

2011 HOUSE ENERGY AND NATURAL RESOURCES

HB 1107

2011 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee
Pioneer Room, State Capitol

HB1107
01/07/2011
12659

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Definitions and informational and adjudicative hearings on a water permit application.

Minutes:

Rep. Porter: Hearing on House Bill1107, I ask the clerk to read the title. A bill for an Act to amend and reenact section 61-04-01.1, relating to definitions and informational and adjudicative hearings on a water permit application.

Robert Shaver: currently HB 1107 provides for a more efficient procedure for public hearings and proceedings associated with water permit applications. The bill provides for an informational hearing and a adjudicative proceeding that provides all interested persons an opportunity to present oral or written comment or both on a water permit application. An informational hearing is held prior to the State Engineer issuing a decision on a water permit application. The need for an informational hearing commonly arising, when a water permit application is highly controversial, and generates a large amount of public concern. The informational hearing provides for additional public comment and allows the State Engineer to explain the water permitting process and the criteria the project considers in a evaluating the water permit application.

An adjudicative proceeding provides for an appeal on a recommended decision, prepared by the State Engineer for a water permit application. After a recommended decision is sent to the water permit applicant and all parties or persons who filed written comments, who are call parties of record within the initial thirty day comment period of the parties of record then have thirty days to review the State Engineers recommended decision. If they so choose, they can file additional written comments with the State Engineer, requesting a state adjudicative proceeding or both. The request for an adjudicative proceeding must be made in writing and must state with particularity how the person would be aggrieved by the decision, and issues and facts to be presented at the adjudicative proceeding. Examples of particularity would possibly include a mistake. That could be an issue that could be brought up that would require an adjudicative proceeding. We could possibly not fully address all of the criteria spelled out in our century code 6104 and so if we missed a certain criteria that could be the grounds of them to request and approve an adjudicative proceeding. If a request for a for an adjudicative is not made, then the State Engineer consider additional comments if any are submitted and then issue a final decision.

If a request for a adjudicative proceeding is made that State Engineer can consider additional comments, if any are submitted and then issue a

final decision. If an request for adjudicative proceeding is made the State Engineer determines an adjudicative proceeding is necessary the State Engineer desiccates the time and place for the adjudicative proceeding and serves a copy of the notice of the proceeding upon the applicant and any parties of record.

Our North Dakota Century Code 610405 only provides for an adjudicative proceeding as described in HB1107. North Dakota Century Code 610405 does not differentiate on informational hearing and adjudicative proceeding. As a result the public is often confused about the hearing process. Providing for an informational hearing also allows the State Engineer to better inform the public about the water permitting process and the concerns associated with the water permit application.

The purposed amendment to HB1107 clarify the meaning of an adjudicative as we referred to it originally an adjudicative hearing which was referred to in the original bill.

North Dakota Code 283201 defines a adjudicative proceeding as an administrative matter resulting in a agency issuing an order after an opportunity for hearing as provided or required. To be consistent with Chapter 283201 on a adjudicative hearing actually is changed to mean on a adjudicative proceeding, rather than a administrative proceeding. The term adjudicative hearing in the original bill is amended to an adjudicative proceeding.

The other issue associated with this bill, last session HB1286 exempted irrigation water users from requiring a water permit for irrigation of up to 5 acres of land. That was under North Dakota Century Code 610401.1, as defined under domestic use. The exemption should have included both commercial and non commercial irrigation projects. Both should have included both commercial and noncommercial irrigation projects. Therefore HB 1107 removes the term noncommercial in North Dakota Century Code 640101.1 which will now allow any irrigation projects either commercial or noncommercial up to 5 acres to be exempt from requiring a water permit.

Rep. Porter: on the last portion are we moving into a noncommercial projects by doing this change or what exactly are we doing by removing the noncommercial term?

Robert Shaver: Removing noncommercial would allow somebody growing Strawberries or whatever for their own use, allows them to continue doing that if they say the old law was one acre. If you exceeded one acre or irrigated one acre or more, than you were required to get a permit. This allows more flexibility for a small project.

Rep. Porter: If an individual has a large garden or a speciality crop such as this that's on 10 acres and they are using their permitted domestic well that's also supplying their house with water. Do they require a permit on top of their already existing well to do their watering during the watering season?

Robert Shaver: Yes, anything over 5 acres now that you are irrigating you can use your domestic well or any well, if you go over 5 acres, you are now required to get a permit.

Rep. Hofstad: The restriction is only acreage, is there no gallon restriction?

Robert Shaver: That's correct. It is based on that acreage if any water permit user, the volume amount kicks in if any one uses more than a twelve one half acre feet of water per year, any user requires a permit for that.

Rep. Kreun: On page 3 of the actual bill on line 11 it says a person filing a written comment, is that being referred to under line 8, the comments written? Or is that any person can file a written comment and require a hearing?

Robert Shaver: yes, it is any person can file written comments on that first 30 day period. The way the permit process operates anybody that is applying for a water permit application is required to submit the notice of application in the county paper of record once a week for 2 consecutive weeks from the date of that publication in the newspaper, the public then has the ability to send in comments or request an informational hearing if they so desire within that 30 day period. They can also request an informational after that 30 day period. We found that a certain permit generates a lot of controversy. It can slowly build to a point that towards the end, or after the 30 days expired, there is a lot on controversy floating around regarding that permit. It also allowing the public information that might be important, that we may need to consider in our evaluation. This is to better inform the public especially in highly controversial permits.

Rep. Porter: Any other questions? Saying none thank you. For the testimony and support of HB 1107 any opposition to HB 1107? We will close the hearing on HB 1107.

Rep. Kasper: Do you want to move the amendments that are attached?

Rep. Porter: Rep. Kasper moves the amendments attached to the legislation in Mr. Shaver's testimony. Is there a second?

Rep. Clark Seconded

Rep. Porter: Discussion on the amendments? Seeing none, all in favor? opposed

Rep. Kasper: Move a do pass as amended.

Rep. Hofstad: Seconded

Rep. Porter: Seconded from Rep. Hofstad. Any discussion motion carries. Committee we are done.

13 Yes 0 No 2 Absent

Do Pass As Amended Carrier: Rep. Anderson

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1107

Page 1, line 9, remove "hearing" means an administrative", after "proceeding" insert "as defined", and remove "that"

Page 2, line 6, after "proceeding" insert ", not an adjudicative proceeding,"

Page 3, line 31, remove "an adjudicative", overstrike "hearing", and immediately thereafter insert "an adjudicative proceeding"

Page 4, line 1, remove "an adjudicative", overstrike "hearing", and immediately thereafter insert "an adjudicative proceeding"

Page 4, line 3, overstrike "hearing" and immediately thereafter insert "proceeding"

Page 4, line 4, remove "an adjudicative", overstrike "hearing", and immediately thereafter insert "an adjudicative proceeding"

Page 4, line 5, remove "an"

Page 4, line 6, remove "adjudicative", overstrike "hearing", immediately thereafter insert "an adjudicative proceeding", after "or" insert "and", remove the overstrike over "if the state engineer determines", after "a hearing", insert "an adjudicative proceeding", and remove the overstrike over "is"

Page 4, line 7, remove the overstrike over "necessary"

Page 4, line 9, overstrike the first "hearing" and immediately thereafter insert "proceeding" and overstrike the second "hearing" and immediately thereafter insert "adjudicative proceeding"

Re-number accordingly

Date: 1-7-11
Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1107

House House Energy and Natural Resources Committee

Legislative Council Amendment Number _____

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

Motion Made By _____ Seconded By _____

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Hanson		
Vice Chairman Damschen	✓		Rep. Hunskor	✓	
Rep. Brabandt	✓		Rep. Kelsh	✓	
Rep. Clark	✓		Rep. Nelson	✓	
Rep. DeKrey					
Rep. Hofstad	✓				
Rep. Kasper	✓				
Rep. Keiser	✓				
Rep. Kreun	✓				
Rep. Nathe	✓				
Rep. Anderson	✓				

Total (Yes) 13 No 0

Absent 2

Floor Assignment _____

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

voice vote taken, motion carried.

January 8, 2011

VR
1/12/11
102

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1107

Page 1, line 3, replace "hearings" with "proceedings"

Page 1, line 9, remove "hearing means an administrative"

Page 1, line 9, after "proceeding" insert "" as defined"

Page 1, line 9, remove "that"

Page 2, line 6, replace "that" with ", not an adjudicative proceeding, which"

Page 3, line 31, remove "an adjudicative"

Page 3, line 31, overstrike "hearing" and insert immediately thereafter "an adjudicative proceeding"

Page 4, line 1, remove "an adjudicative"

Page 4, line 1, overstrike "hearing" and insert immediately thereafter "an adjudicative proceeding"

Page 4, line 3, remove "adjudicative"

Page 4, line 3, overstrike "hearing" and insert immediately thereafter "proceeding"

Page 4, line 4, remove the "an adjudicative"

Page 4, line 4, overstrike "hearing" and insert immediately thereafter "an adjudicative proceeding"

Page 4, line 5, remove "an"

Page 4, line 6, remove "adjudicative"

Page 4, line 6, overstrike "hearing" and insert immediately thereafter "an adjudicative proceeding"

Page 4, line 6, after "or" insert "and"

Page 4, line 6, remove the overstrike over "~~if the state engineer determines~~"

Page 4, line 6, after "hearing" insert "an adjudicative proceeding"

Page 4, line 6, remove the overstrike over "is"

Page 4, line 7, remove the overstrike over "~~necessary~~"

Page 4, line 8, remove the overstrike over the overstruck comma

Page 4, line 8, remove "adjudicative"

Page 4, line 9, overstrike the first "hearing" and insert immediately thereafter "adjudicative proceeding"

Page 4, line 9, overstrike the second "hearing" and insert immediately thereafter "adjudicative proceeding"

Renumber accordingly

Date: 1-7-11
Roll Call Vote #: 2

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1107

House House Energy and Natural Resources Committee

Legislative Council Amendment Number _____

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

Motion Made By Kasper Seconded By Hofstad

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Hanson		
Vice Chairman Damschen	✓		Rep. Hunsakor	✓	
Rep. Brabandt	✓		Rep. Kelsh	✓	
Rep. Clark	✓		Rep. Nelson	✓	
Rep. DeKrey					
Rep. Hofstad	✓				
Rep. Kasper	✓				
Rep. Keiser	✓				
Rep. Kreun	✓				
Rep. Nathe	✓				
Rep. Anderson	✓				

Total (Yes) 13 No 0

Absent 2

Floor Assignment Rep. Anderson

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

REPORT OF STANDING COMMITTEE

HB 1107: Energy and Natural Resources Committee (Rep. Porter, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (13 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1107 was placed
on the Sixth order on the calendar.

Page 1, line 3, replace "hearings" with "proceedings"

Page 1, line 9, remove "hearing" means an administrative"

Page 1, line 9, after "proceeding" insert "as defined"

Page 1, line 9, remove "that"

Page 2, line 6, replace "that" with ", not an adjudicative proceeding, which"

Page 3, line 31, remove "an adjudicative"

Page 3, line 31, overstrike "hearing" and insert immediately thereafter "an adjudicative proceeding"

Page 4, line 1, remove "an adjudicative"

Page 4, line 1, overstrike "hearing" and insert immediately thereafter "an adjudicative proceeding"

Page 4, line 3, remove "adjudicative"

Page 4, line 3, overstrike "hearing" and insert immediately thereafter "proceeding"

Page 4, line 4, remove the "an adjudicative"

Page 4, line 4, overstrike "hearing" and insert immediately thereafter "an adjudicative proceeding"

Page 4, line 5, remove "an"

Page 4, line 6, remove "adjudicative"

Page 4, line 6, overstrike "hearing" and insert immediately thereafter "an adjudicative proceeding"

Page 4, line 6, after "or" insert "and"

Page 4, line 6, remove the overstrike over "~~if the state engineer determines~~"

Page 4, line 6, after "hearing" insert "an adjudicative proceeding"

Page 4, line 6, remove the overstrike over "~~is~~"

Page 4, line 7, remove the overstrike over "~~necessary~~"

Page 4, line 8, remove the overstrike over the overstruck comma

Page 4, line 8, remove "adjudicative"

Page 4, line 9, overstrike the first "hearing" and insert immediately thereafter "adjudicative proceeding"

Page 4, line 9, overstrike the second "hearing" and insert immediately thereafter
"adjudicative proceeding"

Renumber accordingly

2011 SENATE NATURAL RESOURCES

HB 1107

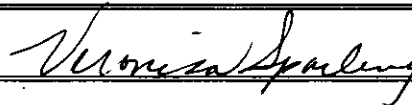
2011 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee Fort Lincoln Room, State Capitol

HB 1107
March 4, 2011
Job #14963

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to definitions and informational and adjudicative proceedings on a water permit application

Minutes:

Testimony Attached

Chairman Lyson opened the hearing on HB 1107.

Robert Shaver, Director of the Water Appropriation Division, Office of the State Engineer presented written testimony in favor of HB 1107 on behalf of Todd Sando. See **Attachment #1**.

Chairman Lyson asked for clarification of the last paragraph of his testimony.

Robert Shaver explained the wording would now make the exemption include both commercial and non-commercial.

Chairman Lyson: Is that the same thing for someone selling water for commercial use?

Robert Shaver: No, if they are selling water for an industrial use, they would need a water permit. Here they are using it specifically for irrigation.

Chairman Lyson: Aren't you giving permits now for them to sell their excess water to oil companies?

Robert Shaver: Yes, we are doing that on a temporary authorization from the Corps of Engineers. When the Corps basically locked us out of Sacagawea early this summer and we couldn't get access and we saw that this demand was really growing for the oil field, we recognized that we had existing irrigation permits that were approved and they had been irrigating. We recognized that some of them were wondering if they could just temporarily convert and use some of that water to sell to the oil field. We developed a policy internally that would temporarily allow an irrigator to request on a one year basis to temporarily cease irrigation for that one growing season and use a portion of their appropriation, (what we consider an average use amount) and that amount could be sold to the oil industry. They

would not be able to irrigate that calendar year, they would have to meter it, and report their annual use to the Water Division so they would know how much they use for that year. If the demand is still there, they will be able to apply annually. If at some point the water is being efficiently distributed, they will cease the policy.

Senator Triplett: I am assuming this works well with the rest of the administrative code?

Robert Shaver: Yes.

Chairman Lyson closed the hearing on HB 1107.

Senator Triplett: Do Pass motion

Senator Schneider: Second

Roll Call Vote: 7-0-0

Carrier: Senator Triplett

Date: 3-4
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1107

Senate Natural Resources Committee

Legislative Council Amendment Number _____

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

Motion Made By Triplett Seconded By Schneider

Senators	Yes	No	Senators	Yes	No
Chairman Lyson	✓		Senator Schneider	✓	
Vice-Chair Hogue	✓		Senator Triplett	✓	
Senator Burckhard	✓				
Senator Freborg	✓				
Senator Uglem	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Triplett

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

REPORT OF STANDING COMMITTEE

HB 1107, as engrossed: Natural Resources Committee (Sen. Lyson, Chairman)
recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed HB 1107 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

HB 1107

TESTIMONY ON HOUSE BILL 1107

House Natural Resources Committee

Robert Shaver, Director
Water Appropriations Division
Office of the State Engineer

January 7, 2011

Mr. Chairman and members of the House Natural Resource Committee, I am Robert Shaver, Director of the Water Appropriation Division, Office of the State Engineer, and I offer the following comments on House Bill No. 1107.

House Bill No. 1107 provides a more efficient procedure for public hearings and proceedings associated with water permit applications. This bill provides for an informational hearing and an adjudicative proceeding. An informational hearing is an administrative proceeding that provides all interested persons an opportunity to present oral or written comment, or both, on a water permit application. An informational hearing is held prior to the State Engineer issuing a decision on a water permit application. The need for an informational hearing commonly arises when a water permit application is highly controversial and generates a large amount of public concern. The informational hearing provides for additional public comment and allows the State Engineer to explain the water permitting process and the criteria the project area hydrologist considers in evaluating the water permit application.

An adjudicative proceeding provides for an appeal on a Recommended Decision prepared by the State Engineer for a water permit application. After a Recommended Decision is sent to the water permit applicant and all persons who filed written comments (parties of record) within the initial 30-day comment period, parties of record have 30 days to review the Recommended Decision, and if they so choose, to file additional written comments with the State Engineer, request an adjudicative proceeding, or both. The request for an adjudicative proceeding must be made in writing and must state with particularity how the person would be aggrieved by the decision and the issues and facts to be presented at the adjudicative proceeding. Examples of particularity include flaws in an analytical procedure used to evaluate the water permit application or that the State Engineer has not adequately addressed all the criteria for issuance of a water permit as prescribed by law in N.D.C.C. § 61-04-06. If a request for an adjudicative proceeding is not made, the State Engineer considers the additional comments, if any are submitted, and issues a final decision. If a request for an adjudicative proceeding is made and the State Engineer determines an adjudicative proceeding is necessary, the State Engineer designates a time and place for the adjudicative proceeding and serves a copy of the notice of proceeding upon the applicant and any parties of record.

Currently, N.D.C.C. § 61-04-05 only provides for what is essentially an adjudicative proceeding as described in House Bill No. 1107. N.D.C.C. § 61-04-05 does not differentiate an informational hearing and an adjudicative proceeding, and as a result, the public often is confused about the hearing process. Providing for an informational hearing also allows the State Engineer to better inform the public about the water permitting process and allay concerns associated with a water permit application.

The proposed amendments to House Bill No. 1107 clarify the meaning of an adjudicative hearing as referred to in the original bill. N.D.C.C. § 28-32-01(1) defines "adjudicative proceeding" as "an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required." To be consistent with § 28-32-01(1), an "adjudicative hearing" means "adjudicative proceeding" rather than an "administrative proceeding." The term "adjudicative hearing" in the original bill is amended to "adjudicative proceeding."

In addition, during the previous legislative session, House Bill No. 1286 exempted irrigation water users from the requirement of a water permit for irrigation of up to five acres of land under N.D.C.C. § 61-04-01.1(3), "Domestic use." The exemption should have included both commercial and noncommercial irrigation projects. Therefore, House Bill No. 1107 removes the term "noncommercial" in N.D.C.C. § 61-04-01.1(3), which will now allow any irrigation projects up to five acres to be exempt from requiring a water permit.

#1

TESTIMONY ON ENGROSSED HOUSE BILL 1107

Senate Natural Resources Committee

Robert Shaver, Director
Water Appropriations Division
Office of the State Engineer

March 4, 2011

Mr. Chairman and members of the Senate Natural Resource Committee, I am Robert Shaver, Director of the Water Appropriation Division, Office of the State Engineer. On behalf of the State Engineer, Todd Sando, I offer the following comments on Engrossed House Bill No. 1107.

Engrossed House Bill No. 1107 provides a more efficient procedure for public hearings and proceedings associated with water permit applications. This bill provides for an informational hearing and an adjudicative proceeding. An informational hearing is an administrative proceeding that provides all interested persons an opportunity to present oral or written comment, or both, on a water permit application. An informational hearing is held prior to the State Engineer issuing a decision on a water permit application. The need for an informational hearing commonly arises when a water permit application is highly controversial and generates a large amount of public concern. The informational hearing provides for additional public comment and allows the State Engineer to explain the water permitting process and the criteria the project area hydrologist considers in evaluating the water permit application.

An adjudicative proceeding provides for an appeal on a Recommended Decision prepared by the State Engineer for a water permit application. After a Recommended Decision is sent to the water permit applicant and all persons who filed written comments (parties of record) within the initial 30-day comment period, parties of record have 30 days to review the Recommended Decision, and if they so choose, to file additional written comments with the State Engineer, request an adjudicative proceeding, or both. The request for an adjudicative proceeding must be made in writing and must state with particularity how the person would be aggrieved by the decision and the issues and facts to be presented at the adjudicative proceeding. Examples of particularity include flaws in an analytical procedure used to evaluate the water permit application or that the State Engineer has not adequately addressed all the criteria for issuance of a water permit as prescribed by law in N.D.C.C. § 61-04-06. If a request for an adjudicative proceeding is not made, the State Engineer considers the additional comments, if any are submitted, and issues a final decision. If a request for an adjudicative proceeding is made and the State Engineer determines an adjudicative proceeding is necessary, the State Engineer designates a time and place for the adjudicative proceeding and serves a copy of the notice of proceeding upon the applicant and any parties of record.

Currently, N.D.C.C. § 61-04-05 only provides for what is essentially an adjudicative proceeding as described in Engrossed House Bill No. 1107. N.D.C.C. § 61-04-05 does not differentiate an informational hearing and an adjudicative proceeding, and as a result, the public often is confused about the hearing process. Providing for an informational hearing also allows the State Engineer to better inform the public about the water permitting process and allay concerns associated with a water permit application.

The proposed amendments to Engrossed House Bill No. 1107 clarify the meaning of an adjudicative hearing as referred to in the original bill. N.D.C.C. § 28-32-01(1) defines "adjudicative proceeding" as "an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required." To be consistent with § 28-32-01(1), an "adjudicative hearing" means "adjudicative proceeding" rather than an "administrative proceeding." The term "adjudicative hearing" in the original bill is amended to "adjudicative proceeding."

In addition, during the previous legislative session, House Bill No. 1286 exempted irrigation water users from the requirement of a water permit for irrigation of up to five acres of land under N.D.C.C. § 61-04-01.1(3), "Domestic use." The exemption should have included both commercial and noncommercial irrigation projects. Therefore, Engrossed House Bill No. 1107 removes the term "noncommercial" in N.D.C.C. § 61-04-01.1(3), which will now allow any irrigation projects up to five acres to be exempt from requiring a water permit.