

Testimony
Budget Section
Thursday, September 15, 2011
Senate Chamber, State Capitol, 1:55 p.m.
North Dakota Department of Health

Chairman Grindberg and members of the Budget Section, my name is L. David Glatt, Chief of the Environmental Health Section for the North Dakota Department of Health (Department). The Department is responsible for the implementation and oversight of many of the environmental protection programs in the state, including directing programs under the Clean Air Act (CAA).

During the 2011 legislative session, the Department was appropriated \$1 million for the purpose of defraying expenses associated with legal action against the U.S. Environmental Protection Agency (EPA). Pursuant to Section 5 of House Bill 1004, the Department is required to present a quarterly financial and project status update to this committee on actions associated with the litigation.

Financial Update: To date a total of \$135,629 of the \$1,000,000 has been expended for litigation.

The Department is currently working with the Attorney General's Office and Moye White, LLP, of Denver to address the following legal challenges:

- Sulfur Dioxide (SO₂) 1 hour Standard

The EPA has proposed to implement a 1 hour SO₂ ambient standard that, based upon language in the rule preamble, would require states to utilize air quality models to determine compliance. North Dakota, along with four other states, has challenged the rule in its current form as the modeling requirement was not appropriately vetted in a public forum. The state is concerned that the use of models, without consideration of monitoring data, can result in the misclassification of the actual air quality conditions. Overestimation of air quality may result in the installation of unnecessary and expensive pollution control equipment. Through its attorneys, the Department submitted a motion asking the courts to stay the rule until the public has been given an opportunity to provide comment on the rule and preamble. Recently, the states submitted their brief challenging the rule to the District of Columbia Circuit Court of Appeals.

- Best Available Control Technology (BACT)

In 2006, the state entered into a Consent Decree (CD) with the EPA and Minnkota Power Cooperative (Minnkota). The CD directed the state to identify the Best Available Control Technology (BACT) for Minnkota to control Nitrogen Oxide (NO_x) air emissions. After a several year review process, the

state has determined that Selective Non Catalytic Reduction (SNCR) is the most appropriate control technology for the Minnkota facility. The federal Department of Justice and the EPA have challenged the state's determination, and the state's decision is now being reviewed in the federal court in Bismarck. Through its attorneys, the state has provided the Record of Decision and legal arguments for the court's review. A court decision is pending. It is important to note that nine states, led by South Dakota, have filed an amicus brief in support of the North Dakota decision.

- Regional Haze State Implementation Plan

Pursuant to federal law, the state has submitted to the EPA a State Implementation Plan outlining how the state of North Dakota will comply with the requirements of the Regional Haze Rule. The EPA has indicated it intends to approve over 75 percent of the plan, but the agency disagrees with the state's NO_x determination for the Minnkota Power Cooperative and Basin Electric Lelands Olds Unit 2 facilities. The state believes SNCR is appropriate, while the EPA believes Selective Catalytic Reduction (SCR) is appropriate. EPA also indicated that they disagree with the plan as it relates to emissions from the Great River Energy Coal Creek Station facility and a portion of the Reasonable Progress plan. The EPA recently proposed and is seeking comments on a Federal Implementation Plan that would require the installation of SCR technology and potential emission reductions at other facilities under the Reasonable Progress Plan. An EPA public hearing on the issue will be conducted on October 13, 2011, in Bismarck. If the EPA makes a final determination to require SCR (scheduled for January or February 2012), the state may need to challenge that decision in federal court in Denver. We are working with legal counsel to prepare for the hearing and potential litigation.

- Other litigation includes the state's challenge to Consent Agreements which directly impact North Dakota, but were developed between the EPA and environmental groups (to the exclusion of North Dakota). The state has moved to intervene in these cases, which has been approved by the federal court in Denver. In addition, the state has sought to dismiss these agreements due to the fact that the state was excluded from any negotiations during their development. We are continuing to monitor federal actions nationwide for those that might have an impact on North Dakota.

In summary, our actions to date have primarily included preparing, reviewing and submitting legal briefs to several courts of competent jurisdiction. We will continue to track developments and report back to the committee as required.

This concludes my testimony. I would be happy to answer any of your questions.