2023 SENATE AGRICULTURE AND VETERANS AFFAIRS

SB 2062

2023 SENATE STANDING COMMITTEE MINUTES

Agriculture and Veterans Affairs Committee
Fort Union Room, State Capitol

SB 2062
1/13/2023

Relating to requirements for certification under the plant variety protection act; and to provide a penalty.

11:47 AM Chairman Luick called the meeting to order.
Members Present: Chairman Luick, Vice Chairman Myrdal, Senator Lemm, Senator Weber, Senator Weston, Senator Hogan.

Discussion Topics:

- Penalties
- Certification requirements

11:48 AM Ken Bertsch, State Seed Commissioner and Administrator of the ND State Seed Department, presented testimony # 12950 in favor of SB 2062.

11:58 AM Stu Letcher, Executive Director, ND Agricultural Association, testified verbally in support of SB 2062.

11:59 AM Chairman Luick closed the hearing.

Senator Weston moved Do Pass.
Seconded by Senator Myrdal.

Senators	Vote
Senator Larry Luick	Y
Senator Janne Myrdal	Y
Senator Kathy Hogan	Y
Senator Randy D. Lemm	Y
Senator Mark F. Weber	Y
Senator Kent Weston	Y

Motion passed. 6-0-0

Senator Weston will carry the bill

12:00 PM Chairman Luick adjourned the meeting.

Brenda Cook, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2062: Agriculture and Veterans Affairs Committee (Sen. Luick, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2062 was placed on the Eleventh order on the calendar. This bill does not affect workforce development.

2023 HOUSE AGRICULTURE

SB 2062

2023 HOUSE STANDING COMMITTEE MINUTES

Agriculture Committee
Room JW327C, State Capitol

SB 2062
3/9/2023

Relating to requirements for certification under the plant variety protection act; and to provide a penalty.

Chairman Thomas call the meeting to order 8:31 AM

Members present: Chairman Thomas, Vice Chairman Beltz, Representatives Christy, Finley-DeVille, Fisher, Headland, Henderson, Kiefert, Olson, Prichard, Schreiber-Beck, Tveit, VanWinkle.

Discussion Topics:

- Court action
- Seed labeler

In Favor:
Ken Bertsch, Commissioner, ND State Seed Department, #22214

Representative Headland moved a do pass.
Representative Fisher seconded.

Roll call vote:

Representatives	Vote
Representative Paul J. Thomas	AB
Representative Mike Beltz	Y
Representative Josh Christy	Y
Representative Lisa Finley-DeVille	Y
Representative Jay Fisher	Y
Representative Craig Headland	Y
Representative Donna Henderson	Y
Representative Dwight Kiefert	Y
Representative SuAnn Olson	Y
Representative Brandon Prichard	Y
Representative Cynthia Schreiber-Beck	Y
Representative Bill Tveit	Y
Representative Lori VanWinkle	Y

Motion passed 12-0-1

Representative S. Olson will carry the bill.

Chairman Thomas adjourned the meeting 8:53 AM

Diane Lillis, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2062: Agriculture Committee (Rep. Thomas, Chairman) recommends **DO PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2062 was placed on the Fourteenth order on the calendar.

TESTIMONY

SB 2062

Kenneth J. Bertsch
State Seed Commissioner

Testimony
Senate Bill 2062

Senate Agriculture and Veterans Affairs Committee
January 13, 2023

Good morning Mr. Chairman and members of the Senate Agriculture and Veterans Affairs Committee. For the record, my name is Ken Bertsch and I serve as State Seed Commissioner and administrator of the ND State Seed Department. I appreciate the opportunity to speak to you today regarding Senate Bill 2062, which is a measure previously approved by the State Seed Commission and subsequently introduced as an agency bill.

The Department is asking for your consideration of revisions regarding primary enforcement authority for regulatory violations involving state seed laws. We are also seeking to update references in state law to federal Plant Variety Protection Act (PVPA) language and to make consistent the penalty provisions across all sections of Seed Department code.

I'll walk through the bill section by section to explain the amendments being sought in SB 2062.

Section 1, page 1

Each time the Seed Department code is opened during a legislative session, the agency requests that the most current version of the PVPA is updated in our state's Century Code. The language on page 1, line 9 accomplishes this function in Chapter 4.1-53-48 of Century Code.

Section 2, page 1

The amendment in Section 2 resolves a potential ambiguity in state seed laws that has recently proven problematic for the agency and seed industry. Section 2 amendments affect the Seed Department Century Code sections governing field crop certification and regulatory activity, specifically Chapter 4.1-53-17.

As currently written (beginning on page 1, line 17), the statute's enforcement and penalty authority of the seed regulatory agency (the Seed Commissioner) could possibly be exploited to place the Commissioner in a secondary position before the court.

By way of explanation: In early 2022, a class action lawsuit was threatened by a Minnesota producer claiming soybean varieties were being incorrectly labeled and consequently damaging to purchasers. An element of the lawsuit, which was eventually settled out of court, referenced ND seed law provisions including the Commissioner's authority to enforce and penalize for violations of seed laws.

In short, current language permits a plaintiff to bypass the Commissioner and file a regulatory action directly with a court for injunctive relief. This type of lawsuit is called a ***qui tam action***-this type of suit would permit a private individual to sue on behalf of the State of North Dakota (and potentially collect adjudged administrative penalties, and even court costs and attorney's fees). In other words, "if the Commissioner won't satisfy our claim, we'll go to a judge to do it." This is a layman's look at the issue, but is accurate in terms of the problem as outlined.

Both the Seed Commissioner and Agriculture Commissioner were contacted by the defendant when the first class-action lawsuit was threatened in early 2022. Agriculture Commissioner Goehring, Dutch Bialke (our former agency Asst. Attorney General and the current Agriculture Department counsel), and I discussed this issue and all agree that this potential problem, which I believe is a weakness in the seed laws, should be addressed by proposing to the Legislature to amend the Department chapters.

This ambiguous language could encourage and facilitate nuisance or other lawsuits that lack merit. ***Qui tam*** lawsuits generally should be brought only when the State has been defrauded or in the case of a whistleblower claim. Potential seed regulatory actions are better addressed first by the state administrative enforcement authority (the Seed Commissioner in this case) and with a purposeful administrative appeal process stated in the law.

This issue is more critical in North Dakota, as our seed laws contain the highest maximum penalty provision in the U.S., at $10,000 per occurrence. The Committee should be aware that $10,000 is the maximum penalty, and has never been assessed by the Seed Department for violations other than PVPA. The violations accused in these recent class-action cases have only been related to seed labeling. Nonetheless, the potential to privately recover an administrative penalty of $10,000 or more against a defendant in a ***qui tam*** lawsuit could encourage nuisance litigation, or the threat of such litigation, in the hope of garnering a quick settlement.

The bill is designed to resolve the following problematic language in the law that may allow an individual to bypass the Seed Commissioner's authority to enforce and penalize and appeal directly to the court for relief. The current language in Section 2 reads ***"The civil penalty may be imposed by a court in a civil proceeding or by the seed commissioner…"*** putting the court before the agency in the enforcement/penalty actions.

To address this issue, SB 2062 proposes the following: ***"the civil penalty may be imposed by the seed commissioner. The seed commissioner may make application to the district court to compel payment of civil penalties imposed under this section."***

As the seed regulatory authority for the State, I believe this is a problem (for both our agency and the seed industry) that can be solved with the fairly simple amendment as stated. The language does not prohibit a stand-alone civil claim to be made to the court. It only clarifies and clearly defines that the State seed laws must be enforced by the seed regulatory authority and ensures that the seed commissioner retains the duty, responsibility and authority to administratively enforce State seed law.

I will note for the Committee: this is not a speculative request to the legislature. A small number of such suits have been threated and settled, and that this matter has quickly become an issue of national concern in seed industry circles.

This amending language is replicated in each section of code (4.1-53-57(3), 4.1-55-17(2) and 4.1-57-22) that reference the Seed Commissioner's regulatory enforcement authority.

Section 3, page 2

This section updates language in 4.1-53-61 regarding Plant Variety Protection act versions, identical to the amendment in Section 1.

Sections 4

Section 4 amendments provide the same correction in enforcement provisions to the Seed Department code governing potato certification and regulatory activities, Chapter 4.1-55-17.

Section 5, page 2

The section 5 provides for two amendments to the Departments Wholesale Potato Dealers chapter, 4.1-57-22.

First, the amendment on line 14 increases the penalty provision from one thousand to ten thousand for violations of the chapter. In 2015, the Seed Department requested and the Legislature passed an amendment to penalty provisions increasing the maximum penalties from five thousand to ten thousand dollars. At that time, we did not request the change in Chapter 4.1-57, and are asking to make the penalty provisions uniform across all Seed Department chapters at this time.

Lastly, page 3, line 6 states the same amendment to enforcement language as previously requested in Sections 2 and 4 for the chapter governing wholesale potato dealers.

Chairman Luick and committee members, thank you for your consideration of SB 2062. I ask for your support of the legislation, and will be happy to answer any questions you may have.

Kenneth J. Bertsch
State Seed Commissioner

Testimony
Senate Bill 2062

House Agriculture Committee
March 9, 2023

Good morning Mr. Chairman and members of the House Agriculture Committee. For the record, my name is Ken Bertsch and I serve as State Seed Commissioner and administrator of the ND State Seed Department. I appreciate the opportunity to speak to you today regarding Senate Bill 2062, which is a measure previously approved by the State Seed Commission and subsequently introduced as an agency bill.

The Department is asking for your consideration of revisions regarding primary enforcement authority for regulatory violations involving state seed laws. We are also seeking to update references in state law to federal Plant Variety Protection Act (PVPA) language and to make consistent the penalty provisions across all sections of Seed Department code.

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In short, current language permits a plaintiff to bypass the Commissioner and file a regulatory action directly with a court for injunctive relief. This type of lawsuit is called a ***qui tam action***-this type of suit would permit a private individual to sue on behalf of the State of North Dakota (and potentially collect adjudged administrative penalties, and even court costs and attorney's fees). In other words, "if the Commissioner won't satisfy our claim, we'll go to a judge to do it." This is a layman's look at the issue, but is accurate in terms of the problem as outlined.

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