

Testimony
Budget Section
Thursday, September 20, 2012
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). Of the \$1 million dollars appropriated to the Department, \$500,000 was to be provided out of the general fund with the remaining sum of \$500,000 to be borrowed from the Bank of North Dakota. The Department may spend the general fund moneys and access the line of credit upon approval by the Office of the Attorney General. Pursuant to Section 5 of House Bill 1004, the Department is also required to present a quarterly financial and project status update to this committee on actions associated with the litigation.

Financial Update: To date, a little over \$513,000 has been approved for reimbursement from the funds allocated to the Department to pursue legal action against the Environmental Protection Agency as part of actions taken under the Clean Air Act (CAA). Based upon the current status of the legal activities associated with the EPA, the Department has requested the \$500,000 line of credit from the Bank of North Dakota as allowed in House Bill 1004.

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 air quality standard that, based upon language in the rule preamble, would require states to utilize predictive air quality models to determine compliance. North Dakota, along with four other states, challenged the rule in its current form claiming the modeling requirement is not allowed under the CAA, is a departure from historical procedures used to determine compliance with air quality standards and was not appropriately vetted in a public forum. On May 3, 2012, the state presented oral argument in front of the DC Circuit Court. The Court issued its decision on July 20, 2012, as follows:

- 1.) The Court found EPA's attempts to implement new 1-hour SO₂ standard based upon modeling predictions rather than monitoring data was "not yet ripe for review."
- 2.) The Court's opinion reflects success the state received by initiating this litigation in that it prompted EPA to issue letters to states in April 2012 retracting its earlier position that states include modeling analysis in their 2013 infrastructure submission. Had the state not initiated this legal action, it is believed EPA would not have retracted its position to require modeling to determine attainment status.
- 3.) The Courts made it clear that the states may challenge any final action EPA takes in the future that imposes an obligation the states must meet.

- **Regional Haze SIP/FIP**

Since the last report, the state has served notice to EPA that it would challenge portions of their Regional Haze Federal Implementation Plan, specifically:

- 1.) That the state did not give up its decision making authority regarding appropriate control technology for the Great River Energy facility to EPA. We believe that Congress intended for the state to make the determinations regarding implementation of this portion of the Clean Air Act.
- 2.) That we believe EPA acted recklessly by arbitrarily rejecting the modeling protocol developed by the state to assess visibility improvement.

Legal briefs are due to the court by October 1, 2012.

This concludes my testimony and I would be happy to answer any questions you may have regarding this matter.