2021 SENATE ENERGY AND NATURAL RESOURCES

SB 2238

2021 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Peace Garden Room, State Capitol

SB 2238
2/11/2021 AM

A BILL for an Act to create and enact section 23.1-06-16 of the North Dakota Century Code, relating to the state regional haze plan; to provide a penalty; and to declare an emergency.

Chairman Kreun, called the committee to order
Senators Patten, Schaible, Bell, Roers, Piepkorn, and Kreun all present

Discussion Topics:

- Visibility, Haze, and EPA Planning
- Emissions

Senator Bell, District 33, introduced the bill and testified in favor #6358, 6359, 6360 (9:01am)

David Glatt, North Dakota Department of Environmental Quality, Director, testified in favor #6304 (9:07am)

Jason Bohrer, Lignite Energy Council, President, testified in favor (9:08am)

Scott Skokos, Dakota Resource Council, Executive Director, testified opposed #6318 (9:10am)

Elizabeth Loos, Badlands Conservation Alliance, Executive Director, testified opposed #6340 (9:14am)

Additional written testimony:

Michael Nasi, Jackson Walker, testified in favor #6351

John Schuh, Public Service Commission, Staff Attorney, testified in favor #6264

Kevin Herrmann, testified opposed #6344

Chairman Kreun called the hearing to a close at 9:22am

Dave Owen, Committee Clerk

Testimony ID#6358

Senator Jessica Bell
District 33

The bill in front of you addresses the federal Regional Haze rule. We've all heard about it, and the state has spent an inordinate amount of money defending its position on how to best implement the rule requirements at the state level. Even though the Regional Haze rule is a federal rule, states get a say in how that rule is implemented. This is a rule based on visibility improvements at selected national parks, with the end goal to achieve "natural" visibility by 2064. Every ten years the state updates their State Implementation Plan (SIP) utilizing guidelines EPA creates to reflect reasonable progress toward the ultimate goal of natural visibility. These plans need to be approved by EPA as well, which can be a difficult achievement in an administration that's show exceptional disdain toward our fossil fuel industry. There are glidepaths and natural conditions and modeling involved, all interacting in complicated ways, but the general concepts and goals for the SIPs are identified in this bill. Making progress toward visibility improvements is a worthy goal, and something this bill assists in achieving by creating some wide guideposts for the state to follow when it is developing its plan.

I've attached some amendments to my online testimony. As far as I know, the amendments satisfy any concerns the DEQ or utilities may have had. The amendment is 21.0742.02004. The bill first directs the state to develop a regional haze plan, then to analyze the causes of visibility impairment. It then directs the DEQ to take into consideration the level of visibility improvement any investments in additional control measures would cost and weigh the benefit of the two, but only if it is necessary to do so if no progress is made in visibility improvements prior to this analysis. It then allows the DEQ to develop a new plan if the EPA denies approval of our SIP and states any new control measures required in the plan are only required once EPA approval is received. The last section says if there is something required that shouldn't have been, the state cannot take action to require it anyway. Section 2 declares an emergency so this goes into effect prior to the state's submittal of our SIP to the EPA.

We separated the Department of Environmental Quality from the Department of Health in 2017 so we can better handle state implementation of federal programs such as this. We want to do everything we can to defend our position as a state when we have deference to make our own decisions on how a rule like this is implemented. This bill helps bolster that position and makes clear we will implement a plan that follows the ultimate goal of the rule – visibility improvements. We will not be requiring private businesses to make unnecessary investments in their private assets unless we have to to meet the rule of the federal law. Governor Burgum's press release (attached) from last week said it best.

21.0742.02004

Sixty-seventh
Legislative Assembly
of North Dakota

SENATE BILL NO. 2238

Introduced by

Senator Bell

A BILL for an Act to create and enact section 23.1-06-16 of the North Dakota Century Code, relating to the state regional haze plan; to provide a penalty; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Section 23.1-06-16 of the North Dakota Century Code is created and enacted as follows:

23.1-06-16. Implementation of federal regional haze program requirements.

1. Consistent with the federal Clean Air Act [42 U.S.C. 7401 et seq.] and the regulations adopted under the Clean Air Act, the department shall develop and implement a state regional haze plan ~~for making reasonable progress toward improving visibility in mandatory class I federal areas, as defined under the Clean Air Act,~~ in accordance with this section.
2. The state regional haze plan must include~~:~~

~~a. An~~ an analysis of the ~~primary causes of visibility degradation in the state's mandatory class I federal areas, including~~ natural and international causes of visibility ~~degradation;~~

~~b. An analysis of the available and technically feasible control measures most likely to improve visibility in class I federal areas, including control measures that may be applied to stationary sources. In conducting the analysis, the department must:~~

~~(1) Consider the level of visibility improvement achievable by each control measure evaluated, including whether the control measures individually and collectively can improve visibility by more than a de minimis amount, more than a humanly perceptible amount, and more than the amount needed to~~

~~make reasonable progress toward natural visibility conditions in mandatory class I federal areas by 2064;~~

~~(2) Consider, based on site-specific information, the total cost of implementing each control measure; the incremental cost of implementing each control measure compared to other control measures; and, for electric generating units, the potential impact to the price of electricity; and~~

~~(3) Weigh the total and incremental cost of each individual control measure against the visibility improvements each individual control measure is projected to achieve at mandatory class I federal areas.~~

~~3. The state regional haze plan may mandate only new control measures the department determines, based on the analysis under subsection 2, are necessary to make reasonable progress toward meeting the national goal of visibility improvement required by the Clean Air Act and further defined by the United States environmental protection agency to be natural visibility conditions by 2064.~~

~~4. Any control measures imposed on stationary sources subject to permitting under this chapter must be adopted through individual source permitting actions that must allow each source the flexibility to achieve the same level of emission reductions through alternative control measures.~~

~~5. Before submitting the state regional haze plan to the environmental protection agency, the department shall submit the plan to the energy and natural resources committees of the North Dakota senate and house of representatives for review. Unless the legislative assembly disapproves the plan by a concurrent resolution, the department shall comply, to the extent feasible, with the environmental protection agency's deadline to submit the state regional haze plan to the environmental protection agency. If either of the legislative energy and natural resources committees or~~impairment.

3. In developing a periodic comprehensive revision of the state implementation plan, the department shall consider whether additional measures are necessary to make reasonable progress toward meeting the national goal of visibility improvement, as required by the Clean Air Act and further defined by the United States environmental protection agency to be natural visibility conditions by 2064. The department may not

require controls the department has determined serve only to increase total costs with little corresponding visibility benefit.

4. If the environmental protection agency disapproves the state regional haze plan, the department ~~shall~~may develop and submit as expeditiously as possible a revised plan to address the reasons for the disapproval in accordance with the requirements of this section.

~~6.~~5. Any new control measures mandated by the state regional haze plan are effective only upon final approval by the environmental protection agency.

6. If federal laws, a federal court, or a final federal agency action renders any control measures included in the state plan unenforceable by the environmental protection agency, the requirement to implement the measures may not be enforced under state law to the same extent the measures are unenforceable under federal law.

~~7. The department may not include in the state regional haze plan any mandatory control measures that have been implemented previously only with the direct assistance of financial support from the state or federal government through a program intended to encourage the development of emerging emission reduction technologies and techniques.~~

SECTION 2. EMERGENCY. This Act is declared to be an emergency measure.

Testimony ID#6360

Bell, Jessica K.

From: Nowatzki, Mike
Sent: Tuesday, February 2, 2021 2:07 PM
To: Nowatzki, Mike
Subject: BURGUM DIRECTS AGENCIES TO EVALUATE IMPACTS OF BIDEN ADMINISTRATION'S EXECUTIVE ORDERS ON ENERGY INDUSTRY

NORTH Dakota | Office of the Governor
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Doug Burgum
GOVERNOR

NEWS: FOR IMMEDIATE RELEASE

Burgum directs agencies to evaluate impacts of Biden administration's executive orders on energy industry

VIEW THIS RELEASE ONLINE: governor.ND.gov

BISMARCK, N.D. (FEB. 2, 2021) – Gov. Doug Burgum today signed an executive order directing state Cabinet agencies to determine the impacts of recent executive orders issued by the Biden administration on North Dakota's energy industry and to identify opportunities to challenge federal overreach where necessary.

"The Biden administration's recent executive orders pose a serious threat to American energy security, our nation's economic growth and the tens of thousands of North Dakotans whose livelihoods depend on the oil, gas and coal industries. Today we're directing our state agencies to determine the fiscal, economic and workforce impacts of this regulatory overreach and identify ways to counter these harmful orders, including defending our state's rights," Burgum said. "We will pursue all available avenues to ensure that North Dakota remains a powerhouse for the nation and a beacon of innovation, entrepreneurship and responsible, clean energy development."

"No one cares more about North Dakota's environment than the people who live here, and we have some of the country's cleanest air and water to prove it. As the nation's No. 2 oil producing state and No. 6 energy producer overall, we know that only innovation, not regulation, will provide a viable path forward for stable, low-cost, clean energy. Even if all American greenhouse gas emissions ceased, emissions from developing nations would continue to increase," Burgum added. "By pursuing an all-of-the-above energy strategy and leading the advancement of innovative technology such as carbon capture, utilization and storage, we can continue to produce clean energy here at home and export these environmentally sound solutions to drive global emissions down."

The executive order can be viewed here.

— # # # —

CONTACT:

Mike Nowatzki
mnowatzki@nd.gov
701.328.2424

Mike Kennedy
mikennedy@nd.gov
701.328.2937

600 E Boulevard Ave.
Bismarck ND 58505-0001
PHONE: 701.328.2200

Testimony ID#6304

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Testimony in Support of
Senate Bill No. 2238
Senate Energy & Natural Resources Committee
February 11, 2021

TESTIMONY OF
David Glatt, Director of North Dakota Department of Environmental Quality

Chairman Kruen and members of the Senate Energy and Natural Resources Committee, my name is David Glatt, Director of the North Dakota Department of Environmental Quality (DEQ). The DEQ is responsible for the implementation of many of the environmental protection programs in the state. I am here today to testify in support of SB 2238.

The DEQ, through an agreement with the US EPA, is responsible for the implementation of the federal Clean Air Act (CAA) in North Dakota. Through the efforts of the DEQ, industry and citizens of the state, North Dakota is one of a handful of states that meets all of the national ambient air quality standards. Our high level of air quality is accomplished through compliance outreach, technical evaluations, permitting programs, monitoring and enforcement activities. Another section of the CAA requires that the DEQ develop a plan that addresses visibility impairing emissions from a variety of source categories such as electric generation facilities. These plans, known as the Regional Haze State Implementation Plans (SIPs), are routinely reviewed and updated by the DEQ and approved by the US EPA. SIP plan development by the state and subsequent review by the US EPA can be at times contentious. The DEQ strives to follow the law and science in making our Regional Haze SIP determinations, and we feel that SB 2238 will support us in this endeavor.

This concludes my testimony, and I will stand for any questions from the committee.

Testimony of Dakota Resource Council
SB 2238
February 11, 2021
Scott Skokos # 256

Chairman Kruen & members of the committee, my name is Scott Skokos and I am testifying on behalf of Dakota Resource Council and our members. DRC was founded in the late 1970s by farmers and ranchers that wanted to promote sustainable use of North Dakota's natural resources and family-owned and operated agriculture. Currently DRC has over 600 dues paying members and several thousands of supporters statewide. Thank you for allowing me to testify today. I stand here today in opposition to SB 2238.

The testimony to follow reviews some of our issues with SB 2238. In our view, this proposed bill would place certain restrictions on the creation and submission of the North Dakota Regional Haze State Implementation Plan (SIP), which would be in conflict with the federal Regional Haze Rule. Many elements of this bill are unnecessary, unclear, and at odds with the Clean Air Act. As a result, if passed this bill at best could result in costly litigation, and at worst could result in North Dakota losing its ability to administer the Clean Air Act through the Department of Environmental Quality.

1. SB 2238 Creates Unnecessary Parallel Requirements

The proposed Bill includes language that generally parallels requirements already in the Regional Haze Rule. This includes some of the text in Paragraphs 1, 2.a, 2.b(3), 3, and 6. In addition, Paragraph 4 would require that any required emission limit be configured such that a pollution source has the flexibility to employ any pollution control it desires in order to meet that limit. Although control cost analyses focus on specific controls that have been identified as being technically feasible, the final emission limit can be met using any technology the pollution source desires. This has been a long standing feature of the Regional Haze Rule and EPA Guidance and there is no need to reinforce it through legislation.

The overall effects of these parallel requirements would be to introduce unnecessary duplication, and cause the North Dakota Department of Environmental Quality to spend resources comparing this proposed legislation to the Regional Haze Rule in an attempt to identify conflicts. Thus, these requirements serve no useful purpose and should not be finalized.

2. SB 2238 Creates Requirements that would be in Conflict with the Regional Haze Rule

The following sections detail specific aspects of this Bill that if finalized would be in conflict with the Regional Haze Rule:

a. *The Price of Electricity is Not a Consideration under the Regional Haze Rule*

Paragraph 2.b(2) would require that when considering controls for Electric Generating Units, the North Dakota Department of Environmental Quality must consider the potential impact on the price of electricity. There is no place in the Regional Haze Rule for such a consideration. Controls for the upcoming North Dakota Regional Haze SIP would be considered under the "Long Term Strategy" section of the Regional Haze Rule, mainly covered in 40 CFR Section 51.308(f). Specifically, Section 51.308(f)(2)(i) requires that North Dakota "evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic source of visibility impairment." These four "reasonable progress factors," are the main metrics states use when considering regional haze emission controls. Notably, there is no consideration given to the price of electricity here or in other sections of the Regional Haze Rule. However, if a control introduces such a burden to the pollution control source that it is in danger of going out of business, the Regional Haze Rule and EPA's Guidance have noted that such a source can submit an affordability analysis which can be considered by states and EPA. EPA's position on the impact on the price of electricity and the affordability of controls are long standing features of the Regional Haze Rule and there are a number of examples of EPA expressing these views in responses to comments received in its proposed actions. Therefore, because the text in Paragraph 2.(b)2 would be in conflict with the Regional Haze Rule, it should not be finalized.

b. SB 2238 Could Result in a Separate Review of the North Dakota Regional Haze SIP, Which Could Result in A Missed Deadline

Section 51.308(f) requires that the North Dakota Regional Haze SIP be Submitted to EPA by July 31, 2021. The proposed legislative review required under Paragraph 5 could therefore cause North Dakota to miss this deadline. Should North Dakota miss this deadline, EPA would be obligated to start a "Federal Implementation Plan (FIP) clock." Under Section 110(c) of the Federal Clean Air Act, EPA is required to promulgate a Federal Implementation Plan (FIP) within two years of the effective date of a finding that a state has failed to submit a SIP. This occurred in the previous round of Regional Haze SIPs and culminated with EPA issuing a number of FIPs.

Even if the North Dakota Regional Haze SIP is modified according to direction from the North Dakota Legislature and submitted on time, it may include elements that are in conflict with the Regional Haze Rule, placing it in danger of being rejected by EPA. Therefore, this requirement should not be finalized.

c. Paragraph 2(b)(1) of SB 2238 Impermissibly Grafts a "Perceptibility" Factor onto the Statute.

Paragraph 2(b)(1) would require DEQ to consider whether individual controls "improve visibility by more than a de minimis amount, more than a humanly perceptible amount." This would effectively graft a fifth "perceptibility" factor onto the four-factor statutory definition of reasonable progress. Moreover, EPA has consistently maintained that perceptibility of visibility improvements from individual controls should not be a determinative factor. This is because an individual source's "contribution to haze may be significant

relative to other source contributions in the Class I area," and controls should be required if they are cost effective in terms of tons of pollution reduced per dollar because the regional haze program is designed to achieve gains in the aggregate by the total of measures reducing emissions to benefit Class I national park and wilderness visibility.

d. Paragraph 2(b)(2) and (3) of SB 2238 Impermissibly Focus on a Comparison of the Total Costs of any Individual Control to Visibility Improvements at Class I Areas.

Paragraphs 2(b)(2) and (3) require DEQ to compare the total cost of controls at an individual facility with the visibility benefit at Class I areas. Although states must calculate the capital costs of controls, EPA has consistently rejected total cost, in and of itself, as a determinative factor for controls. The cost of reducing pollution will always be more than doing nothing at all and is not in isolation an accurate metric for evaluating reasonable control costs. States must evaluate the cost of controls against the total anticipated pollution reductions. BART Guidelines, 40 C.F.R. pt. 51 app. Y(IV)(D)(4)(c). To the extent this bill attempts to supplant EPA's regulatory cost-effectiveness analysis, the proposed statute is contrary to federal law.

e. Paragraphs 6 of SB 2238 is contrary to the Clean Air Act and the Regional Haze Rule

Paragraph 6 provides that "[a]ny new control measures mandated by the state plan are effective only upon final approval by the environmental protection agency." This proposed provision conflicts with the Clean Air Act, which requires that the state implementation plan itself include "enforceable emission limitations," 42 U.S.C. § 7410(a)(2)(A), and prohibits EPA from approving any plan that is not itself enforceable under state law. *Id*. § 7410(a)(2)(E). The Regional Haze Rule, in turn, provides that each state implementation plan "must include *enforceable* emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by States having mandatory Class I Federal areas." 40 C.F.R. § 51.308(d)(3) (emphasis added). The state cannot condition the enforceability of its plan on federal approval.

f. Paragraph 7 of SB 2238 is Ambiguous

Paragraph 7 states, "The department may not include in the state regional haze plan any mandatory control measures that have been implemented previously only with the direct assistance of financial support from the state or federal government through a program intended to encourage the development of emerging emission reduction technologies and techniques." This requirement appears to be unclear, possibly misworded, and subject to multiple interpretations, intended to either preclude certain controls or impermissibly graft on an additional requirement for controls. Regardless of the its intended formulation, it cannot usurp responsibility from the North Dakota Department of Environmental Quality to make a determination of the technical feasibility of a control under Section 51.308(f)(i) of the Regional Haze

Rule, as that would place the legal delegation of authority EPA granted North Dakota to implement the Regional Haze Program in jeopardy.

4. Conclusion

Thank you for the opportunity to testify today. DRC urges this committee to give this bill a do not pass recommendation due to the possible clean air act compliance issues that this law could create. North Dakota does not need to subject itself to unnecessary litigation or the risk of having the federal government take over its administration of the Clean Air Act.

Testimony of Badlands Conservation Alliance
SB 2238
11 February 2021
Elizabeth Loos # 342

Chairman Kreun and Members of the Energy and Natural Resources Committee:

My name is Elizabeth Loos and I am the Executive Director of Badlands Conservation Alliance. We are a non-profit organization based in western North Dakota dedicated to the wise stewardship of public lands, including the approximately 70,000 acres of Theodore Roosevelt National Park (TRNP). Many of our members live in or originated in the small communities and rural landscapes surrounding these public lands. Members hold significant familiarity with these lands and value them for a host of ecological, heritage and personal reasons, frequently through multiple generations. I appear before you today in opposition to SB 2238.

As the only national park within North Dakota's borders, TRNP is a popular tourist destination, attracting nearly 600,000 tourists each year. The entirety of TRNP is designated a mandatory Class I federal area and, as such, has the strongest clean air protections in the country, mandated by the Clean Air Act (CAA). The Regional Haze Rule (RHR) requires federal and state agencies to work together with stakeholders to restore clear skies at Class I areas around the country (which in North Dakota also includes Lostwood National Wildlife Refuge). In order to meet that requirement, ND must submit its plan to the Environmental Protection Agency by July 2021. Section 1(5) in SB 2238 would require the ND Department of Environmental Quality to submit the Regional Haze State Implementation Plan (SIP) to the ND House and Senate Energy and Natural Resource Committees for review. If this review results in a late submission of ND's SIP – which is likely – the Environmental Protection Agency (EPA) is likely to issue a Federal Implementation Plan for North Dakota. As legislators, wouldn't it be better to trust the experts at the DEQ rather than attempt to review the technical and complicated SIP?

Another issue in SB 2238 that I would like to touch on appears in Paragraph 2(b). As background, the RHR requires states to set reasonable progress goals towards achieving natural visibility conditions in all Class I areas by 2064. A four-factor analysis is required to determine if there are reasonable controls available for reducing visibility-impairing emissions. The four factors considered are: cost of compliance, time necessary for compliance, energy and non-air quality environmental impacts, and remaining useful life of the source. Lines 21-22 on page 1 of SB 2238 require DEQ to consider whether individual controls "improve visibility by more than a de minimis amount, more than a humanly perceptible amount." This would effectively result in changing the definition of reasonable progress to include a "human perceptibility" factor, which is clearly not consistent with federal law.

As I noted above, cost of compliance is one of the four factors that must be analyzed. However, lines 3-9 on page 2 of this bill require DEQ to compare the total cost of controls at an *individual* facility with the visibility benefit at Class I areas. Although the RHR requires states to calculate the capital costs of controls, EPA has rejected that total cost be decisive factor. Of course the capital cost of reducing pollution will always be higher than doing nothing at all, but it is not the only factor in evaluating reasonable control costs. In determining the cost effectiveness of a given control, states must also analyze the total anticipated reduction in pollution in Class I areas. EPA has established its cost-effectiveness analysis through regulation and state law cannot federal requirements.

Thank you for the opportunity to testify this morning. BCA urges this committee to give SB 2238 a Do Not Pass recommendation.

Testimony ID#6351

Testimony of Michael J. Nasi on SB 2238 (relating to the state regional haze plan)

My name is Michael J. Nasi and I am a partner at the law firm of Jackson Walker, LLP in Austin, Texas. I have been practicing environmental law for more than 27 years, including work on behalf of North Dakota industries, industry associations, and in coordination with North Dakota public officials and agency staff, as well as other Energy Council states and members. My practice, which specializes in air quality issues, has involved extensive experience with the Regional Haze program under the Federal Clean Air Act which is the subject of SB 2238. It is an honor to testify before the Senate Energy and Natural Resources Committee in support of SB 2238.

The overarching goal of this legislation as I understand it is to clarify key issues in a way that is rational and fully consistent with what DEQ is already planning to do. The clarifications are necessary because some of the issues addressed in the bill have been muddled with inconsistent guidance at the federal level. The bill and the Senators clarifying amendments make clear that:

a. DEQ should consider visibility benefits in evaluating control measures;

b. DEQ should consider total and incremental cost in evaluating control measures; and

c. DEQ should weigh the visibility and costs in determining which measures are necessary to make reasonable progress.

The bill also includes safeguards that help ensure state law requirements always remain consistent with federal law requirements. For example,

- New control requirements only take effect once EPA approves them, which helps avoid forcing sources to begin implementing controls that are still under review at EPA or in court; and

- If the control requirements are rescinded at the federal level, they must be automatically rescinded at the state level as well.

Some have expressed concern that the bill could slow the planning process down or allow additional challenges, raising the potential threat of an EPA-imposed Federal Implementation Plan (FIP). Those concerns are unfounded because:

- The bill only provides statutory clarification support for the approach DEQ is already planning to do.

- The bill does not require DEQ to take a position that is inconsistent with federal law—both the Obama EPA and the Trump EPA made clear that states may lawfully consider the issues I have noted that the bill clarifies.

- The bill does not create any new basis for challenging the state's plan that would not already exist under existing law.

Senate Bill 2237
Senate Bill 2238

Presented by: **Public Service Commission**

Before: **Senate Energy and Natural Resources Committee**
The Honorable Curt Kreun, Chairman

Date: **February 11, 2021**

TESTIMONY

Mr. Chairman and committee members, the Public Service Commission appreciates the opportunity to provide written comments in general support of Senate Bill 2237 and 2238.

There are few things more important to our long-term future than dependable and affordable electricity and gas service to our local businesses and residents. The Commission does not have jurisdiction over the creation or enforcement of environmental regulations on generation facilities. However, with very few exceptions, the subsequent cost impacts are borne by the retail customers under the Commission's jurisdiction. The cost of environmental compliance may result in additional capital expenditures in order to remain operating or early closure of the generation facilities. The sunk and stranded costs undoubtedly will have an impact on retail rates for the customers of our state.

As this committee considers SB 2237 and SB 2238, the Commission would request that the legislature ensure that state environmental compliance be no more scrupulous than necessary.

Testimony ID#6344

Written testimony of Senate Bill 2238

Chairman Kreun and Senate Energy and Natural Resources Committee Members

My name is Kevin Herrmann from Beulah, ND. I am representing myself.
After reading Senate Bill 2238 more than once, I am opposing of Senate Bill 2238 due to page 2 subsection 5, lines 19 to line 29. It does not make sense for the Department of Environmental Quality to submit a state regional haze plan to the legislative assembly. When did the supermajority of legislators become experts on environmental dealing with regional haze plan?
In the 65th Legislative session, Senator Bell sponsor Senate Bill 2327 which added another state agency called Department of Environmental Quality. Senate Bill 2327 set policy for what the department is supposed to do.
Now, Senate Bill 2238 will not allow the Department of Environmental Quality to do their work without the legislative assembly getting in the way of their job.

Again, I am oppose of Senate Bill 2238 unless the Senate Energy and Natural Resources committee amends in taking out subsection 5 on page 2, lines 19-29.

Kevin Herrmann
300 Fair St. SW
Beulah, ND 58523
701-873-4163

2021 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Peace Garden Room, State Capitol

SB 2238
2/11/2021 PM

A BILL for an Act to create and enact section 23.1-06-16 of the North Dakota Century Code, relating to the state regional haze plan; to provide a penalty; and to declare an emergency.

Chairman Kreun called the committee to order at 4:15pm
Senators Roers, Patten, Schaible, Piepkorn, and Kreun Present
Senator Bell absent

Discussion Topics:

- Position on the amendment from 2-11-21 AM
- Regulatory flexibility

Elizabeth Loos, Badlands Conservation Alliance, Executive Director, testified opposed #6442 (4:15pm)

David Glatt, North Dakota Department of Environmental Quality, Director, testified in favor (4:20pm)

Chairman Kreun called the committee to a close at 4:24pm

Dave Owen, Committee Clerk

Testimony ID#6442

Testimony of Badlands Conservation Alliance
SB 2238 – Amended version 2/11/21
11 February 2021
Elizabeth Loos # 342

Chairman Kreun and Members of the Energy and Natural Resources Committee:

I've had some time to review the "Christmas Tree" version of SB 2238 that included amendments introduced by Senator Bell.

From my perspective, the bill was improved by the deletions. However, it is still problematic and BCA remains opposed.

The language in new paragraph 3 (P. 2, lines 27-31, P. 3, lines 1-3) "the department may not require controls the department has determined serve only to increase total costs with little corresponding visibility benefit" is problematic. How is little corresponding visibility benefit defined? Who defines it? This language still would require ND DEQ to consider total cost, which has been consistently rejected by EPA. Again, the EPA has very clear guidelines in the Regional Haze Rule regarding the four factor analysis that is required to determine if there are reasonable controls available for reducing visibility-impairing emissions. (As I enumerated earlier, the four factors considered are: cost of compliance, time necessary for compliance, energy and non-air quality environmental impacts, and remaining useful life of the source.) This section clearly unlawfully contradicts Clean Air Act requirements, by skewing a control cost analysis to weigh such impermissible considerations as assessing the impacts of an individual control.

New paragraph 5 (P. 3, lines 7-8), reads "Any new control measures mandated by the state regional haze plan are effective only upon final approval by the environmental protection agency," is also in conflict with the CAA, which requires that the SIP itself include *enforceable* emission limitations.

Thank you for the opportunity to provide additional testimony this afternoon. BCA urges this committee to give SB 2238 a Do Not Pass recommendation.

2021 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Peace Garden Room, State Capitol

SB 2238
2/12/2021

A BILL for an Act to create and enact section 23.1-06-16 of the North Dakota Century Code, relating to the state regional haze plan; to provide a penalty; and to declare an emergency.

Chairman Kreun called the hearing to order at 10:13am
Senators Bell, Schaible, Patten, Roers, Piepkorn, and Kreun Present

Discussion Topics:

- Amendments
- Federal Plan Flexibility

Senator Bell, moved the amendment #21.0724.02004 (10:13am)

Senator Roers, seconded the amendment (10:13am)

David Blatt, Director, Department of Environmental Quality, testified in favor of the amendment (10:18am)

Move the Amendment	Vote
Senator Curt Kreun	Y
Senator Jim P. Roers	Y
Senator Dale Patten	Y
Senator Merrill Piepkorn	Y
Senator Donald Schaible	Y
Senator Jessica Unruh Bell	Y

Motion Passed 6-0-0

Senator Roers moved DO PASS AS AMENDED (10:21am)

Senator Piepkorn seconded DO PASS AS AMENDED (10:21am)

DO PASS AS AMENDED	Vote
Senator Curt Kreun	Y
Senator Jim P. Roers	Y
Senator Dale Patten	Y
Senator Merrill Piepkorn	Y
Senator Donald Schaible	Y
Senator Jessica Unruh Bell	Y

Motion Passed 6-0-0

Senator Piepkorn will carry

Chairman Kreun called the committee to a close at 10:22am

Dave Owen, Committee Clerk

21.0742.02004
Title.03000

Prepared by the Legislative Council staff for
Senator Bell
February 10, 2021

PROPOSED AMENDMENTS TO SENATE BILL NO. 2238

Page 1, line 9, remove "for making reasonable progress toward improving visibility in"

Page 1, line 10, remove "mandatory class I federal areas, as defined under the Clean Air Act,"

Page 1, line 12, remove the underscored colon

Page 1, line 13, replace "a. An" with "an"

Page 1, line 13, remove "primary causes of visibility degradation in the state's"

Page 1, line 14, remove "mandatory class I federal areas, including"

Page 1, line 15, remove "degradation;"

Page 1, remove lines 16 through 23

Page 2, remove lines 1 through 24

Page 2, line 25, replace "agency. If either of the legislative energy and natural resources committees or" with "impairment.

3. In developing a periodic comprehensive revision of the state implementation plan, the department shall consider whether additional measures are necessary to make reasonable progress toward meeting the national goal of visibility improvement, as required by the federal Clean Air Act [42 U.S.C. 7401 et seq.] and further defined by the United States environmental protection agency to be natural visibility conditions by 2064. The department may not require controls the department has determined serve only to increase total costs with little corresponding visibility benefit.

4. If"

Page 2, line 27, replace "shall" with "may"

Page 2, line 30, replace "6." with "5."

Page 2, line 30, after "state" insert "regional haze"

Page 2, line 31, after the underscored period insert:

"6."

Page 3, remove lines 5 through 9

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2238: Energy and Natural Resources Committee (Sen. Kreun, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2238 was placed on the Sixth order on the calendar.

Page 1, line 9, remove "for making reasonable progress toward improving visibility in"

Page 1, line 10, remove "mandatory class I federal areas, as defined under the Clean Air Act,"

Page 1, line 12, remove the underscored colon

Page 1, line 13, replace "a. An" with "an"

Page 1, line 13, remove "primary causes of visibility degradation in the state's"

Page 1, line 14, remove "mandatory class I federal areas, including"

Page 1, line 15, remove "degradation;"

Page 1, remove lines 16 through 23

Page 2, remove lines 1 through 24

Page 2, line 25, replace "agency. If either of the legislative energy and natural resources committees or" with "impairment.

3. In developing a periodic comprehensive revision of the state implementation plan, the department shall consider whether additional measures are necessary to make reasonable progress toward meeting the national goal of visibility improvement, as required by the federal Clean Air Act [42 U.S.C. 7401 et seq.] and further defined by the United States environmental protection agency to be natural visibility conditions by 2064. The department may not require controls the department has determined serve only to increase total costs with little corresponding visibility benefit.

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"6."

Page 3, remove lines 5 through 9

Renumber accordingly

2021 HOUSE ENERGY AND NATURAL RESOURCES

SB 2238

2021 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau AB Room, State Capitol

SB 2238
3/12/2021
10:14 AM

Relating to the state regional haze plan; to provide a penalty; and to declare an emergency.

10:14 AM

Chairman Porter opened the hearing. Roll call was taken. Present: Representatives Porter, Damschen, Anderson, Bosch, Devlin, Heinert, Keiser, Lefor, Marschall, Roers Jones, Ruby, Zubke, Guggisberg, and Ista.

Discussion Topics:

- Regional haze plan
- Visibility improvement
- Air quality improvement
- State priorities
- July plan due date
- Visibility benefits and cost

Testimony:

#8913, #8914 Sen Jessica Bell, District 33
. Jason Bohrer, President of Lignite Council oral testimony and answered questions
#8863 Jim Semerad, Director of Air Quality, ND DEQ
#8905 Elizabeth Loos, Executive Director, Badlands Conservation Alliance

10:26 am hearing closed.

Kathleen Davis, Committee Clerk

Senator Jessica Bell
District 33

The bill in front of you addresses the federal Regional Haze rule. We've all heard about it, and the state has spent an inordinate amount of money defending its position on how to best implement the rule requirements at the state level. Even though the Regional Haze rule is a federal rule, states get a say in how that rule is implemented. This is a rule based on visibility improvements at selected national parks, with the end goal to achieve "natural" visibility by 2064. Every ten years the state updates their State Implementation Plan (SIP) utilizing guidelines EPA creates to reflect reasonable progress toward the ultimate goal of natural visibility. These plans need to be approved by EPA as well, which can be a difficult achievement in an administration that's show exceptional disdain toward our fossil fuel industry. There are glidepaths and natural conditions and modeling involved, all interacting in complicated ways, but the general concepts and goals for the SIPs are identified in this bill. Making progress toward visibility improvements is a worthy goal, and something this bill assists in achieving by creating some wide guideposts for the state to follow when it is developing its plan.

The bill first directs the state to develop a regional haze plan, then to analyze the causes of visibility impairment. It then directs the DEQ to take into consideration the level of visibility improvement any investments in additional control measures would cost and weigh the benefit of the two, but only if it is necessary to do so if no progress is made in visibility improvements prior to this analysis. It then allows the DEQ to develop a new plan if the EPA denies approval of our SIP and states any new control measures required in the plan are only required once EPA approval is received. The last section says if there is something required that shouldn't have been, the state cannot take action to require it anyway. Section 2 declares an emergency so this goes into effect prior to the state's submittal of our SIP to the EPA.

We separated the Department of Environmental Quality from the Department of Health in 2017 so we can better handle state implementation of federal programs such as this. We want to do everything we can to defend our position as a state when we have deference to make our own decisions on how a rule like this is implemented. This bill helps bolster that position and makes clear we will implement a plan that follows the ultimate goal of the rule – visibility improvements. We will not be requiring private businesses to make unnecessary investments in their private assets unless we have to to meet the rule of the federal law. Governor Burgum's press release (attached) from last week said it best.

Bell, Jessica K.

From: Nowatzki, Mike
Sent: Tuesday, February 2, 2021 2:07 PM
To: Nowatzki, Mike
Subject: BURGUM DIRECTS AGENCIES TO EVALUATE IMPACTS OF BIDEN ADMINISTRATION'S EXECUTIVE ORDERS ON ENERGY INDUSTRY

NORTH Dakota | Office of the Governor
Be Legendary.™
Doug Burgum
GOVERNOR

NEWS: FOR IMMEDIATE RELEASE

Burgum directs agencies to evaluate impacts of Biden administration's executive orders on energy industry

VIEW THIS RELEASE ONLINE: governor.ND.gov

BISMARCK, N.D. (FEB. 2, 2021) – Gov. Doug Burgum today signed an executive order directing state Cabinet agencies to determine the impacts of recent executive orders issued by the Biden administration on North Dakota's energy industry and to identify opportunities to challenge federal overreach where necessary.

"The Biden administration's recent executive orders pose a serious threat to American energy security, our nation's economic growth and the tens of thousands of North Dakotans whose livelihoods depend on the oil, gas and coal industries. Today we're directing our state agencies to determine the fiscal, economic and workforce impacts of this regulatory overreach and identify ways to counter these harmful orders, including defending our state's rights," Burgum said. "We will pursue all available avenues to ensure that North Dakota remains a powerhouse for the nation and a beacon of innovation, entrepreneurship and responsible, clean energy development."

"No one cares more about North Dakota's environment than the people who live here, and we have some of the country's cleanest air and water to prove it. As the nation's No. 2 oil producing state and No. 6 energy producer overall, we know that only innovation, not regulation, will provide a viable path forward for stable, low-cost, clean energy. Even if all American greenhouse gas emissions ceased, emissions from developing nations would continue to increase," Burgum added. "By pursuing an all-of-the-above energy strategy and leading the advancement of innovative technology such as carbon capture, utilization and storage, we can continue to produce clean energy here at home and export these environmentally sound solutions to drive global emissions down."

The executive order can be viewed here.

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CONTACT:

Mike Nowatzki
mnowatzki@nd.gov
701.328.2424

Mike Kennedy
mikennedy@nd.gov
701.328.2937

600 E Boulevard Ave.
Bismarck ND 58505-0001
PHONE: 701.328.2200

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Testimony in Support of
Senate Bill No. 2238
House Energy & Natural Resources Committee
March 12, 2021

TESTIMONY OF
Jim Semerad, Director of Air Quality

Good morning Chairman Porter and members of the House Energy and Natural Resources Committee. My name is Jim Semerad and I am the Air Quality Division Director for the North Dakota Department of Environmental Quality (DEQ). The DEQ is responsible for the implementation of many environmental protection programs in the state. I am here to testify in support of SB 2238.

The DEQ, through an agreement with the U.S. Environmental Protection Agency (EPA), is responsible for the implementation of the federal Clean Air Act (CAA) in North Dakota. Through the efforts of the DEQ, industry, and citizens of the state, North Dakota is one of a handful of states that meets all the national ambient air quality standards. Our high level of air quality is accomplished through compliance outreach, technical evaluations, permitting programs, monitoring, and enforcement activities.

Another section of the CAA requires that the DEQ develop a plan that addresses visibility impairing emissions from a variety of source categories such as electric generation facilities. These plans, known as the Regional Haze State Implementation Plans (SIPs), are routinely reviewed and updated by the DEQ and approved by the U.S. EPA. SIP plan development by the state and subsequent review by the U.S. EPA can be at times contentious. The DEQ strives to follow the law and science in making our Regional Haze SIP determinations and we feel that SB 2238 will support us in this endeavor.

This concludes my testimony and I will stand for any questions from the committee.

Testimony of Badlands Conservation Alliance
SB 2238
12 March 2021
Elizabeth Loos # 342

Chairman Porter and Members of the Energy and Natural Resources Committee:

My name is Elizabeth Loos and I am the Executive Director of Badlands Conservation Alliance. We are a non-profit organization based in western North Dakota dedicated to the wise stewardship of public lands, including the approximately 70,000 acres of Theodore Roosevelt National Park (TRNP). Many of our members live in or originated in the small communities and rural landscapes surrounding these public lands. Members hold significant familiarity with these lands and value them for a host of ecological, heritage and personal reasons, frequently through multiple generations. I appear before you today in opposition to SB 2238 in its current form.

As the only national park within North Dakota's borders, TRNP is a popular tourist destination, attracting nearly 600,000 tourists each year. The entirety of TRNP is designated a mandatory Class I federal area and, as such, has the strongest clean air protections in the country, mandated by the Clean Air Act (CAA). The Regional Haze Rule (RHR) requires federal and state agencies to work together with stakeholders to restore clear skies at Class I areas around the country. In order to meet the requirements of RHR, ND must submit its State Implementation Plan to the Environmental Protection Agency by July 2021.

The RHR requires states to set reasonable progress goals towards achieving natural visibility conditions in all Class I areas by 2064. A four-factor analysis is required under this rule to determine if there are reasonable controls available for reducing visibility-impairing emissions. The four factors considered are: cost of compliance, time necessary for compliance, energy and non-air quality environmental impacts, and remaining useful life of the source. Lines 17-18 on page 1 of SB 2238 read: "[t]he department may not require controls the department has determined serve only to increase total costs with little corresponding visibility benefit."

The EPA recognizes that states will weigh the visibility benefits of potential control measures along with those four factors, but according to its 2019 guidance document, "visibility is not an explicit fifth factor and does not have the same weight as the four statutory factors." Many individual sources contribute to regional haze, so according to the guidance document "it is not appropriate to reject a control measure for a single emission unit, a single source, or even a group of sources on the basis of the associated visibility benefits being imperceptible to the human eye.

Although the RHR requires states to calculate the capital costs of controls, EPA has rejected that total cost be decisive factor. Of course the capital cost of reducing pollution will always be higher than doing nothing at all, but it is not the only factor in evaluating reasonable control costs. In determining the cost effectiveness of a given control, states must also analyze the total anticipated reduction in pollution in Class I areas. EPA has established its cost-effectiveness analysis through regulation and state law cannot modify those federal requirements. I would suggest that the bill be amended to delete lines 17-18.

Thank you for the opportunity to testify this morning.

2021 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau AB Room, State Capitol

SB 2238
3/12/2021
10:53 AM

Relating to the state regional haze plan; to provide a penalty; and to declare an emergency.

10:53 AM

Chairman Porter opened the hearing. Roll call was taken. Present: Representatives Porter, Damschen, Anderson, Bosch, Devlin, Heinert, Keiser, Lefor, Marschall, Roers Jones, Ruby, Zubke, Guggisberg, and Ista.

Discussion topics: Committee work.

Rep Bosch moved a Do Pass, second by Rep D Anderson.

Representatives	Vote
Representative Todd Porter	Y
Representative Chuck Damschen	Y
Representative Dick Anderson	Y
Representative Glenn Bosch	Y
Representative Bill Devlin	Y
Representative Ron Guggisberg	Y
Representative Pat D. Heinert	Y
Representative Zachary Ista	Y
Representative George Keiser	Y
Representative Mike Lefor	Y
Representative Andrew Marschall	Y
Representative Shannon Roers Jones	Y
Representative Matthew Ruby	Y
Representative Denton Zubke	Y

Motion carried. 14 – 0 – 0 Rep Lefor is carrier.

10:55 am hearing closed.

Kathleen Davis, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2238, as engrossed: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2238 was placed on the Fourteenth order on the calendar.