

2011 HOUSE ENERGY AND NATURAL RESOURCES

HB 1226

2011 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee Pioneer Room, State Capitol

HB 1226
01/28/2011
13646

☐ Conference Committee

Committee Clerk Signature



Minutes:

3 "attached testimony."

Rep. Porter: We will open the hearing HB 1226.

Rep. Nelson: I have been asked by people where and what is the purpose of this bill. Where is easy, it comes from the rules of the sovereign land management under the State Water Commission action and administrative code. (see attachment 1)

Rep. Porter: Are there any questions for Rep. Nelson?

Rep. Kasper: Does your bill go far enough or is it strong enough to assert that our North Dakota navigable waters cannot be used by the Federal Government?

Rep. Nelson: I don't think we can pass any law that could go far enough to say the feds cannot de surf us. The thing that we can change is how our state agencies administer things and what the water and the concerns with the oil are. I could assert that the State of North Dakota owns all the mineral rights under all of the potholes in Northwest North Dakota. Since the Clean Water Act was written for navigable waters and clearly under E.P.A. interruption applies to those potholes therefore the potholes are navigable waters and in the Clean Water Act the word potholes appears because potholes can be navigable if there are part of a chain of navigation.

The state would be wealthy but I wouldn't be able to live here. There is confusion between navigable and jurisdictional. Navigable is often being interrupted as if you float a canoe it is navigable even though it is not used in commerce. I would like to make a move towards a state position on who owns it.

Rep. Kasper: Would this bill give us standing if the State of North Dakota thought the Federal Government was reaching beyond where they should?

Rep. Nelson: It has affect because this list has often used the term traditional navigable waters in the State of North Dakota.

Rep. Kasper: What would be the effect if we added the words "not limited to including but not limited to the Missouri river?"

Rep. Nelson: This goes back to where the states agencies want to be. There are probably waters out there that should be added to this list but we haven't done that.

Rep. Kasper: Isn't the Little Missouri part of that? Should we have any emergency clause to get this into law as quickly as we can?

Rep. Nelson: I think it should have an emergency clause. As far as the navigation that goes back to how the feds term the word navigable.

Rep. Clark: Have other states looked at this?

Rep. Nelson: I know states have been thinking about this. Every state has to manage the waters some way. Most states don't have prairie potholes.

Rep. Damschen: Is the State Water Commission attempting to change the existing definition of navigable?

Rep. Nelson: I don't know that they are trying to change it. I do know changing this to a general rule was part of that State's Strategic Plan that they handed out to all of you. Look it up and see what they did.

Rep. Porter: Are there any questions for Rep. Nelson? Is there any further in support of HB 1226? Is there any opposition to HB 1226?

Bruce Engelhardt: I am the director of the State Water Development Division of the State Water Commission. The testimony that was handed out this morning has John Paczkowski's name on it, he is the head of regulatory. I am testifying in behalf of Todd Sando who can't be here. I speak of opposition of HB 1226. This bill seeks to add the definition for navigable waters to the North Dakota Century Code. The term navigable waters are already defined in subsection 5. Under the State Constitution all the waters of the state are considered waters of the state by the people of the state whether they are navigable or not. (see attachment 2.)

Rep. Damschen: Is the State Water Commission planning to change the definition of navigable waters?

Bruce Engelhardt: No we aren't.

Rep. Damschen: If that was the case would that have to be done through legislation?

Bruce Engelhardt: If there were reasons, for instance a river or lake adjudicated to be navigable and it was decided to modify the list to add another water body to the list that can be done by administrative rule. Changing the overall definition, that is Constitutional issue. It couldn't be done by Administrative Rule.

Rep. Hofstad: As the waters of a navigable water recede and the land owner changes, how would we handle that issue?

Bruce Engelhardt: With the issue of Devils Lake a lot of the counties around Devils Lake are still charging property taxes at a reduced rate to the land owners with the idea that is a way for them to maintain some method of holding title for when that lake recedes. We did face this same issue on Devils Lake back in the early part of the 1900's. Hopefully that would revert back to the land owner that holds the title.

Rep. Porter: Who would own the minerals?

Bruce Engelhardt: I am not qualified to answer that.

Rep. Kasper: what is the effect to the Administrative Code definition that you gave us by adding the first line of the bill?

Bruce Engelhardt: I don't see where that would have any impact.

Rep. Kasper: Then your biggest concern is going to be to "codify" and you don't like the last sentence.

Bruce Engelhardt: The last sentence is the biggest concern.

Rep. Porter: Why is that your biggest concern?

Bruce Engelhardt: The first crossing on the Red River is about one mile south of the Canadian border so if this were codified into law you could make the argument that the Red River above the Pembina was not navigable which is not the case.

Rep. Kasper: Give me more information about the First Crossing.

Bruce Engelhardt: The Red River was used for commerce and navigation up stream all the way past Fargo. Those forks, if they haven't already will find that breach was navigable, by saying it includes waters up to the First Crossing as you move upriver the first crossing above that is not navigable or sovereign land which is not the case.

Rep. Kasper: What does it mean to be the First Crossing?

Bruce Engelhardt: I don't think it is explained well in this bill which is also part of our concern we don't know what that means either. My interruption is, if a river crosses the river by the border of North Dakota or if it is a part to another river within the state, either way you would start at the most downstream point of that river in the state as you work upstream the first road or railroad crossing, this would be the first crossing.

Rep. Nelson: If a private business wants to put a business on navigable water would they be allowed to impede navigation?

Bruce Engelhardt: If anyone wants to put a structure across the navigable water they need a sovereign land permit from the State of North Dakota.

Rep. Nelson: I am thinking of the railroad bridge in Bismarck. That bridge had to allow navigation correct?

Bruce Engelhardt: That is correct.

Rep. Nelson: We have the main line of the Burlington Northern railroad that is being impacted by Devils Lake, if the water stays up they will have to do a major restructuring including bridge work. If Devils Lake is navigable the first crossing would be Highway 2. Does Burlington Northern have to put a crossing in on that navigable water that would allow navigation to continue.

Bruce Engelhardt: When the sovereign permits are issued on other navigable Rivers, that are considered, we don't require that bridges be built to pass a steamboat or a river tug.

Rep. Nelson: Do you have any ideas as far as something that would be reasonable as a wording to say "we don't go up the river to the last drop?"

Bruce Engelhardt: I don't and I think the court history is clear that land below the high water mark of a body of water is sovereign land of the state.

Rep. Nelson: In Devils Lake we have many lakes. Would you interrupt Devils Lake to be just Devils Lake or include all the other named lakes?

Bruce Engelhardt: All the other lakes that are below 1451 are part of Devils Lake which includes Stump Lake and most of the chain of lakes to the North etc.

Rep. Porter: Are there any further questions for Mr. Engelhardt? Is there further testimony in opposition to HB 1226?

David Glatt: I am chief of the Environmental Health Section of the North Dakota Department of Health. I am here today to testify in opposition to HB 1226. The Department of Health is in opposition because we are concerned it could result in confusion in the regulation of water resources in the state. (see attachment 3)

Rep. Porter: Are there any questions for Mr. Glatt?

Rep. Nelson: Do you follow the definitions of the code today?

David Glatt: We do too a certain extend as it relates to the environmental part of it. We have jurisdiction for waters of the state. Prairie potholes that are confined to piece of property and do not impact groundwater are not part of waters of that we would regulate.

Rep. Nelson: The state agencies have authority on all the waters in the state, in the air, on the land or in the land but the Federal Government does not and we shouldn't use the Federal government as a standard for where and when the state regulates.

David Glatt: There is a fair amount of discretion that we use in regulating waters of the state. The Federal Government has very limited jurisdiction over ground water. We understand the Federal regulations but we implement at the state level. For all state and purposes is broad brush, that means anything. As we get into the environmental end of it I am concerned that this may have some impact that would have some issues that we don't want to see.

Rep. Porter: Are there further questions for Mr. Glatt? We will close the hearing on HB 1226.

2011 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee
Pioneer Room, State Capitol

HB 1226
02/3/2011
13924

☐ Conference Committee

Committee Clerk Signature

J. Minuth

Minutes:

Rep. Porter: We have HB 1226 in front of us.

Rep. DeKrey: I move a do not pass.

Rep. Nathe: Second

Rep. Porter: Is there any discussion?

Rep. Nelson: What this is doing is moving up what is in rule in into Century Code. If we were to keep it there are a couple of things that could be changed. The last line really does need to go away. We would have the choice to make it for all the state agencies and purposes or not. We could make it for the State Engineers. My concern is, we don't have a hard list. The State Engineer can determine that something is navigable. That opens up the whole issue of sovereign land and waters. I would like to try a long term to get away from that situation because as it currently sets there is question of whether when a person puts a structure on what is not designated as navigable water, of having to go through a permitting process as if it was a navigable water because it might be a navigable water. That is my main concern of why I would like to do it. I ask that you do a do not pass so we can clean this up.

Rep. Porter: Is there any further discussion? The clerk will call the roll on a do not pass. Motion Carries

Yes 11 No 4 Absent 0 Carrier: Rep. Hofstad

Date: 2-3-11
Roll Call Vote #: 1226

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

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 Rep. DeKrey Seconded By Rep. Nathe

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) 11 No 4

Absent 0

Floor Assignment Rep. Hofstad

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

22-013

REPORT OF STANDING COMMITTEE

HB 1226: Energy and Natural Resources Committee (Rep. Porter, Chairman)
recommends **DO NOT PASS** (11 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING).
HB 1226 was placed on the Eleventh order on the calendar.

2011 TESTIMONY

HB 1226

Testimony before the House Energy and Natural Resources Committee by Rep. Marvin E. Nelson 1/28/2011 On HB1226

I've been asked by quite a few people just where and what the purpose of this bill is. Where is easy, it comes from the rules of sovereign land management under the State Water Commission section of the Administrative code. Here that small section is.

89-10-01-03. Definitions.

The following definitions apply to this article:

1. "Authorization" means a permit, easement, lease, or management agreement approved and granted by the state engineer after application; and the authority granted in sections 89-10-01-10 and 89-10-01-19.

2. "Boardwalk" means a walk constructed of planking.

3. "Grantee" means the person, including that person's assigns, successors, and agents who are authorized pursuant to an authorization.

4. "Navigable waters" means any waters which were in fact navigable at time of statehood, that is, were used or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water, including the Missouri River, the Yellowstone River, the Red River of the North from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, Devils Lake, Painted Woods Lake, and Sweetwater Lake.

5. "Ordinary high watermark" means that line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable waters are considered to be below the ordinary high watermark in their entirety.

6. "Project" means any activity which occurs either partially or wholly on sovereign lands.

7. "Riparian owner" means a person who owns land adjacent to navigable waters or the person's authorized agent.

8. "State engineer" means the state officer provided for in North Dakota Century Code section 61-03-01 or any of the state engineer's employees or authorized agents.

9. "Structure" means something that is formed from parts, and includes boat docks, boat ramps, and water intakes.

It makes a lot of sense, if you are managing sovereign lands you need to know what that means. The first concern I had was in the Strategic Plan, the plan was to remove the enumeration of what that exactly meant, plus then people were to apply for permits concerning structures in waters and then the

state engineer would as part of that process make a determination if the water was or was not navigable.

I thought it was a bit of a stretch to basically treat everyone as if they were on navigable waters when the state has had over 100 years to delineate those and hasn't chosen to do so. I thought if we've waited over a 100 years, we could wait until the next legislative session.

Now the term navigable waters causes people to perk up for a whole bunch of reasons. One big reason is the Clean Water Act. The Clean Water Act was written concerning navigable waters and there was a lot of emails and such going around when Senator Feinstein of California wanted to introduce legislation to expand that to basically all waters.

It seemed strange to me that so much politically was made about that because right now, today, the EPA applies the Clean Water Act on every single farm fuel tank of sufficient size. Even though written under the Clean Water Act, if you have a fuel tank of single 5000 or aggregate 10,000 they will tell you that you are subject to the Clean Water Act.

Now where it gets really strange to me was Governor Hoeven telling the EPA thank you but no, the state has authority over fracking. I'm a bit fuzzy on how the state of North Dakota can give jurisdiction over every farm fuel tank and then say stay away from oil. But the state has not fought EPA over their application to farm fuel tanks.

The big concern, the thing I want to try to control with this is the upper lakes of Devils Lake. If ones' land is inundated by navigable water, if a new high water mark is established, then at some point, it seems not later than the time necessary for adverse possession, the land, the minerals and such become the property of the state. If the water recedes at some time in the future, the land would not revert to some owner of historical record, it would to the riparian owner.

We heard yesterday about the effects of losing land to the government and how it still affects people years later, the basic difference at this point between the Corp of Engineers around lake Oahe and Sakakawea and the state around Devils Lake is that the state doesn't make even a token payment, we let the water do our work for us.

I would note that if we leave the term navigable open to interpretation basically on the fly that I could indeed make a very good case that starting with the Clean Water Act, and that being written for navigable waters, and then taking how that has been interpreted and then applying that to sovereign lands that the State of North Dakota is the rightful owner of all the minerals under all the prairie potholes, while that would certainly make the state wealthy indeed, I don't think I would be around to enjoy the wealth.

Attachment 2

TESTIMONY ON HOUSE BILL NO. 1226

House Energy and Natural Resources Committee

Bruce Engelhardt

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

January 28, 2010

Mr. Chairman and members of the House Energy and Natural Resources Committee, my name is John Paczkowski and I am the Chief of the Regulatory Section for the State Water Commission. On behalf of the State Engineer, Todd Sando, I am here in opposition of House Bill No. 1226 which seeks to add a definition for "navigable waters" to the North Dakota Century Code.

The term "navigable waters" is already defined in subsection 5 of North Dakota Administrative Code § 89-10-01-03 in nearly identical terms as House Bill No. 1226:

"Navigable waters" means any waters which were in fact navigable at time of statehood, that is, were used or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water, including the Missouri River, the Yellowstone River, the Red River of the North from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, Devils Lake, Painted Woods Lake, and Sweetwater Lake.

N.D. Admin. Code § 89-10-01-03(5).

Additionally, referring to the last sentence of House Bill No. 1226, the location of the "first crossing" on a river is an arbitrary point on a river system and has no real bearing on the river's navigability.

attachment 3
Testimony
House Bill 1226
Energy and Natural Resources Committee
Friday, January 28, 2011; 9 a.m.
North Dakota Department of Health


Good morning, Chairman Porter and members of the House Energy and Natural Resources Committee. My name is L. David Glatt, chief of the Environmental Health Section of the North Dakota Department of Health. I am here today to testify in opposition to House Bill 1226, which addresses the definition of navigable waters for the state.

The Department of Health is in opposition to House Bill 1226 because we are concerned it could result in considerable confusion in the regulation of water resources in the state, limit environmental protection activities for large areas, result in increased federal oversight and implementation of environmental protection programs, and allow degradation of water resources that have significant public and environmental benefit.

The term “navigable waters” is used in various federal and state laws relating to water resource management and environmental protection. The term has different meanings depending on the purpose or context. For example, the Federal Power Act, Clean Water Act, and Rivers and Harbor Act of 1894 all have different definitions of “navigable waters.” In addition, courts apply another definition for determining title to submerged lands. See Utah v. United States, 403 U.S. 9 (1971). Because the term “navigable waters” is currently used in many areas, we are concerned about the ramifications of this new definition that would be mandatory “for all state agencies and purposes.” Because of this uncertainty, we recommend that no additional definitions of navigable waters be adopted.

If adopted, environmental protection would be limited to only those water resources identified in the law, leaving large areas of the state unprotected. Importantly, a significant number of water bodies could lose environmental protection because they are not navigable under this proposed law, even though they are still valuable for agricultural, industrial, recreational and wildlife benefits.

If large areas of the state do not have the benefit of environmental protection, the federal government may increase its oversight and involvement in the



implementation of federal environmental laws. This would limit the state's voice in implementing these laws.

This concludes my testimony I am happy to answer any questions you may have.