chairman

In Support of HB 1432

March 13, 2015

Chairman Miller and members of the Senate Agriculture Committee, my name is Fred Helbling. I am here today as the chairman of the North Dakota Ag Coalition in support of HB 1432.

The Ag Coalition has provided a unified voice for North Dakota agricultural interests for over 30 years. Today, we represent more than 40 statewide organizations and associations that represent specific commodities or have a direct interest in agriculture. Through the Ag Coalition, our members seek to enhance the climate for North Dakota's agricultural producers. The Ag Coalition takes a position on a limited number of issues, brought to us by our members, which have significant impact on North Dakota's agriculture industry.

The Ag Coalition supports HB 1432 as our member groups recognize the potentially disastrous effects of federal regulation overreach. HB 1432 will provide North Dakota with a necessary tool to protect itself and its strong economic engines, including agriculture, from potentially harmful regulatory efforts that would be detrimental not only to its economy, but to its citizens.

HB 1432's start-up appropriation combined with strong agricultural representation on the Environmental Impact Litigation Advisory Committee represents North Dakota's proactive approach in not only recognizing our state's right to protect the agriculture industry and natural resources but assuring our citizens that that the state is committed to maintaining a strong economy for the future. We urge your support of HB 1432.

#9

House Bill 1432
Senate Agriculture Committee

March 13, 2015

Testimony of Bruce E. Hicks, Assistant Director—NDIC—DMR—Oil and Gas Division

Chairman Miller and members of the Senate Agriculture Committee, our department is neutral on this bill, but we offer the following information:

HB1432 amends North Dakota Century Code Chapter 4-01 and creates an environmental impact litigation advisory committee, appropriates litigation funds, and identifies threats to the state.

Certain threats to States have been identified by the Interstate Oil and Gas Compact Commission, including governmental interpretations pertaining to the Safe Drinking Water Act, the Clean Air Act, and the Toxic Substances Control Act. Interior Secretary Sally Jewell recently announced the rules from the Interior's Bureau of Land Management for hydraulic fracturing on federal land will be published in the federal register within weeks. The rules could pose a potential detriment to the State of North Dakota or to industries operating within the state.

Page 3, Lines 17-20 require Emergency Commission and Budget Section approval for litigation activities.

- Some money needs to be available immediately to react to "Sue and Settle" situations
- $1 million should be available for the agriculture commissioner to hire counsel and participate as an affected party when "Sue and Settle" situations develop

A report on "Sue and Settle" was issued by the U.S. Chamber of Commerce in May 2013. Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated with no participation by other affected parties or the public. This practice has replaced the rulemaking process with private party negotiated settlements under the supervision of the federal courts. The Chamber's investigation found that many federal agencies, including the EPA, Fish and Wildlife Service, Forest Service, BLM, National Park Service, Army Corps of Engineers, Department of Agriculture, and Department of Commerce have all used the sue and settle tactic.

It is critical to have funds available immediately to allow North Dakota representatives to be present during any negotiations of a "Sue and Settle" agreement, therefore we suggest that $1 million of the Environmental Impact Litigation Fund be immediately available to respond to such suits.

The Commission proposes the following amendment to HB1432 (version 15.0961.04000):

Page 3, Line 17:
After "and ending June 30, 2017." insert "The sum of $1,000,000 shall be immediately available to defend against sue and settle law suits as directed by the agriculture commissioner."

Page 3, Line 18
Overstrike "the funds" and replace with "the sum of $3,000,000, or so much of the sum as may be necessary,"

#1
3/20/15

15.0961.04004
Title.

Prepared by the Legislative Council staff for
Senator Miller
March 19, 2015

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1432

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review committee.

1. The federal environmental law impact review committee consists of:
   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and advise the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. If the attorney general elects to participate in an administrative or judicial process, as recommended by the review committee under section 1 of this Act, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

2. For purposes of this section, "expenses" include consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Gifts - Grants - Donations.

The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

SECTION 4. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:

   a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and

   b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $4,000,000, or so much of the sum as may be necessary, which sum the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly

#2
3/20/15

15.0961.04000

SECOND ENGROSSMENT

Sixty-fourth
Legislative Assembly
of North Dakota

REENGROSSED HOUSE BILL NO. 1432

Introduced by

Representatives Brandenburg, Belter, Boe, Headland, D. Johnson, Kasper, Kempenich, Thoreson

Senators Dotzenrod, Erbele, Schaible, Wanzek

A BILL for an Act to create and enact two new sections to chapter 4-01 of the North Dakota Century Code, relating to the creation of the environmental impact advisory committee and litigation fund; ~~to provide for a transfer;~~ and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact ~~litigation~~ advisory committee.

1. The environmental impact ~~litigation~~ advisory committee consists of:
   a. The commissioner of agriculture, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One individual appointed by the lignite energy council;
   f. One individual appointed by the North Dakota corn growers association;
   g. One individual appointed by the North Dakota grain growers association;
   h. One individual appointed by the North Dakota petroleum council;
   i. One individual appointed by the North Dakota soybean growers association; and
   j. One individual appointed by the North Dakota stockmen's association.
2. The committee shall advise the agriculture commissioner with respect to ~~expenditures from the environmental impact litigation fund~~ the environmental impact to N.D. agricultural interests caused by federal requirements including the following.

~~**SECTION 2.** A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:~~

~~**Environmental impact litigation fund - Purpose.**~~

~~1. The environmental impact litigation fund consists of:~~

~~a. Any moneys appropriated or transferred for the purposes set forth in this section; and~~

~~b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes of this section.~~

~~2. Moneys in the environmental impact litigation fund may be used, subject to legislative appropriations, for any expenses incurred in the consideration of, the pursuit of, or the participation in administrative or judicial matters, including litigation, pertaining to:~~

a. Exempt and nonexempt activities governed by section 404 of the Clean Water Act [33 U.S.C. 1344] or by regulations implementing section 404 of the Clean Water Act;

b. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act of 1970, as amended, [42 U.S.C. 7401, et seq.] or any regulations implementing the Clean Air Act;

c. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Endangered Species Act of 1973, as amended, [16 U.S.C. 1531, et seq.] or any regulations implementing the Endangered Species Act;

d. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act, as amended, [42 U.S.C. 300f, et seq.] or any regulations implementing the Safe Drinking Water Act;

e. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act, as amended, [15 U.S.C. 2601, et seq.] or any regulations implementing the Toxic Substances Control Act; and

f. Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any other federal law or tribal law, or to any regulations implementing such a law.

~~3. For purposes of this section, "expenses" include consulting fees, research costs, expert witnesses, attorney fees, and travel costs.~~

SECTION 3. APPROPRIATION ~~AND TRANSFER~~ – ENVIRONMENTAL IMPACT FUND. There is hereby appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of ~~$4,000,000~~$3,000,000, ~~or so much of the sum as may be necessary, which sum the office of management and budget shall transfer~~ to the industrial commission ~~environmental impact fund~~, for the purpose of funding an environmental impact litigation ~~and related activities~~fund, during the biennium beginning July 1, 2015, and ending June 30, 2017. ~~The office of management and budget shall transfer funds under this section at the time and in the amount directed by the attorney general in consultation with the agriculture commissioner.~~

~~SECTION 4. APPROPRIATION – ENVIRONMENTAL IMPACT LITIGATION FUND – EMERGENCY COMMISSION AND BUDGET SECTION APPROVAL – TRANSFER AUTHORITY. There is appropriated out of any moneys in the environmental impact litigation fund in the state treasury, not otherwise appropriated, the sum of $4,000,000, or so much of the sum as may be necessary, to the office of management and budget for the purpose of providing transfers to state agencies as provided in this section, for the biennium beginning July 1, 2015, and ending June 30, 2017. Subject to emergency commission and budget section approval, the office of management and budget shall transfer the funds provided in this section to state agencies for environmental impact litigation activities as recommended by the environmental impact litigation advisory committee.~~

VERSION 1

PROPOSED AMENDMENT TO HOUSE BILL NO. 1432

Page 1, line 2, after "the" insert "creation of the"

Page 1, line 2, after "impact" insert "advisory committee and "

Page 1, line 2, overstrike "to provide for a transfer;"

Page 1, line 7, remove "litigation "

Page 1, line 8, remove "litigation "

Page 1, line 19, overstrike "expenditures" and insert immediately thereafter "the environmental impact to North Dakota agricultural interests caused by federal requirements including the following:

a) Exempt and nonexempt activities governed by section 404 of the Clean Water Act [33 U.S.C. 1344] or by regulations implementing section 404 of the Clean Water Act;

b) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Clean Air Act of 1970, as amended, [42 U.S.C. 7401, et seq.] or any regulations implementing the Clean Air Act;

c) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Endangered Species Act of 1973, as amended, [16 U.S.C. 1531, et seq.] or any regulations implementing the Endangered Species Act;

d) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Safe Drinking Water Act, as amended, [42 U.S.C. 300f, et seq.] or any regulations implementing the Safe Drinking Water Act;

e) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to the Toxic Substances Control Act, as amended, [15 U.S.C. 2601, et.seq.] or any regulations implementing the Toxic Substances Control Act; and

f) Any potential detriment to the state or to industries operating within the state as a result of governmental interpretations pertaining to any other federal law or tribal law, or to any regulations implementing such a law."

Page 1, overstrike lines 20 through 22

Page 2, remove lines 1 through 31

Page 3, remove lines 1 and 2

Page 3, line 3, overstrike "AND TRANSFER"

Page 3, line 5, overstrike "4,000,000" and insert immediately thereafter "3,000,000"

Page 3, line 5, overstrike "or so much of the sum as"

Page 3, line 6, overstrike "may be necessary, which sum the office of management and budget shall transfer"

Page 3, line 7, after the second "the" insert "industrial commission"

Page 3, line 7, remove "environmental impact litigation fund"

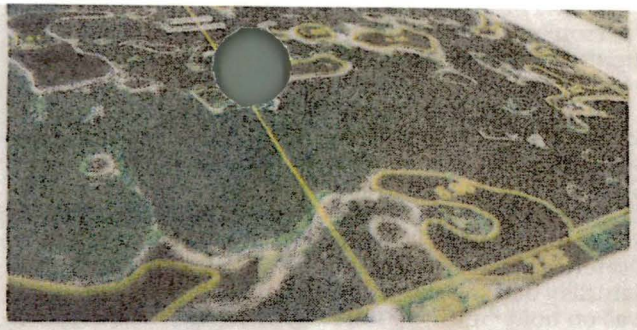
Page 3, line 7, after "funding" insert "an"

Page 3, line 8, overstrike "and related activities" and insert immediately thereafter "fund"

Page 3, remove lines 9 through 20

Renumber accordingly

HB 1432
3-31-15
#1



LAUREN DONOVAN, Tribune

ABOVE: This Google Earth map of a section of the Weckerly family farm land near Hurdsfield shows how potholes have filled in over the past several years.

RIGHT: Managing growing prairie potholes and the salty soil around them is an increasing challenge to farmers such as Chad Weckerly, of Hurdsfield, who fear the potential for the Environmental Protection Agency to take over nearly all water management will make a bad situation even worse.

N.D. waters

Continued from 1A

Mac McLennan, president of Minnkota Power Cooperative, which operates a lignite-fired power plant near Center, said he fears, just like Weckerly, a confusing scenario of new permits every time the cooperative needs to construct a power line or a substation where water is standing after a flood or moving through a ditch.

"What is the cost of permitting? There is significant potential for delays in all our projects," McLennan said.

Michelle Klose, assistant state engineer with the State Water Commission, said the EPA can expect a legal challenge if it adopts the new definition.

"They (EPA) should focus on water that flows from state to state. It's our responsibility to protect our ground and surface water. We have a lot of protection that already exists," said Klose, adding that some western states don't have protections and are more receptive to federal oversight.

"They (EPA) should focus on water that flows from state to state. It's our responsibility to protect our ground and surface water. We have a lot of protection that already exists."

Michelle Klose, assistant state dngineer with the State Water Commission

Attorney generals and governors from 17 states, including North Dakota, in a joint letter, say not only would farmers like Weckerly and business managers like McLennan be impacted, so would nearly everyone else.

"The proposed rule's scope is truly breathtaking," according to the letter.

Officials say much of the rule is illegal and a vast overreach of the Clean Water Act.

North Dakota submitted 15 pages of comments and said the proposed rule illegally intrudes on state jurisdiction.

"(Its) ... defects are so extensive that the EPA and Corps must withdraw the proposed rule. It poses a serious threat ... through federal over-regulation and overreach," said the state in comments signed by the Industrial Commission, the state engineer, the state health officer and the Department of Transportation.

The Farm Bureau organization has a "Ditch the Rule" website campaign opposing the new definition.

Pete Hanebutt, public policy director of the North Dakota Farm Bureau, said the rule is potentially a serious threat wherever water falls, even in municipalities when it drains off a parking lot.

"This could be a problem for cities, just like for accepted farming practices," Hanebutt said.

The EPA's proposed new definition for Waters of the United States is in draft rule form. Final rules, following the comment period, are expected in June, Klose said.

U.S. senators John Hoeven and Heidi Heitkamp opposed the rule at a Senate Agricultural Committee hearing earlier this week. Both are calling for the rule to be withdrawn or to be more narrowly focused.

(Reach Lauren Donovan at 701-220-5511 or lauren@westriv.com.)

1.1

57/36
Details, 8C

SUNDAY,
MARCH 29, 2015

The Bismarck Tribune

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Feds to stick big paddle in N.D. waters

Many are voicing opposition to increasing the EPA's jurisdiction

LAUREN DONOVAN
Bismarck Tribune

HURDSFIELD – Chad Weckerly has been powerless as he has watched more and more of his family farm around Hurdsfield turn into prairie potholes and wetlands, a legacy of two decades into a wet cycle.

Weckerly

He can't farm water, and he can't produce much from the salty soil around those potholes if some of the water dries up after spring.

He says he fears a tough situation is about to get worse with the federal Environmental Protection Agency's plan to take jurisdiction over all water that could potentially run into a navigable river.

The EPA, along with the U.S. Army Corps of Engineers, proposes a new definition of "Waters of the United States" to be inserted into the Clean Water Act. If adopted, it would give the federal government the biggest jurisdictional paddle it's ever had.

For Weckerly, it would include all the potholes and wetlands on his farm, the water running in certain ditches, the streams that may only carry spring melt or rainwater and any water left standing after a flood.

Currently, the federal government only has authority over navigable rivers. The rule proposed a year ago expands that to include any water that could eventually flow into those rivers.

"This would mean that the EPA could come in and make me submit a nutrient permit for every pothole and then force me to maintain a buffer strip around it," Weckerly said.

He points to a Google map of one of his farm sections, liberally dotted with small potholes of water that together cover maybe 15 percent of the land there.

"If I have to put in buffers around the potholes on this section, tell me what's left," he said.

Continued on 6A

HB 1432 Sen. Dotzenrod HB 1432 3-31-15 #2

please post on the ag policy page (replacing the second story from Wednesday), Canada top stories, recent feature articles (p. 2)

Photo:

http://cmsappprod01/netpub/server.np?original=15608&site=DTN&catalog=catalog

Cutline: Northern Wyoming farmer David Hamilton made improvements to an irrigation ditch on his farm. Although work on such ditches is exempt from the Clean Water Act, EPA and the Corps of Engineers charged Hamilton with violations. A court sided with Hamilton. (Photo courtesy of Todd Rhodes)

Web of Water - 4

Web of Water - 4

EPA Pursues Ag Practices to Seek Violations

Summary: Though the EPA touts a list of exemptions from the Clean Water Act rule for agriculture, the agency has pursued violations on practices that seemed exempt.

By Todd Neeley

DTN Staff Reporter

OMAHA (DTN) -- Farmers and ranchers at times have been caught off-guard by neighbors or regulators questioning how they work the land. Some are willing to fight it out in federal court, but it can be costly just to prove they were right.

Concerns are mounting that perhaps no agricultural practice truly is exempt. A newly proposed Clean Water Act rule defining waters of the U.S. appears to call for a significant regulatory expansion of waters coming under federal control, though EPA estimates minimal expansion of jurisdiction.

In recent years, some farmers and ranchers conducted seemingly exempted practices but the EPA slapped them with alleged CWA violations.

So, when EPA released an interpretive rule that includes 56 exempted conservation practices, suspicion grew that the agency is instead narrowing exemptions by requiring farmers to follow Natural Resource Conservation Service specifications. EPA Administrator Gina McCarthy told DTN last summer the list of agricultural conservation practices could grow or shrink over time.

In this series, "Web of Water," DTN looks at some of the concerns farmers have about the rule and how it might be implemented. Although EPA has outlined a number of agriculture-related exemptions, this fourth and final story in the series looks at the potential threats farmers face when doing seemingly normal farming operations.

CONCERNS ABOUT EPA DIRECTION

Wyoming lawyer Harriet Hageman represents farmers and ranchers on Clean Water Act cases. She said she is concerned about the direction EPA is going with the proposed rule. "What we've got to do is keep pushing back," Hageman said. "This isn't about clarification. It is actually a worse rule than you think it is."

EPA and the U.S. Army Corps of Engineers want to expand jurisdiction for a reason, and that is to control water quantity, Hageman said. If farmers and ranchers are not protected, "they can't do irrigated agriculture in the West, and I'm not being melodramatic," she said. "Water is erosional and you have to be able to maintain irrigation ditches. Can't have the federal government come in and say to move. It costs several hundreds of thousands of dollars to get a 404 permit (dredge and fill)."

EPA's legal pursuits of property owners in recent years seem to indicate the agency is searching for ways to test agriculture exemptions, largely by citing small producers.

Consider the case of West Virginia poultry farmer Lois Alt who was charged by EPA with a Clean Water Act violation for storm water coming into contact with dust, feathers and manure outside a poultry house -- although storm water on farms is exempt. EPA claimed the farm had the potential to discharge into waters of the U.S. and issued an order in 2011 for Alt to apply for a federal storm-water discharge permit. Alt appealed with the help of the American Farm Bureau Federation, which opted to intervene in the case. Environmental groups opted to intervene on the side of EPA, even though the agency finally deemed the case was a loser last year and tried to get the case dismissed. EPA tried to argue that the agricultural storm-water exemption didn't apply.

"Common sense and plain English lead to the inescapable conclusion that Ms. Alt's poultry operation is 'agricultural' in nature and that the precipitation-caused runoff from her farmyard is 'storm water,'" wrote U.S. District Judge John Preston Baily as he concluded that storm-water runoff from Alt's farm is exempt from discharge permit requirements.

Yet, few property owners can stomach a legal battle and often settle with EPA on alleged violations and never make their stories public. EPA news releases announcing settlements often provide scant details about the alleged violations.

HAMILTON CASE

Hageman successfully defended Worland, Wyo., farmer David Hamilton in a case that took more than six years of legal battles. Hamilton had bought farms with old irrigation ditches that had not been maintained for some 30 years in a region that receives about 7 inches of precipitation annually.

Beginning in 2005, Hamilton started correcting erosional problems. Slick Creek was part of an irrigation system that incorporated many natural draws, and Hamilton installed head gates and diverted water in April 2005. Irrigation systems are exempt from the CWA. Hageman said he decided to stabilize the channel, pulling out junk cars, combines and other junk on site. He designed a new concrete channel.

"He made a beautiful farm out there," Hageman said. Hamilton made a number of repairs to underground drains, making improvements to allow water to drain to the creek. "He did what someone would expect to properly take care of the land," she said.

In spring 2006, he was reported to EPA and the Corps of Engineers for the work he did. In 2009, the Corps issued a notice of violation and told Hamilton to restore the creek back to its original state -- which was an environmental mess.

"He was engaging in normal farming and ranching activities," Hageman said. "Try to tell that to EPA and the Army Corps of Engineers." After six years of litigation, a jury found Hamilton not guilty of violating the Clean Water Act, ruling the irrigation ditch was exempt from the law.

"One of the things that was interesting is this was all over a battle of 2.1 acres," Hageman noted. "Even their experts could only find 2.1 acres, while the lawsuit was based on the notion that Hamilton destroyed some 8.8 acres of wetlands. You don't destroy wetlands where we get 7 inches of precipitation."

GOVERNMENT TEST CASES?

The federal government invested more than $1 million to pursue Hamilton in what Hageman said was a "test case." "They go into these communities because farmers can't afford to fight back," she said. "A jury understood what was going on here."

Hageman has been involved with water cases dating back to the early 1990s. Since then, the reach of EPA and Corps of Engineers has continued to expand, she said. "The last five years is the worst I've ever seen," Hageman said.

Many landowners undertake projects to improve their land, she said. When these kinds of cases make it to court, however, the government typically isn't interested in the improvements, said Hageman. During trial, Hageman lost a 45-minute battle arguing to the judge to allow photos of Hamilton's work to be shown to the jury.

She said the photos would have been a game-changer. "The judge wouldn't allow us to show them to the jury. This is about the environment. It doesn't matter if you've improved the environment."

WYOMING LANDOWNER FIGHTS FOR STOCK POND

In another Wyoming case, Andy Johnson continues to battle EPA for the right to keep a stock pond on his small cattle ranch. The pond is along Six Miles Creek; the creek itself was 2 feet wide and a few inches deep. With a state engineer's permit in hand, Johnson created a small dam and constructed what has become wildlife habitat that attracted geese, ducks and trout. Johnson's cattle as well as other herds used the pond throughout the year. Johnson said a neighbor reported his work to EPA.

EPA continues to maintain that the stock pond -- which is exempt from the Clean Water Act -- is not a stock pond at all. The agency has asked

Johnson to remove it or face potentially hundreds of thousands of dollars in fines.

Following an initial interview with DTN in March, Johnson hired Idaho consultant Ray Kagel who completed a wetlands analysis of the property. Kagel determined a dam created by Johnson in building the stock pond qualifies for national permit No. 18 -- and that's just one of several exemptions. According to a letter and engineer's analysis sent to EPA last May, because the dam has less than 10 cubic yards of material below the ordinary high water mark, it qualifies for the permit.

The nationwide permit allows Johnson to discharge into waters as long as it is no more than 25 cubic yards of soil. Johnson's discharge was measured far less, at 8.7. "The worse-case scenario is we still fall under the agriculture exemption," Johnson said. "We're surrounded by cattle ranches."

Contrary to EPA's claims, Kagel found Six Mile Creek runs into an irrigation canal that leads to Johnson's pond, and is not a water of the U.S. That's because it "is not a tributary to anything except an irrigation canal," according to Johnson's letter to EPA. Johnson, who sought and received approval from the state of Wyoming to build the stock pond, said EPA has yet to respond to the substance of the letter.

The public comment period for the proposed Waters of the U.S. rule ends Nov. 14. You can read the rule here, http://tinyurl.com/ns4vxbh and also see http://www2.epa.gov/uswaters

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(CC/ES/AG/CZ)

HB 1432
3-31-15
#3

15.0961.04007
Title.

Prepared by the Legislative Council staff for
Senator Wanzek
March 30, 2015

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1432

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review committee.

1. The federal environmental law impact review committee consists of:
   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and advise the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

3.1

3. a. Any member of the legislative assembly serving on the committee is entitled to compensation at the rate provided for attendance at interim committee meetings and reimbursement for expenses, as provided by law for state officers, if the member is attending meetings of the committee or performing duties directed by the committee.

b. The compensation and reimbursement of expenses, as provided for in this subsection, is payable by the legislative council.

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. If the attorney general elects to participate in an administrative or judicial process, pertaining to federal environmental legislation or regulations, which detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

2. For purposes of this section, "expenses" include consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Gifts - Grants - Donations.

The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

SECTION 4. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:

   a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and

   b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $1,500,000, or so

much of the sum as may be necessary, which the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly

#4
HB 1323
3-31-15

House Bill 1432
Testimony of J. Roger Kelley
Senate Appropriations Committee
March 31, 2015

Continental Resources, Inc. (NYSE: CLR) is a Top 10 independent oil producer in the United States and a leader in America's energy renaissance. Based in Oklahoma City, Continental is the largest leaseholder and one of the largest producers in the nation's premier oil field, the Bakken play of North Dakota and Montana. The Company also has significant positions in Oklahoma, including its SCOOP Woodford and SCOOP Springer discoveries and the Northwest Cana play. With a focus on the exploration and production of oil (along with natural gas), Continental has unlocked the technology and resources vital to American energy independence and is a strong free market advocate in favor of lifting of the domestic crude oil export ban. In 2015, the Company will celebrate 48 years of operations.

Through our interactions in North Dakota and other states in the Union, we have gained an appreciation and respect for the need to preserve the rights of private land owners in the use of their land. Over the past few years, the Federal Government has advanced efforts in many areas that challenge that right. Two of those areas are the subject of this bill, namely the Federal Water Pollution Control Act of 1977 or the Clean Water Act (CWA) and the Endangered Species Act of 1973 (ESA). Granted both of the statutes have been in effect for many years, but over the past six (6) years, efforts set forth under the assumed authority of both of these acts have been been tremendously exaggerated and I might say, have exasperated the situation.

For the purposes of today's hearing , I would like to concentrate on the potential utility of the committee that HB1432 is proposing to form. And while there may be many Federal issues that challenge the use of private lands and the state's rights to manage their affairs in these regards, I will chose the Endangered Species Act for my example. The ESA has been used, through the "sue and settle" process, to inundate the states and private landowners with challenges that are onerous and overwhelming. The U.S Fish and Wildlife Service has listed hundreds of critters as candidates for threatened or endangered status based on "best available science" and litigation. Best available science is not defined in the act and is usually bad or inadequate science; and the litigation is forced by environmental activist groups and inevitably results in a rushed up decision making process that renders poor decisions which benefit no one, especially the poor critter being considered.

The "Federal Environmental Law Impact Committee" proposed in HB1432 can use the funds appropriated in this bill to conduct research and outreach functions through (and I take these examples from a similar committee formed in another state):

1. Developing a watch list of candidate species by county that will help landowners and other stakeholders remain aware of the impending challenges
2. Conduct research to develop and maintain economic and scientific data related to the proposed listings
3. Develop a comprehensive web site that will convey this information to the stakeholders
4. Develop a comprehensive map showing the potential impact of critical habitat of the candidate species
5. Hold public meetings and provide updates and recommendations on the proposed candidate species listings to the stakeholders
6. Provide up to date information on proposed listing and comment periods on Federal actions and provide comments on those same actions
7. Gather species data through research and surveys using

associations, consultants, and whoever else can provide this expert information.

This committee can work with other state and national organizations to develop conservation plans and agreements and work with members of Congress as well as the FWS to help maintain state control of these Federally control issues that threaten to impact the state of North Dakota. The activities described for dealing with the ESA issues herein can be used to organize and manage efforts related to other Federal challenges to land use in this state.

HB 1432 places the leadership of this advisory committee under the authority of the Commissioner of Agriculture who is also one of the three members of the NDIC. The Ag Commissioner can foster this symbiotic relationship between the agricultural/landowner community and the energy sector. We have found that the needs of both of these groups are very similar and can be simultaneously satisfied in most situations.

Continental therefore recommends this committee appropriate the funds requested in HB1432 and suggests that doing so will prove beneficial to this state and to the advancement of states rights in so dealing with the Federal issues.
1

HB 1432 #
3-31-15 5

North Dakota
Grain Growers Association

Your voice for wheat and barley. www.ndgga.com

North Dakota Grain Growers Association
Testimony on HB 1432
Senate Appropriations Committee
March 31, 2015

Chairman Holmberg, members of the Senate Appropriations Committee, for the record my name is Dan Wogsland, Executive Director of the North Dakota Grain Growers Association. The North Dakota Grain Growers Association is in full support of HB 1432.

How has it come to this? How have we come to a situation where the state of North Dakota has to provide funding to protect ourselves from ourselves? Yet sadly this is precisely the situation we find ourselves in as regulatory over-reach and federal regulatory creep threaten our agriculture industry, our energy industry as well as our business climate in the state of North Dakota. HB 1432 is before you today to provide North Dakota the means necessary to protect itself and its strong economic engines from potentially harmful regulatory efforts that would be detrimental not only to our economy but to the citizens of our state.

Let's be clear, not all federal regulatory efforts are detrimental to our state, our economy or to our people. We as a state and a nation enjoy the benefits of clean water and clean air due in part to federal regulations. Our soil is protected in part from conservation regulations designed to preserve the land for generations to come. Our wildlife are protected and preserved in part due to federal regulatory efforts. However when regulatory over-reach goes out of control we as a state must have a mechanism in place to protect our citizens and our economy from negative federal interference.

There are a host of examples of federal regulatory creep in North Dakota; every industry in the state can cite the horror stories. Proposed Waters of the United States regulations, off-site wetland determinations, pesticides and buffer zones, nutrients, endangered species, the list for agriculture alone goes on and on.

Individually, and even collectively, the economic engines of this state like agriculture, energy and business cannot match the resources of the federal government in terms of litigation. We need a partner; HB 1432 provides that partner.

Chairman Holmberg, members of the Senate Appropriations Committee, HB 1432 represents a proactive approach by the North Dakota legislature in asserting our state's rights in protecting our state's economic engines, our natural resources and most importantly our citizens. Therefore the North Dakota Grain Growers Association would ask the Committee's favorable recommendation on the proposed amendments and then give the measure a Do Pass recommendation.

HB 1432 #6
3-31-15

In support of HB 1432

Senate Appropriations Committee

March 31, 2015

Chairman Holmberg and Committee members,

I am Larry Syverson from Mayville, I raise soybeans on my farm in Traill County, I am the Chairman of the Board of Supervisors of Roseville Township of Traill County and I am also the Executive Secretary of the North Dakota Township Officers Association. NDTOA represents the 6,000 Township Officers that serve in more than 1,100 dues paying member townships.

On December 1, 2014 the membership of the North Dakota Township Officer's Association held their annual meeting and passed the following resolution.

"Be it resolved that NDTOA opposes the new rules proposed in the Federal Clean Water Act as proposed by the Environmental Protection Agency (EPA) & the US Corps of Engineers."

Those new rules might become the weapon of choice for the enviro-activist to use against North Dakota government subdivisions, agriculture and industry. They would file suit to require that the EPA enforce the over-reaching rules with court imposed definitions, and the EPA would be forced to do so. NDTOA is very concerned that this will happen. To prepare for what seems to be nearly inevitable we feel HB 1432 is much needed legislation.

NDTOA asks that you give HB 1432 your favorable recommendation.

Thank you, Chairman Holmberg and Committee members.

#7

North Dakota AG COALITION

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MEMBERS

AmeriFlax
BNSF Railway Company
Garrison Diversion Conservancy District
Independent Beef Association of ND
Landowners Association of ND
Milk Producers Association of ND
Minn-Dak Farmers Cooperative
ND Ag Aviation Association
ND Ag Consultants
ND Agricultural Association
ND Agri-Women
ND Association of Agricultural Educators
ND Association of Soil Conservation Districts
ND Barley Council
ND Beef Commission
ND Corn Growers Association
[redacted]rn Utilization Council
ND Crop Improvement and Seed Association
ND Dairy Coalition
ND Department of Agriculture
ND Dry Bean Council
ND Dry Edible Bean Seed Growers
ND Elk Growers
ND Ethanol Council
ND Farm Credit Council
ND Farmers Union
ND Grain Dealers Association
ND Grain Growers Association
ND Irrigation Association
ND Lamb and Wool Producers
ND Oilseed Council
ND Pork Producers
ND Soybean Council
ND Soybean Growers Association
ND State Seed Commission
ND Stockmen's Association
ND Wheat Commission
NDSU Agricultural Affairs
Northern Canola Growers Association
Northern Food Grade Soybean Association
[redacted]hern Plains Potato Growers [redacted]ciation
Northern Pulse Growers Association
Northwest Landowners Association
Red River Valley Sugarbeet Growers
US Durum Growers Association

Fred Helbling

North Dakota Ag Coalition Chairman

In Support of HB 1432

March 31, 2015

Chairman Holmberg and members of the Senate Appropriations Committee, my name is Fred Helbling. I am here today as the chairman of the North Dakota Ag Coalition in support of HB 1432.

The Ag Coalition has provided a unified voice for North Dakota agricultural interests for over 30 years. Today, we represent more than 40 statewide organizations and associations that represent specific commodities or have a direct interest in agriculture. Through the Ag Coalition, our members seek to enhance the climate for North Dakota's agricultural producers. The Ag Coalition takes a position on a limited number of issues, brought to us by our members, which have significant impact on North Dakota's agriculture industry.

The Ag Coalition supports HB 1432 as our member groups recognize the potentially disastrous effects of federal regulation overreach. HB 1432 will provide North Dakota with a necessary tool to protect itself and its strong economic engines, including agriculture, from potentially harmful regulatory efforts that would be detrimental not only to its economy, but to its citizens.

HB 1432's start-up appropriation combined with strong agricultural representation on the Environmental Impact Litigation Advisory Committee represents North Dakota's proactive approach to protecting our state's agriculture industry and natural resources as well as assuring our citizens that the state is committed to maintaining a strong economy for the future. We urge your support of HB 1432.

7.1

HB1432 + HB1014 # 1
4-2-15

Subcommittee Meeting April 2, 2015

Second Engrossment with Senate Amendments Reengrossed House Bill No.1358 (15.0460.04000) -
Relating to the operation of underground gathering pipelines and the sharing of information by a surface owner; to amend and reenact subsection 18 of section 38-08-02, subdivisions d and l of subsection 1 of section 38-08-04, subsection 6 of section 38-08-04, and section 38-08-04.5 of the North Dakota Century Code, relating to an exception to confidentiality of well data, to underground gathering pipelines, to temporarily abandoned status, and the uses of the abandoned oil and gas well plugging and site reclamation fund; to provide a report to the legislative management; to provide a transfer; to provide an appropriation; and to declare an emergency.

Fiscal Impact - Includes funding of $3,500,000 from the Abandoned Oil and Gas Well Plugging and Site Reclamation Fund

Fiscal Note - Does not refer to the $3,500,000 from the Abandoned Oil and Gas Well Plugging and Site Reclamation Fund but refers to the General Fund funding of $379,980 needed to administer the additional responsibilities being given to the Industrial Commission/Department of Mineral Resources. **The Industrial Commission is requesting that the $379,980 in General Fund dollars to be amended into House Bill 1014.**

Second Engrossment with Senate Amendments Reengrossed House Bill No. 1432 (15.0961.05000) -
Relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

At the Senate Appropriations hearing Senator Wanzek proposed Amendment 15.0961.04007 which replaced the entire bill.

Fiscal Impact - As the bill came to the Senate it included $4,000,000 of General Fund dollars to be transferred to the Federal Environmental Law Impact Review Fund. (The Governor's Executive Budget had included $3,000,000 for litigation in House Bill 1014. That amount was removed by the House and the discussion was that this $3,000,000 would be in the Federal Environmental Law Impact Review Fund.) Amendment 15.0961.04007 reduces the amount to go into the Federal Environmental Law Impact Review Fund to $1,500,000. **The Industrial Commission is requesting that the remaining $2,500,000 be reinstated in House Bill 1014.**

First Engrossment Engrossed House Bill No. 1443 (15.0867.02000) -
Relating to creation of the infrastructure revolving loan fund; to provide a statement of legislative intent; to provide for transfers; to provide a continuing appropriation; to provide an effective date; and to provide an expiration date.

Amendment 15.0867.02001 was previously presented to the subcommittee by Senator Carlisle which removes references to:

- hospitals being able to access loans from the infrastructure revolving loan fund (**that is being handled by the MedPACE amendments being proposed for House Bill 1014)** and
- political subdivisions being able to access loans for the purpose of installing new conduit for telecommunications infrastructure (broadband).....

These proposed amendments remove most of the amendments that were made by the House. See statement of purpose of amendment.

Fiscal Impact - As the bill came to the Senate it included $150,000,000 for the Infrastructure Revolving Loan Fund. $100,000,000 of the $150,000,000 would come from Bank of North Dakota

profits and $50,000,000 from the Strategic Investment and Improvements Fund. Amendment 15.0867.02001 does not change the total fiscal amount or the source of the funding.

First Engrossment Engrossed House Bill No. 1014 (15.8122.02000) -
Appropriation bill for the Industrial Commission agencies and relates to the housing incentive fund credits, the lignite research council, and the use of the flex PACE program; and to provide an expiration date.

Proposed amendments include:
BND - Med PACE Program - Attachment 1
BND - Construction of North Dakota Financial Center - Attachment 2

HFA - Kresbach/Streyle amendment - already presented to full Senate Appropriations Committee - Attachment 3
HFA - Amendment to cap origination fees at no more than 5% of project award - Attachment 4

MILL - Transfers to the General Fund set at 50% level with $8 million cap - Attachment 5
MILL - Funding for retention/recruiting at $410,000 as proposed in Executive Budget

DMR (Department of Mineral Resources)
DMR - Funding for expansion of Core Library - $13,625,321.63 (one-time), $1,850,000 (one-time) for parking replacement and $20,500 (annual on-going) for operating costs for a total of $15,495,821.63. An emergency clause is requested for at least a portion of this project.
DMR - Amendment that would allow any of the $1,000,000 currently in the 2013-2015 budget for litigation that is unused be carried over to the 2015-2017 biennium and not returned to the General Fund
DMR - Amendment for a one-time spending line of $2,500,000 for litigation (similar to what was in the original bill - see discussion on HB 1432)
DMR - Amendment to add funding and 2 FTE positions for the additional duties as a result of passage of House Bill 1358. - Attachment 6
DMR - Contingency amendment with trigger for the 10 positions -- 1 position for every 10 additional rigs with the first trigger being when the number of rigs averages110 for one month. - Attachment 7
DMR - Correction on one-time ATV's w/Trailers funding

Open Issues:
HFA - Additional funding of $20 million for Housing Incentive Fund in General Fund dollars for this bill or for Senate Bill No. 2257
Section 18 - Legislative Intent regarding funding that may be triggered.

15.0460.04000

Sixty-fourth
Legislative Assembly
of North Dakota

SECOND ENGROSSMENT
with Senate Amendments
REENGROSSED HOUSE BILL NO. 1358

Introduced by

Representatives D. Anderson, Hatlestad, J. Nelson, Porter, Weisz

Senators Bekkedahl, O'Connell

A BILL for an Act to create and enact a new section to chapter 38-08 and a new subsection to section 38-08-26 of the North Dakota Century Code, relating to the operation of underground gathering pipelines and the sharing of information by a surface owner; to amend and reenact subsection 18 of section 38-08-02, subdivisions d and l of subsection 1 of section 38-08-04, subsection 6 of section 38-08-04, and section 38-08-04.5 of the North Dakota Century Code, relating to an exception to confidentiality of well data, to underground gathering pipelines, to temporarily abandoned status, and the uses of the abandoned oil and gas well plugging and site reclamation fund; to provide a report to the legislative management; to provide a transfer; to provide an appropriation; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 18 of section 38-08-02 of the North Dakota Century Code is amended and reenacted as follows:

18. "Underground gathering pipeline" means an underground gas or liquid pipeline ~~that~~with associated above ground equipment which is designed for or capable of transporting crude oil, natural gas, carbon dioxide, or water produced in association with oil and gas which is not subject to chapter 49-22. As used in this subsection, "associated above ground equipment" means equipment and property located above ground level which is incidental to and necessary for or useful for transporting crude oil, natural gas, carbon dioxide, or water produced in association with oil and gas from a production facility. As used in this subsection, "equipment and property" includes a pump, a compressor, storage, leak detection or monitoring equipment, and any other facility or structure.

SECTION 2. A new section to chapter 38-08 of the North Dakota Century Code is created and enacted as follows:

Controls, inspections, and engineering design on crude oil and produced water underground gathering pipelines.

The application of this section is limited to an underground gathering pipeline that is designed or intended to transfer oil or produced water from a production facility for disposal, storage, or sale purposes and which was placed into service after August 1, 2015. Within sixty days of an underground gathering pipeline being placed into service, the operator of that pipeline shall file with the commission the underground gathering pipeline engineering final construction design drawings and specifications, an independent inspector's certificate of hydrostatic or pneumatic testing of the underground gathering pipeline, and a plan for leak detection and monitoring for the underground gathering pipeline.

SECTION 3. AMENDMENT. Section 38-08-04.5 of the North Dakota Century Code is amended and reenacted as follows:

38-08-04.5. Abandoned oil and gas well plugging and site reclamation fund - Budget section report.

There is hereby created an abandoned oil and gas well plugging and site reclamation fund.

1. Revenue to the fund must include:
   a. Fees collected by the oil and gas division of the industrial commission for permits or other services.
   b. Moneys received from the forfeiture of drilling and reclamation bonds.
   c. Moneys received from any federal agency for the purpose of this section.
   d. Moneys donated to the commission for the purposes of this section.
   e. Moneys received from the state's oil and gas impact fund.
   f. Moneys recovered under the provisions of section 38-08-04.8.
   g. Moneys recovered from the sale of equipment and oil confiscated under section 38-08-04.9.
   h. Moneys transferred from the cash bond fund under section 38-08-04.11.
   i. Such other moneys as may be deposited in the fund for use in carrying out the purposes of plugging or replugging of wells or the restoration of well sites.
   j. Civil penalties assessed under section 38-08-16.
2. Moneys in the fund may be used for the following purposes:
   a. Contracting for the plugging of abandoned wells.

b. Contracting for the reclamation of abandoned drilling and production sites, saltwater disposal pits, drilling fluid pits, and access roads.

c. To pay mineral owners their royalty share in confiscated oil.

d. Defraying costs incurred under section 38-08-04.4 in reclamation of oil and gas-related pipelines and associated facilities.

e. Reclamation and restoration of land and water resources impacted by oil and gas development, including related pipelines and facilities that were abandoned or were left in an inadequate reclamation status before August 1, 1983, and for which there is not any continuing reclamation responsibility under state law. Land and water degraded by any willful act of the current or any former surface owner are not eligible for reclamation or restoration. The commission may expend up to one million five hundred thousand dollars per biennium from the fund in the following priority:

(1) For the restoration of eligible land and water that are degraded by the adverse effects of oil and gas development including related pipelines and facilities.

(2) For the development of publicly owned land adversely affected by oil and gas development including related pipelines and facilities.

(3) For administrative expenses and cost in developing an abandoned site reclamation plan and the program.

(4) Demonstration projects for the development of reclamation and water quality control program methods and techniques for oil and gas development, including related pipelines and facilities.

3. All moneys collected under this section must be deposited in the abandoned oil and gas well plugging and site reclamation fund. This fund must be maintained as a special fund and all moneys transferred into the fund are appropriated and must be used and disbursed solely for the purpose of defraying the costs incurred in carrying out the plugging or replugging of wells, the reclamation of well sites, and all other related activities.

4. The commission shall report to the budget section of the legislative management on the balance of the fund and expenditures from the fund each biennium.

SECTION 4. AMENDMENT. Subdivision d of subsection 1 of section 38-08-04 of the North Dakota Century Code is amended and reenacted as follows:

d. The furnishing of a reasonable bond with good and sufficient surety, conditioned upon the full compliance with this chapter, and the rules and orders of the industrial commission, including without limitation a bond covering the operation of any underground gathering pipeline transferring oil or produced water from a production facility for disposal, storage, or sale purposes, except that if the commission requires a bond to be furnished, the person required to furnish the bond may elect to deposit under such terms and conditions as the industrial commission may prescribe a collateral bond, self-bond, cash, or any alternative form of security approved by the commission, or combination thereof, by which an operator assures faithful performance of all requirements of this chapter and the rules and orders of the industrial commission.

SECTION 5. AMENDMENT. Subdivision l of subsection 1 of section 38-08-04 of the North Dakota Century Code is amended and reenacted as follows:

l. The placing of wells in abandoned-well status which have not produced oil or natural gas in paying quantities for one year. A well in abandoned-well status must be promptly returned to production in paying quantities, approved by the commission for temporarily abandoned status, or plugged and reclaimed within six months. If none of the three preceding conditions are met, the industrial commission may require the well to be placed immediately on a single-well bond in an amount equal to the cost of plugging the well and reclaiming the well site. In setting the bond amount, the commission shall use information from recent plugging and reclamation operations. After a well has been in abandoned-well status for one year, the well's equipment, all well-related equipment at the well site, and salable oil at the well site are subject to forfeiture by the commission. If the commission exercises this authority, section 38-08-04.9 applies. After a well has been in abandoned-well status for one year, the single-well bond referred to above, or any other bond covering the well if the single-well bond has not been obtained, is subject to forfeiture by the commission. A surface owner may request a review of the temporarily abandoned status of a well that has been on

temporarily abandoned status for at least seven years. The commission shall require notice and hearing to review the temporarily abandoned status. After notice and hearing, the surface owner may request a review of the temporarily abandoned status every two years.

SECTION 6. AMENDMENT. Subsection 6 of section 38-08-04 of the North Dakota Century Code is amended and reenacted as follows:

6. To provide for the confidentiality of well data reported to the commission if requested in writing by those reporting the data for a period not to exceed six months. However, the commission may release:

   a. Volumes injected into a saltwater injection well.

   b. Information from the spill report on a well on a site at which more than ten barrels of fluid, not contained on the well site, was released for which an oilfield environmental incident report is required by law.

SECTION 7. A new subsection to section 38-08-26 of the North Dakota Century Code is created and enacted as follows:

The surface owner may share information contained in the geographic information system database.

SECTION 8. TRANSFER - ABANDONED OIL AND GAS WELL PLUGGING AND SITE RECLAMATION FUND TO OIL AND GAS RESEARCH FUND - PRODUCED WATER PIPELINE STUDY - REPORT TO LEGISLATIVE MANAGEMENT. The director of the office of management and budget shall transfer the sum of $1,500,000 from the abandoned oil and gas well plugging and site reclamation fund to the oil and gas research fund for the purpose of funding a special project through the energy and environmental research center at the university of North Dakota during the biennium beginning July 1, 2015, and ending June 30, 2017. The special project must focus on conducting an analysis of crude oil and produced water pipelines including the construction standards, depths, pressures, monitoring systems, maintenance, types of materials used in the pipeline including backfill, and an analysis of the ratio of spills and leaks occurring in this state in comparison to other large oil and gas-producing states with substantial volumes of produced water. The industrial commission shall contract with the energy and environmental research center to compile the information and the center shall work with the department of mineral resources to analyze the existing regulations on

construction and monitoring of crude oil and produced water pipelines, determine the feasibility and cost effectiveness of requiring leak detection and monitoring technology on expansion of existing pipeline systems, and provide a report with recommendations to the industrial commission and the energy development and transmission committee by December 1, 2015. The industrial commission shall adopt the necessary administrative rules necessary to improve produced water pipeline safety and integrity. In addition, the industrial commission shall contract for a pilot project to evaluate a pipeline leak detection and monitoring system.

SECTION 9. APPROPRIATION. Notwithstanding section 38-08-04.5, there is appropriated out of any moneys in the abandoned oil and gas well plugging and site reclamation fund in the state treasury, not otherwise appropriated, the sum of $500,000, or so much of the sum as may be necessary, to the industrial commission for the purpose of conducting a pilot program involving the oil and gas research council in conjunction with research facilities in this state to determine the best techniques for remediating salt and any other contamination from the soil surrounding waste pits reclaimed by trenching between 1951 and 1984 in the north central portion of this state, for the biennium beginning July 1, 2015, and ending June 30, 2017.

SECTION 10. EMERGENCY. This Act is declared to be an emergency measure.

15.0460.04000

FISCAL NOTE
Requested by Legislative Council
03/30/2015

Amendment to: HB 1358

1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			$379,980		$379,980	
Appropriations			$379,980		$379,980	

1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This measure requires controls, inspection oversight, and bonding for underground gathering pipelines; expands reclamation for pre 08/01/1983 damages; changes temporarily abandoned statuses and confidentiality of well data; and provides transfers for pipeline and salt removing technique studies.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 2 requires the Oil & Gas division to oversee the proper filing of construction drawings, specifications, pressure tests, and leak detection/monitoring plans, and verify independent inspections are properly completed. Section 3 adds the use of AWPSRF funds for reclamation and restoration of pre 08/01/1983 oil and gas development damages. Section 4 requires the Oil & Gas division to administer a new category of bonds for gathering pipelines. Sections 5, 6, and 7 require substantial increases in processing of temporary abandoned well cases, confidential well status and spill reports, and pipeline information requests. Section 8 requires the Industrial Commission to analyze pipeline regulations, provide a report, adopt and enforce rules to improve pipeline safety and integrity.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

No revenue is anticipated at this time.

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Expenditures per biennium include:

$240,340 for one petroleum engineer to develop standards of inspections and technological devices as well as

supervise the pipeline program;

$139,640 for one administration assistant to administer bonds;

Three engineering technicians (one per district) for pipeline inspection programs are included in HB1014 budget request approved by House;

One RBDMS technician to update and maintain the database and gather pipeline records is included in HB1014 budget request approved by House;

One petroleum engineer for reclamation and restoration of pre 08/01/1983 oil and gas development damages is included in HB1014 budget request approved by House; and

One GIS Engineering technician FTE (100% of time) is included in HB1014 budget request approved by House.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

The Oil & Gas Division expenditures for the increased costs in FTE expenses mentioned in 3B total $379,980. The FTE costs are general fund expenses, and are not included in the executive budget.

Name: Robyn Loumer

Agency: Industrial Commission

Telephone: 701-328-8011

Date Prepared: 03/05/2015

15.0961.05000

Sixty-fourth
Legislative Assembly
of North Dakota

SECOND ENGROSSMENT
with Senate Amendments
REENGROSSED HOUSE BILL NO. 1432

Introduced by

Representatives Brandenburg, Belter, Boe, Headland, D. Johnson, Kasper, Kempenich, Thoreson

Senators Dotzenrod, Erbele, Schaible, Wanzek

A BILL for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review committee.

1. The federal environmental law impact review committee consists of:
   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.

2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and advise the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. If the attorney general elects to participate in an administrative or judicial process, as recommended by the review committee under section 1 of this Act, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.
2. For purposes of this section, "expenses" include consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Gifts - Grants - Donations.

The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

SECTION 4. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:
   a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and
   b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $4,000,000, or so much of the sum as may be necessary, which sum the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner.

15.0961.04007
Title.

Prepared by the Legislative Council staff for
Senator Wanzek
March 30, 2015

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1432

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review committee.

1. The federal environmental law impact review committee consists of:
   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and advise the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

3. a. Any member of the legislative assembly serving on the committee is entitled to compensation at the rate provided for attendance at interim committee meetings and reimbursement for expenses, as provided by law for state officers, if the member is attending meetings of the committee or performing duties directed by the committee.

b. The compensation and reimbursement of expenses, as provided for in this subsection, is payable by the legislative council.

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. If the attorney general elects to participate in an administrative or judicial process, pertaining to federal environmental legislation or regulations, which detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

2. For purposes of this section, "expenses" include consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Gifts - Grants - Donations.

The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

SECTION 4. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:

   a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and

   b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $1,500,000, or so

much of the sum as may be necessary, which the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly

15.0867.02000

Sixty-fourth
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED HOUSE BILL NO. 1443

Introduced by

Representatives Carlson, Belter, Delzer

Senators Cook, Schaible

A BILL for an Act to create and enact section 6-09-49 of the North Dakota Century Code, relating to creation of the infrastructure revolving loan fund; to provide a statement of legislative intent; to provide for transfers; to provide a continuing appropriation; to provide an effective date; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Section 6-09-49 of the North Dakota Century Code is created and enacted as follows:

6-09-49. (Effective through June 30, 2017) Infrastructure revolving loan fund - Continuing appropriation.

1. The infrastructure revolving loan fund is a special fund in the state treasury from which the Bank of North Dakota shall provide loans to political subdivisions for essential infrastructure projects. The Bank shall administer the infrastructure revolving loan fund. The maximum term of a loan made under this section is thirty years. A loan made from the fund under this section must have an interest rate that does not exceed one and one-half percent per year.
2. The Bank shall establish priorities for making loans from the infrastructure revolving loan fund. Loan funds must be used to address the needs of the community by providing critical infrastructure funding. Except as expressly provided under this section, a political subdivision may not use infrastructure revolving loan funds for capital construction. In addition to eligible infrastructure needs established by the Bank, eligible infrastructure needs may include new water treatment plants; new wastewater treatment plants; new sewer lines and water lines; new construction and renovation of critical access hospitals; and new storm water and transportation infrastructure, including curb and gutter construction.

3. In processing political subdivision loan applications under this section, the Bank shall calculate the maximum loan amount for which a qualified applicant may qualify, not to exceed seven million dollars for an eligible critical access hospital loan and not to exceed fifteen million dollars each for all other eligible loans. The total amount of loans issued for critical access hospitals may not exceed thirty-five million dollars. The Bank shall consider the applicant's ability to repay the loan when processing the application and shall issue loans only to applicants that provide reasonable assurance of sufficient future income to repay the loan. The Bank may adopt policies establishing priorities for issuance of loans, setting additional qualifications for applicants, and establishing timelines addressing when a participating political subdivision may be required to make loan draws and the consequences of not meeting these timelines, and setting other guidelines relating to the loan program under this section.

4. The Bank shall deposit in the infrastructure revolving loan fund all payments of interest and principal paid under loans made from the infrastructure revolving loan fund. The Bank may use a portion of the interest paid on the outstanding loans as a servicing fee to pay for administrative costs which may not exceed one-half of one percent of the amount of the interest payment. All moneys transferred to the fund, interest upon moneys in the fund, and payments to the fund of principal and interest are appropriated to the Bank on a continuing basis for administrative costs and for loan disbursement according to this section.

5. The Bank may adopt policies and establish guidelines to supplement and leverage the funds in the infrastructure revolving loan fun. Additionally, the Bank may adopt policies allowing participation by local financial institutions.

(Effective after June 30, 2017) Infrastructure revolving loan fund - Continuing appropriation.

1. The infrastructure revolving loan fund is a special fund in the state treasury from which the Bank of North Dakota shall provide loans to political subdivisions for essential infrastructure projects. The Bank shall administer the infrastructure revolving loan fund. The maximum term of a loan made under this section is thirty years. A loan made from the fund under this section must have an interest rate that does not exceed one and one-half percent per year.

2. The Bank shall establish priorities for making loans from the infrastructure revolving loan fund. Loan funds must be used to address the needs of the community by providing critical infrastructure funding. Except as expressly provided under this section, a political subdivision may not use infrastructure revolving loan funds for capital construction. In addition to eligible infrastructure needs established by the Bank, eligible infrastructure needs may include new water treatment plants; new wastewater treatment plants; new sewer lines and water lines; new conduit for telecommunications infrastructure; new construction and renovation of critical access hospitals; and new storm water and transportation infrastructure, including curb and gutter construction.

3. In processing political subdivision loan applications under this section, the Bank shall calculate the maximum loan amount for which a qualified applicant may qualify, not to exceed seven million dollars for an eligible critical access hospital loan and not to exceed fifteen million dollars each for all other eligible loans. The total amount of loans issued for critical access hospitals may not exceed thirty-five million dollars. The Bank shall consider the applicant's ability to repay the loan when processing the application and shall issue loans only to applicants that provide reasonable assurance of sufficient future income to repay the loan. The Bank may adopt policies establishing priorities for issuance of loans, setting additional qualifications for applicants, and establishing timelines addressing when a participating political subdivision may be required to make loan draws and the consequences of not meeting these timelines, and setting other guidelines relating to the loan program under this section.

4. The Bank shall deposit in the infrastructure revolving loan fund all payments of interest and principal paid under loans made from the infrastructure revolving loan fund. The Bank may use a portion of the interest paid on the outstanding loans as a servicing fee to pay for administrative costs which may not exceed one-half of one percent of the amount of the interest payment. All moneys transferred to the fund, interest upon moneys in the fund, and payments to the fund of principal and interest are appropriated to the Bank on a continuing basis for administrative costs and for loan disbursement according to this section.

5. The Bank may adopt policies and establish guidelines to supplement and leverage the funds in the infrastructure revolving loan fund. Additionally, the Bank may adopt policies allowing participation by local financial institutions.

SECTION 2. LEGISLATIVE INTENT - ELIGIBLE BORROWERS UNDER INFRASTRUCTURE REVOLVING LOAN FUND. If a political subdivision receives funds distributed by the state treasurer under subsection 1 or 4 of section 1 or by the department of transportation under subsection 1 of section 2 of Senate Bill No. 2103, as approved by the sixty-fourth legislative assembly, it is the intent of the sixty-fourth legislative assembly that political subdivision be ineligible to receive a loan under the infrastructure revolving loan fund until July 1, 2017. However, this section does not apply to loans for critical access hospitals.

SECTION 3. LEGISLATIVE INTENT - CRITICAL ACCESS HOSPITAL LOAN LIMITATION. It is the intent of the sixty-fourth legislative assembly that the total amount of loans associated with a critical access hospital issued from the medical facility infrastructure fund and the infrastructure revolving loan fund for the period beginning July 1, 2013, and ending June 30, 2017, not exceed fifteen million dollars.

SECTION 4. TRANSFER - BANK OF NORTH DAKOTA - INFRASTRUCTURE REVOLVING LOAN FUND. During the biennium beginning July 1, 2015, and ending June 30, 2017, the Bank of North Dakota shall transfer the sum of $100,000,000, or so much of the sum as may be necessary, from the Bank's current earnings and undivided profits to the infrastructure revolving loan fund.

SECTION 5. TRANSFER - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - INFRASTRUCTURE REVOLVING LOAN FUND. During the biennium beginning July 1, 2015, and ending June 30, 2017, the office of management and budget shall transfer the sum of $50,000,000 from the strategic investment and improvements fund to the infrastructure revolving loan fund. The office of management and budget shall transfer the funds provided under this section to the infrastructure revolving loan fund as requested by the Bank of North Dakota.

15.0867.02001
Title.

Prepared by the Legislative Council staff for
Senator Carlisle
March 12, 2015

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1443

Page 1, line 2, remove "to provide a statement of legislative"

Page 1, line 3, remove "intent;"

Page 1, line 3, after the second semicolon insert "and"

Page 1, line 3, remove "; to provide an effective"

Page 1, line 4, remove "date; and to provide an expiration date"

Page 1, line 8, remove "**(Effective through June 30, 2017)**"

Page 1, line 15, replace "one and one-half" with "two"

Page 1, line 22, remove "new construction and"

Page 1, line 23, remove "renovation of critical access hospitals;"

Page 2, line 2, remove ", not to"

Page 2, remove lines 3 and 4

Page 2, line 5, remove "issued for critical access hospitals may not exceed thirty-five million dollars"

Page 2, remove lines 24 through 31

Page 3, remove lines 1 through 30

Page 4, remove lines 1 through 15

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

This amendment:

- Changes the interest rate on loans from 1.5 to 2 percent, which is the same as the bill as introduced, but .5 percent more than the House version.
- Removes critical access hospitals from eligible projects, which was added by the House.
- Removes telecommunications conduit infrastructure from eligible projects effective July 1, 2017, which was added by the House version.
- Removes the limitations on loan funding for each political subdivision, which were added by the House version.
- Removes two sections of legislative intent added by the House version related to eligible projects and critical access hospital loan limitations.

15.8122.02000

Sixty-fourth
Legislative Assembly
of North Dakota

Introduced by

Appropriations Committee

(At the request of the Governor)

FIRST ENGROSSMENT

ENGROSSED HOUSE BILL NO. 1014

A BILL for an Act to provide an appropriation for defraying the expenses of the state industrial commission and the agencies under the management of the industrial commission; to provide a continuing appropriation; to authorize transfers; to provide legislative intent; to amend and reenact sections 54-17-40, 54-17-41, 54-17.5-02, and 57-38-01.32 of the North Dakota Century Code and section 22 of chapter 579 of the 2011 Session Laws, relating to the housing incentive fund credits, the lignite research council, and the use of the flex PACE program; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. APPROPRIATION. The funds provided in this section, or so much of the funds as may be necessary, are appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, and from special funds derived from federal funds and other income, to the state industrial commission and agencies under its control for the purpose of defraying the expenses of the state industrial commission and agencies under its control, for the biennium beginning July 1, 2015, and ending June 30, 2017, as follows:

Subdivision 1.

INDUSTRIAL COMMISSION

	Base Level	Adjustments or Enhancements	Appropriation
Salaries and wages	$17,873,876	$4,345,078	$22,218,954
Accrued leave payments	347,696	(347,696)	0
Operating expenses	4,775,576	1,552,846	6,328,422
Grants	19,500,000	(14,500,000)	5,000,000
Grants - bond payments	19,809,969	(4,769,140)	15,040,829
Total all funds	$62,307,117	($13,718,912)	$48,588,205

Less estimated income	40,973,792	(23,974,385)	16,999,407
Total general fund	$21,333,325	$10,255,473	$31,588,798
Full-time equivalent positions	98.75	16.00	114.75

Subdivision 2.

BANK OF NORTH DAKOTA - OPERATIONS

	Base Level	Adjustments or Enhancements	Appropriation
Bank of North Dakota operations	$51,523,916	$7,156,915	$58,680,831
Accrued leave payments	881,231	(881,231)	0
Capital assets	745,000	0	745,000
Total special funds	$53,150,147	$6,275,684	$59,425,831
Full-time equivalent positions	179.50	2.00	181.50

Subdivision 3.

MILL AND ELEVATOR ASSOCIATION

	Base Level	Adjustments or Enhancements	Appropriation
Salaries and wages	$29,141,750	$6,837,821	$35,979,571
Accrued leave payments	575,807	(575,807)	0
Operating expenses	21,796,000	5,531,000	27,327,000
Contingencies	400,000	100,000	500,000
Agriculture promotion	210,000	0	210,000
Total from mill and elevator fund	$52,123,557	$11,893,014	$64,016,571
Full-time equivalent positions	135.00	12.00	147.00

Subdivision 4.

HOUSING FINANCE AGENCY

	Base Level	Adjustments or Enhancements	Appropriation
Salaries and wages	$7,434,877	$343,660	$7,778,537
Accrued leave payments	147,806	(147,806)	0
Operating expenses	3,791,758	(47,483)	3,744,275
Grants	29,533,050	(3,602,270)	25,930,780

Housing finance agency contingencies	100,000	0	100,000
Total special funds	$41,007,491	($3,453,899)	$37,553,592
Full-time equivalent positions	46.00	0.00	46.00

Subdivision 5.

	BILL TOTAL		
	Base Level	Adjustments or Enhancements	Appropriation
Grand total general fund	$21,333,325	$10,255,473	$31,588,798
Grand total special funds	187,254,987	(9,259,586)	177,995,401
Grand total all funds	$208,588,312	$995,887	$209,584,199

SECTION 2. ONE-TIME FUNDING - EFFECT ON BASE BUDGET - REPORT TO SIXTY-FIFTH LEGISLATIVE ASSEMBLY. The following amounts reflect the one-time funding items approved by the sixty-third legislative assembly for the 2013-15 biennium and the 2015-17 one-time funding items included in the grand total appropriation in section 1 of this Act:

One-Time Funding Description	2013-15	2015-17
Oil-bearing rock study	$80,000	$0
Possible litigation	1,000,000	0
Core library - architect services	25,000	0
Temperature profiles study	50,000	0
Wide-bed plotter	5,800	0
Lignite research council grants	0	5,000,000
All-terrain vehicles	0	41,500
Aerial photography	0	104,143
Contract analysis	0	125,000
Digital conversion	0	100,000
Migration to RBDMS.net	0	250,000
Medical loan program	50,000,000	0
Housing incentive fund	15,400,000	0
Flood housing grants	1,500,000	0
Total all funds	$68,060,800	$5,620,643

Total special fund	51,500,000	0
Total general fund	$16,560,800	$5,620,643

The 2015-17 one-time funding amounts are not a part of the entity's base budget for the 2017-19 biennium. The industrial commission shall report to the appropriations committees of the sixty-fifth legislative assembly on the use of this one-time funding for the biennium beginning July 1, 2015, and ending June 30, 2017.

SECTION 3. LEGISLATIVE INTENT - BOND PAYMENTS. The amount of $15,040,829 included in subdivision 1 of section 1 of this Act in the grants - bond payments line item must be paid from the following funding sources during the biennium beginning July 1, 2015, and ending June 30, 2017:

North Dakota university system	$8,368,836
North Dakota university system - energy conservation projects	491,161
Department of corrections and rehabilitation	1,279,524
Department of corrections and rehabilitation - energy conservation projects	16,206
State department of health	637,940
Job service North Dakota	427,131
Office of management and budget	664,952
Office of attorney general	765,483
State historical society	1,391,668
Parks and recreation department	73,592
Research and extension service	571,126
Veterans' home	353,210
Total	$15,040,829

SECTION 4. APPROPRIATION. In addition to the amount appropriated to the housing finance agency in subdivision 4 of section 1 of this Act, there is appropriated any additional income or unanticipated income from federal or other funds which may become available to the agency for the biennium beginning July 1, 2015, and ending June 30, 2017.

SECTION 5. APPROPRIATION - EMERGENCY COMMISSION APPROVAL. In addition to the amount appropriated to the state industrial commission in subdivision 1 of section 1 of this Act, there is appropriated, with the approval of the emergency commission, funds that may

become available to the commission from bonds authorized by law to be issued by the state industrial commission for the biennium beginning July 1, 2015, and ending June 30, 2017.

SECTION 6. TRANSFER. The sum of $930,000, or so much of the sum as may be necessary, included in the special funds appropriation line item in subdivision 1 of section 1 of this Act, may be transferred from the entities within the control of the state industrial commission or entities directed to make payments to the industrial commission fund for administrative services rendered by the commission. Transfers shall be made during the biennium beginning July 1, 2015, and ending June 30, 2017, upon order of the commission. Transfers from the student loan trust must be made to the extent permitted by sections 54-17-24 and 54-17-25.

SECTION 7. TRANSFER - BANK OF NORTH DAKOTA - PARTNERSHIP IN ASSISTING COMMUNITY EXPANSION. The Bank of North Dakota shall transfer the sum of $28,000,000, or so much of the sum as may be necessary, from the Bank's current earnings and undivided profits to the partnership in assisting community expansion fund during the biennium beginning July 1, 2015, and ending June 30, 2017.

SECTION 8. TRANSFER - BANK OF NORTH DAKOTA - AGRICULTURE PARTNERSHIP IN ASSISTING COMMUNITY EXPANSION. The Bank of North Dakota shall transfer the sum of $3,000,000, or so much of the sum as may be necessary, from the Bank's current earnings and undivided profits to the agriculture partnership in assisting community expansion fund during the biennium beginning July 1, 2015, and ending June 30, 2017.

SECTION 9. TRANSFER - BANK OF NORTH DAKOTA - BIOFUELS PARTNERSHIP IN ASSISTING COMMUNITY EXPANSION. The Bank of North Dakota shall transfer the sum of $2,000,000, or so much of the sum as may be necessary, from the Bank's current earnings and undivided profits to the biofuels partnership in assisting community expansion fund during the biennium beginning July 1, 2015, and ending June 30, 2017.

SECTION 10. TRANSFER - BANK OF NORTH DAKOTA - BEGINNING FARMER REVOLVING LOAN FUND. The Bank of North Dakota shall transfer the sum of $7,000,000, or so much of the sum as may be necessary, from the Bank's current earnings and undivided profits to the beginning farmer revolving loan fund during the biennium beginning July 1, 2015, and ending June 30, 2017.

SECTION 11. MILL AND ELEVATOR PROFITS - TRANSFER TO THE GENERAL FUND. Notwithstanding any other provision of law, the industrial commission shall transfer to the state

general fund seventy-five percent of the annual earnings and undivided profits of the North Dakota mill and elevator association after any transfers to other state agricultural-related programs during the biennium beginning July 1, 2015, and ending June 30, 2017. The moneys must be transferred on an annual basis in the amounts and at the times requested by the director of the office of management and budget.

SECTION 12. LIGNITE RESEARCH, DEVELOPMENT, AND MARKETING PROGRAM - LIGNITE MARKETING FEASIBILITY STUDY. The amount of $4,500,000 from the lignite research fund, or so much of the amount as may be necessary, may be used for the purpose of contracting for an independent, nonmatching lignite marketing feasibility study or studies that determine those focused priority areas where near-term, market-driven projects, activities, or processes will generate matching private industry investment and have the most potential of preserving existing lignite production and industry jobs or that will lead to increased development of lignite and its products and create new lignite industry jobs and economic growth for the general welfare of this state. Moneys appropriated under this section also may be used for the purpose of contracting for nonmatching studies and activities in support of the lignite vision 21 program; for litigation that may be necessary to protect and promote the continued development of lignite resources; for nonmatching externality studies and activities in externality proceedings; or other marketing, environmental, or transmission activities that assist with marketing of lignite-based electricity and lignite-based byproducts. Moneys not needed for the purposes stated in this section are available to the commission for funding projects, processes, or activities under the lignite research, development, and marketing program.

SECTION 13. AMENDMENT. Section 54-17-40 of the North Dakota Century Code is amended and reenacted as follows:

54-17-40. (Effective through June 30, ~~2015~~2017) Housing incentive fund - Continuing appropriation - Report to budget section.

1. The housing incentive fund is created as a special revolving fund at the Bank of North Dakota. The housing finance agency may direct disbursements from the fund and a continuing appropriation from the fund is provided for that purpose.
2. After a public hearing, the housing finance agency shall create an annual allocation plan for the distribution of the fund. At least twenty-five percent of the fund must be used to assist developing communities to address an unmet housing need or alleviate

a housing shortage. The agency may collect a reasonable administrative fee from the fund, project developers, applicants, or grant recipients.

The annual allocation plan must give first priority through its scoring and ranking process to housing for essential service workers. For purposes of this subsection, "essential service workers" means individuals employed by a city, county, school district, medical or long-term care facility, the state of North Dakota, or others as determined by the housing finance agency who fulfill an essential public service.

The second priority in the annual allocation plan must be to provide housing for individuals and families of low or moderate income. For purposes of this second priority, eligible income limits are determined as a percentage of median family income as published in the most recent federal register notice. Under this second priority, the annual allocation plan must give preference to projects that benefit households with the lowest income and to projects that have rent restrictions at or below department of housing and urban development published federal fair market rents or department of housing and urban development section 8 payment standards.

The housing finance agency shall maintain a register reflecting the number of housing units owned or master leased by cities, counties, school districts, or other employers of essential service workers. This register must also reflect those entities that are providing rent subsidies for their essential workers. The housing finance agency shall report quarterly to the budget section of the legislative management on the progress being made to reduce the overall number of units owned, master leased, or subsidized by these entities. This report must include a listing of projects approved and number of units within those projects that provide housing for essential service workers.

3. The housing finance agency shall adopt guidelines for the fund so as to address unmet housing needs in this state. Assistance from the fund may be used solely for:
   a. New construction, rehabilitation, or acquisition of a multifamily housing project;
   b. Gap assistance, matching funds, and accessibility improvements;
   c. Assistance that does not exceed the amount necessary to qualify for a loan using underwriting standards acceptable for secondary market financing or to make the project feasible; and

d. Rental assistance, emergency assistance, or targeted supportive services designated to prevent homelessness.

4. Eligible recipients include units of local, state, and tribal government; local and tribal housing authorities; community action agencies; regional planning councils; and nonprofit organizations and for-profit developers of multifamily housing. Individuals may not receive direct assistance from the fund.

5. Except for subdivision d of subsection 3, assistance is subject to repayment or recapture under the guidelines adopted by the housing finance agency. Any assistance that is repaid or recaptured must be deposited in the fund and is appropriated on a continuing basis for the purposes of this section.

SECTION 14. AMENDMENT. Section 54-17-41 of the North Dakota Century Code is amended and reenacted as follows:

54-17-41. (Effective through June 30, ~~2015~~2017) Report.

Upon request, the housing finance agency shall report to the industrial commission on the activities of the housing incentive fund.

SECTION 15. AMENDMENT. Section 54-17.5-02 of the North Dakota Century Code is amended and reenacted as follows:

54-17.5-02. Lignite research council - Compensation - Appointment of members.

The industrial commission shall consult with the lignite research council established by executive order in matters of policy affecting the administration of the lignite research fund. Section 44-03-04 does not apply to members of the council appointed by the governor.

SECTION 16. AMENDMENT. Section 57-38-01.32 of the North Dakota Century Code is amended and reenacted as follows:

57-38-01.32. (Effective for the first two taxable years beginning after December 31, ~~2012~~2014) Housing incentive fund tax credit.

1. A taxpayer is entitled to a credit as determined under this section against state income tax liability under section 57-38-30 or 57-38-30.3 for contributing to the housing incentive fund under section 54-17-40. The amount of the credit is equal to the amount contributed to the fund during the taxable year.

2. North Dakota taxable income must be increased by the amount of the contribution upon which the credit under this section is computed but only to the extent the contribution reduced federal taxable income.
3. The contribution amount used to calculate the credit under this section may not be used to calculate any other state income tax deduction or credit allowed by law.
4. If the amount of the credit exceeds the taxpayer's tax liability for the taxable year, the excess may be carried forward to each of the ten succeeding taxable years.
5. The aggregate amount of tax credits allowed to all eligible contributors is limited to ~~twenty~~thirty million dollars.
6. Within thirty days after the date on which a taxpayer makes a contribution to the housing incentive fund, the housing finance agency shall file with each contributing taxpayer, and a copy with the tax commissioner, completed forms that show as to each contribution to the fund by that taxpayer the following:
   a. The name, address, and social security number or federal employer identification number of the taxpayer that made the contribution.
   b. The dollar amount paid for the contribution by the taxpayer.
   c. The date the payment was received by the fund.
7. To receive the tax credit provided under this section, a taxpayer shall claim the credit on the taxpayer's state income tax return in the manner prescribed by the tax commissioner and file with the return a copy of the form issued by the housing finance agency under subsection 6.
8. Notwithstanding the time limitations contained in section 57-38-38, this section does not prohibit the tax commissioner from conducting an examination of the credit claimed and assessing additional tax due under section 57-38-38.
9. A passthrough entity making a contribution to the housing incentive fund under this section is considered to be the taxpayer for purposes of this section, and the amount of the credit allowed must be determined at the passthrough entity level. The amount of the total credit determined at the entity level must be passed through to the partners, shareholders, or members in proportion to their respective interests in the passthrough entity.

SECTION 17. AMENDMENT. Section 22 of chapter 579 of the 2011 Session Laws is amended and reenacted as follows:

SECTION 22. FLEX PACE PROGRAM USE. The Bank of North Dakota shall utilize the flex partnership in assisting community expansion program to assist in financing of affordable multifamily housing units for individuals in ~~areas of~~ North Dakota ~~affected by oil and gas development,~~ for the period beginning with the effective date of this Act and ending June 30, ~~2013~~2019.

SECTION 18. LEGISLATIVE INTENT - CONTINGENT FUNDING PRIORITY LIST. It is the intent of the sixty-fourth legislative assembly that a list of funding priorities be developed for contingent funding if the actual general fund revenues exceed the legislative forecast during the 2015-17 biennium. The priorities may include a core library project, additional full-time equivalent positions for the industrial commission, transfers to the housing incentive fund, and grants for the lignite research council.

HB 1014 1A
4-2-15 Attachment 1

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1014

Page 6, after line 5, insert:

"SECTION 12. MED PACE PROGRAM USE. The Bank of North Dakota shall utilize the medical partnership in assisting community expansion program to assist in the financing of critical access medical infrastructure projects, for the period beginning with the effective date of this Act and ending June 30, 2017. The Bank shall adopt policies and procedures implementing this program. Notwithstanding section 6-09.14-03, the Bank may originate loans made under this program or participate with a lead financial institution. Eligible projects receiving moneys for an interest rate buydown under the medical partnership in assisting community expansion program are not subject to the community commitment requirement in section 6-09.14-02, the maximum interest rate buydown limitation in subsection 4 of section 6-09.14-04, or the state grantor recipient reporting requirement in section 54-60.1-05." 3

Renumber accordingly

1A.1

Attachment 2

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1014

Page 2, line 10, replace the "0" with "17,000,000"

Page 2, line 10, replace the second "745,000" with "17,745,000"

Page 2, line 11, replace "$6,275,684" with "$23,275,684"

Page 2, line 11, replace "$59,425,831" with "$76,425,831"

Page 5, after line 2, insert:

"SECTION 11. APPROPRIATION – BANK OF NORTH DAKOTA – NORTH DAKOTA FINANCIAL CENTER. The capital assets line item in subdivision 2 of section 1 of this Act includes $17,000,000 from the assets of The Bank of North Dakota which the Bank shall use for the purpose of the construction of the North Dakota financial center on a site adjacent to the existing Bank of North Dakota location. The Bank shall lease space for the purpose of housing financially related state agencies."

Renumber accordingly

Attachment 4

PROPOSED AMENDMENT TO HB 1014

Page 7, at the end of line 2 insert "The origination fee assessed to grant recipients may not exceed five percent of the project award."

1A.3

SECTION 11. MILL AND ELEVATOR PROFITS - TRANSFER TO THE GENERAL FUND. Notwithstanding any other provision of law, the industrial commission shall transfer to the state general fund ~~seventy-five~~ fifty percent of the annual earnings and undivided profits of the North Dakota mill and elevator association after any transfers to other state agricultural-related programs or the sum of $8,000,000, whichever is less, during the biennium beginning July 1, 2015, and ending June 30, 2017. The moneys must be transferred on an annual basis in the amounts and at the times requested by the director of the office of management and budget.

SECTION ?? DEPARTMENT OF MINERAL RESOURCES FUNDING - PIPELINE REGULATORY PROGRAM

Of the funds appropriated in subdivision 1 of section 1 of this Act, $360,700 in the salaries and wages line and $19,278 in the operating line are from the general fund. Due to the passage of the Pipeline Regulatory Program (HB 1358), the oil and gas division may hire one full-time equivalent positon at the rate of $240,339 for a pipeline regulatory program supervisor, and one full-time equivalent positon at the rate of $139,639 for an administrative assistant.

SECTION ?? DEPARTMENT OF MINERAL RESOURCES FUNDING - CONTINGENCY TRIGGER

Of the funds appropriated in subdivision 1 of section 1 of this Act, $1,681,050 in the salaries and wages line and $544,030 in the operating line are from the general fund. If funds are required due to an increase in the drilling rig count, the oil and gas division may hire one full-time equivalent positon at the rate of $222,508 upon notification to the office of management and budget, for each ten drilling rigs exceeding one hundred drilling rigs are operating for at last thirty consecutive days up to a maximum of ten additional full-time equivalent positons and a maximum of $2,225,080 of funds.

HB 1432
HB 1014
4-2-15

2

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1358

Page 2, line 10, after the underscored period insert: "The director of the oil and gas division shall review the plan, the construction drawings, and pressure testing within thirty days of receipt and shall notify the pipeline operator that the they are either approved or inform the operator of any improvements to the monitoring system that are required."

Renumber accordingly

HB 1432 & HB 1014 #3
4-2-15

15.0961.04008
Title.

Prepared by the Legislative Council staff for
Senator Wanzek
March 31, 2015

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1432

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review committee.

1. The federal environmental law impact review committee consists of:
   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and advise the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

3.1

3. a. Any member of the legislative assembly serving on the committee is entitled to compensation at the rate provided for attendance at interim committee meetings and reimbursement for expenses, as provided by law for state officers, if the member is attending meetings of the committee or performing duties directed by the committee.

b. The compensation and reimbursement of expenses, as provided for in this subsection, are payable by the legislative council.

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. Any expenses incurred by the agriculture commissioner or by the federal environmental law impact review committee in meeting the requirements of section 1 of this Act must be paid by the agriculture commissioner from the federal environmental law impact fund.

2. If the attorney general elects to participate in an administrative or judicial process, pertaining to federal environmental legislation or regulations, which detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

3. For purposes of this section, "expenses" include administrative costs, consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Gifts - Grants - Donations.

The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

SECTION 4. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:

a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and

b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $1,500,000, or so much of the sum as may be necessary, which the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly

HB 1432 + HB 1014
4-2-15

#4

15.0867.02003
Title.

Prepared by the Legislative Council staff for
Senator Carlisle
April 1, 2015

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1443

Page 1, line 3, after the second semicolon insert "and"

Page 1, line 3, remove "; to provide an effective"

Page 1, line 4, remove "date; and to provide an expiration date"

Page 1, line 8, remove "**(Effective through June 30, 2017)**"

Page 1, line 15, replace "one and one-half" with "two"

Page 1, line 22, remove "new construction and"

Page 1, line 23, remove "renovation of critical access hospitals;"

Page 2, line 2, remove ", not to"

Page 2, remove lines 3 and 4

Page 2, line 5, remove "issued for critical access hospitals may not exceed thirty-five million dollars"

Page 2, remove lines 24 through 31

Page 3, remove lines 1 through 30

Page 4, remove lines 1 through 3

Page 4, line 6, remove "by the state treasurer under subsection 1 or 4 of section 1 or by the department of"

Page 4, line 7, remove "transportation"

Page 4, line 7, remove "subsection 1 of section 2 of"

Page 4, line 8, after the comma insert "or is anticipated to receive funds distributed from the oil and gas impact grant fund or under section 57-51-15,"

Page 4, line 10, remove "However, this section does not apply to loans for critical access hospitals."

Page 4, remove lines 11 through 15

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

This amendment:

- Changes the interest rate on loans from 1.5 to 2 percent, which is the same as the bill as introduced, but .5 percent more than the House version.
- Removes critical access hospitals from eligible projects, which was added by the House.

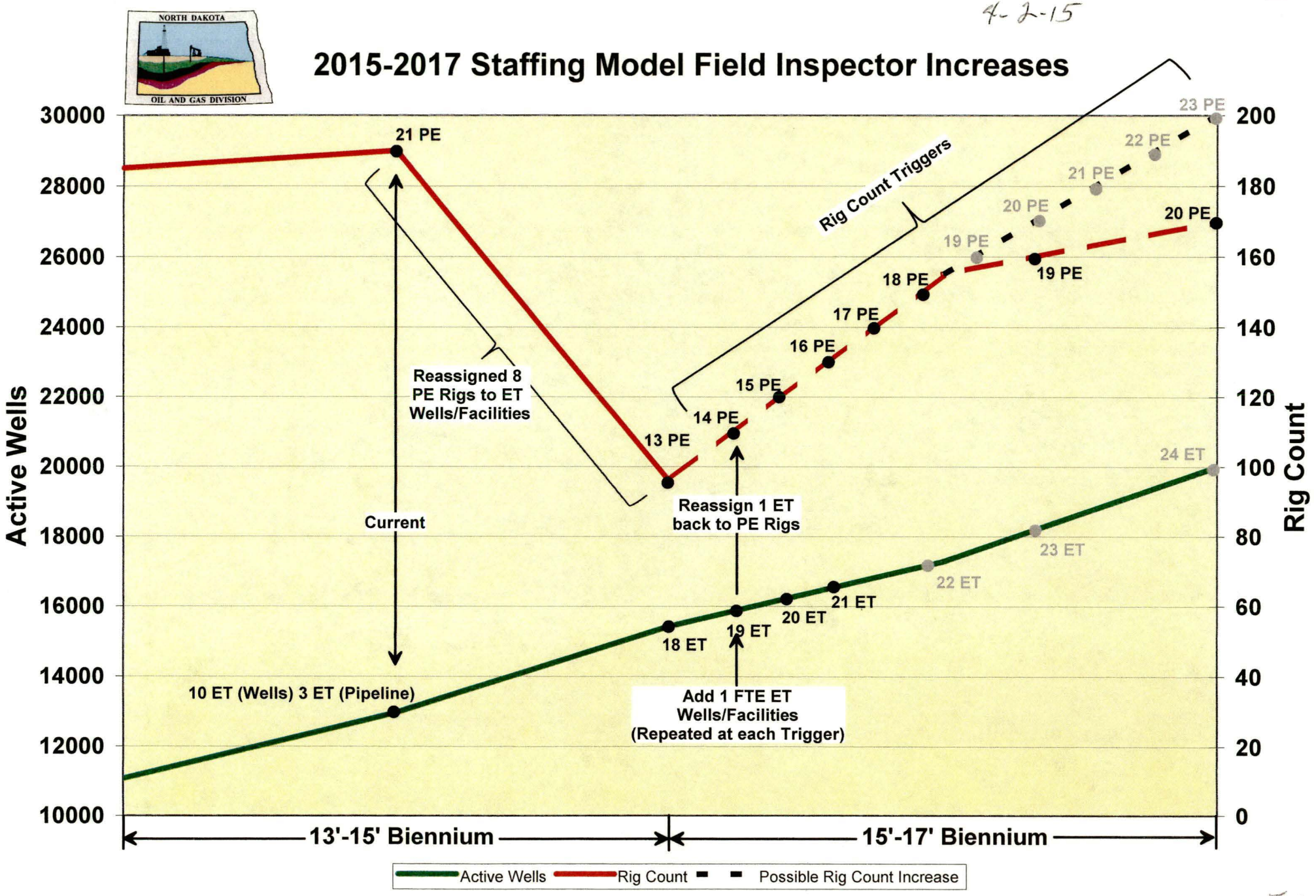
4.1

- Removes telecommunications conduit infrastructure from eligible projects effective July 1, 2017, which was added by the House version.
- Removes the limitations on loan funding for each political subdivision, which were added by the House version.
- Removes a section of legislative intent added by the House related to critical access hospital loan limitations.
- Changes the eligible borrows by precluding political subdivisions that received funds under Senate Bill No. 2103 or are anticipated to receive funds from the oil and gas impact grant fund or the oil and gas gross production tax formula from receiving a loan. The House version provided that certain political subdivisions that received funds under Senate Bill No. 2103 are ineligible.

4.2

HB 1432 +
HB 1014
4-2-15

#5



5.1

15.0961.04008
Title.

Prepared by the Legislative Council staff for
Senator Wanzek
March 31, 2015

#1
HB 1432
4-6-15

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1432

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact four new sections to chapter 4-01 of the North Dakota Century Code, relating to federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors; to provide for a transfer; to provide for a continuing appropriation; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review committee.

1. The federal environmental law impact review committee consists of:
   a. The agriculture commissioner, who shall serve as the chairman;
   b. The governor or the governor's designee;
   c. The majority leader of the house of representatives, or the leader's designee;
   d. The majority leader of the senate, or the leader's designee;
   e. One member of the legislative assembly from the minority party, selected by the chairman of the legislative management;
   f. One individual appointed by the lignite energy council;
   g. One individual appointed by the North Dakota corn growers association;
   h. One individual appointed by the North Dakota grain growers association;
   i. One individual appointed by the North Dakota petroleum council;
   j. One individual appointed by the North Dakota soybean growers association; and
   k. One individual appointed by the North Dakota stockmen's association.
2. The committee shall review federal environmental legislation and regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors and advise the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations.

3. a. Any member of the legislative assembly serving on the committee is entitled to compensation at the rate provided for attendance at interim committee meetings and reimbursement for expenses, as provided by law for state officers, if the member is attending meetings of the committee or performing duties directed by the committee.

b. The compensation and reimbursement of expenses, as provided for in this subsection, are payable by the legislative council.

SECTION 2. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Environmental impact - Cost of participation.

1. Any expenses incurred by the agriculture commissioner or by the federal environmental law impact review committee in meeting the requirements of section 1 of this Act must be paid by the agriculture commissioner from the federal environmental law impact fund.

2. If the attorney general elects to participate in an administrative or judicial process, pertaining to federal environmental legislation or regulations, which detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, any expenses incurred by the attorney general in the participation must be paid by the agriculture commissioner from the federal environmental law impact review fund.

3. For purposes of this section, "expenses" include administrative costs, consulting fees, research costs, expert witness fees, attorney fees, and travel costs.

SECTION 3. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Gifts - Grants - Donations.

The agriculture commissioner may accept gifts, grants, and donations for the purposes set forth in section 2 of this Act, provided the commissioner posts the amount and source of any gifts, grants, and donations on the department of agriculture's website. Any moneys received in accordance with this section must be deposited in the federal environmental law impact review fund.

SECTION 4. A new section to chapter 4-01 of the North Dakota Century Code is created and enacted as follows:

Federal environmental law impact review fund - Continuing appropriation.

1. The federal environmental law impact review fund consists of:

a. Any moneys appropriated or transferred for the purposes set forth in section 2 of this Act; and

b. Any gifts, grants, and donations forwarded to the agriculture commissioner for the purposes set forth in section 2 of this Act.

2. All moneys in the federal environmental law impact review fund are appropriated to the commissioner on a continuing basis for the purposes set forth in section 2 of this Act.

SECTION 5. APPROPRIATION - TRANSFER - FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW FUND. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $1,500,000, or so much of the sum as may be necessary, which the office of management and budget shall transfer to the federal environmental law impact review fund, for the purpose of funding the state's participation in administrative or judicial processes based on federal environmental legislation or regulations that detrimentally impact or have the potential to detrimentally impact the state's agricultural, energy, or oil production sectors, for the biennium beginning July 1, 2015, and ending June 30, 2017. The office of management and budget shall transfer sums under this section at the time and in the amount directed by the agriculture commissioner."

Renumber accordingly