

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2285

2001 SENATE NATURAL RESOURCES

SB 2285

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2285

Senate Natural Resources Committee

Conference Committee

Hearing Date 2-1-01

Tape Number	Side A	Side B	Meter #
1	X		39.4 - end
		X	State - 39.6
2-8-01 2	X		20.0 - 21.1
Committee Clerk Signature <i>Jane James</i>			

Minutes:

SENATOR TOLLEFSON opened the hearing on SB 2285, A BILL RELATING TO THE EFFECTIVE DATE OF THE ASSUMPTION OF THE SECTION 404 PROGRAM OF THE CLEAN WATER ACT BY THE STATE.

SENATOR THOMAS FISCHER of District 46, cosponsor of SB 2285 introduced the Bill, which would give the appropriations needed for State of North Dakota to have the ability for administration and jurisdiction of the Section 404 program of the Clean Water Act.

STEVE MCCALLUM, representing the CCJWRD (Cass County Joint Water Resource District), presented a chronology of the Section 404 permitting process that they have experienced with regard to the Maple River Dam. (See attached testimony).

SENATOR TOLLEFSON asked if they had approached the State's representatives in Washington for help in expediting the corps decision.

STEVE MCCALLUM said the had but to no avail and the cost of the project has now increased greatly along with all the legal expenses.

SENATOR GARY NELSON of District 22, cosponsor of SB 2285 wanted to testify that North Dakota should take charge of what we can do for ourselves and we will find the money necessary to fund these projects.

JEFFRY J. VOLK an engineer with Moore Engineering, Inc. testified in support of SB 2285.
(See attached testimony).

MIKE DWYER, representing the North Dakota Water Users Association and the North Dakota Water Resource Districts, testified in support of SB 2285. Some think that North Dakota could not manage this and we would become federal regulators, but if you look at our state we have a history of taking over federal programs and doing a very fine job. We meet the federal regulation for example the clean air act, clean water act, the federal strip mine act that our state has taken over. Other states that have taken over the Section 404 Program are Michigan and New Jersey. Section 404 Program applies only to nonnavigable waters in the state.

ROBERT THOMPSON, a member of the North Dakota Resources Board and the North Dakota Water Commission testified in support of SB 2285. (See attached testimony).

DEAN PETERSON, representing the North American Coal Corporation and it's subsidiary operations the Falkirk Mining Co. and Coteau Properties Co. Testified in support of SB 2285.

TODD SANDO, the director of the Water Development Division of the North Dakota State Water Commission testified in a neutral position on SB 2285. (See attached testimony).

ARDEN HANER, testified in a neutral position expressed he felt the passage of the bill leave the state divided as not everyone would be under the same rules.

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Written testimony by BILL PFEIFER of the North Dakota Chapter of the Wildlife Society was given to the committee clerk who distributed it to the Committee.

SENATOR TOLLEFSON closed the hearing on SB 2285.

FEBRUARY 8, 2001

SENATOR FISCHER reopened discussion on SB 2285.

This bill does have a slight fiscal impact.

SENATOR TRAYNOR made a motion for a "DO PASS and REREFERRED TO APPROPRIATIONS" of SB 2285.

SENATOR CHRISTMANN second the motion.

SENATOR FISCHER called for a role vote. The vote indicated 6 YAYS, 0 NAYS, 1 ABSENT.

SENATOR FISCHER will carry SB 2285

FISCAL NOTE

Requested by Legislative Council
02/21/2001

Bill/Resolution No.:

Amendment to: SB 2285

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures				\$800,000		\$897,000
Appropriations				\$800,000		\$897,000

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

HB 2285, as amended, provides appropriation authority to the State Water Commission to assume jurisdiction over the 404 program of the Clean Water Act. This program is anticipated to be continued after the 2001-2003 biennium.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

To assume the operation of the 404 program the State Water Commission estimates we would need an additional five FTE's, one program manager, three professional staff positions, and one support staff position. When filled, these new positions will require an increase of \$500,000 in the Salaries and Wages Line Item. In addition, we estimate a required increase of \$265,000 in the Operating Line Item, for items such as; travel, training, rent, professional services, software, and miscellaneous expenditures. We also estimate a required increase of \$35,000 in the Equipment Line Item for computers and office equipment. These increases total the \$800,000 stated in the bill.

In addition to the above costs the North Dakota Attorney General's Office has estimated the the State Water

Commission will incur an additional \$97,000 of legal fees due to the 404 program. These fees could be absorbed by the Water Commission for the 2001-2003 biennium by either delaying the hiring of several of the new staff positions, or leaving one position unfilled for the first biennium. This would allow us to shift \$97,000 from the Salaries and Wages Line Item to the Operating Line Item. For the 2001-2003 biennium this would increase the Salaries and Wages Line Item by \$403,000, the Operating Line Item by \$362,000, and the Equipment Line Item by \$35,000, together totaling \$800,000.

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

The \$800,000 appropriation is for the State Water Commission to operate the 404 program.

Name:	David Laschkewitsch	Agency:	State Water Commission
Phone Number:	328-1956	Date Prepared:	02/22/2001

FISCAL NOTE

Requested by Legislative Council

02/19/2001

Bill/Resolution No.: SB 2285

Amendment to:

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$800,000		\$897,000	
Appropriations			\$800,000		\$897,000	

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

HB 2285 provides appropriation authority to the State Water Commission to assume jurisdiction over the section 404 program of the Clean Water Act. This program will be continued after this biennium.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

To assume the operation of the 404 program the State Water Commission estimates we would need an additional five FTE's, one project manager, three professional staff positions, and one support staff position. When filled, these new positions will require an increase of \$500,000 in the Salaries and Wages Line Item. In addition we estimate a required increase of \$265,000 in the Operating Line Item, for Travel, Training, Rent, Professional Services, Software, and Miscellaneous expenditures. We also estimate a required increase of \$35,000 in the Equipment Line Item for computers and office equipment. These increases total the \$800,000 stated in the bill. The North Dakota Attorney General's Office has estimated that the State Water Commission will incur an additional \$97,000 of legal fees due to the 404 program. These fees can be absorbed by the Water Commission for the 2001-2003 biennium by leaving one of the professional staff positions unfilled and shifting \$97,000 from Salaries to Operating. For the 2001-2003 this would increase

Salaries by \$403,000, Operating by \$362,000, and Equipment by \$35,000.

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

The \$800,000 appropriation is for the State Water Commission to operate the 404 program.

Name:	Dale Frink	Agency:	State Water Commission
Phone Number:	328-4998	Date Prepared:	02/21/2001

REPORT OF STANDING COMMITTEE (410)
February 8, 2001 4:22 p.m.

Module No: SR-23-2802
Carrier: Fischer
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2285: Natural Resources Committee (Sen. Fischer, Chairman) recommends DO PASS and BE REREFERRED to the Appropriations Committee (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2285 was rereferred to the Appropriations Committee.

2001 SENATE APPROPRIATIONS

SB 2285

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2285

Senate Appropriations Committee

Conference Committee

Hearing Date February 19, 2001

Tape Number	Side A	Side B	Meter #
Tape #1	x		6.8-38.8
Committee Clerk Signature <i>Donna Piatock</i>			

Minutes:

Senator Nothing opened the hearing on SB2285.

Senator Jack Traynor, District 15, Devils Lake, spoke in support of the act relating to the effective date of the assumption of section 404 program of the Clean Water Act by the state.

Senator Nothing: ½ FTE for legal work?

Senator Traynor: In favor!

Senator Nothing: 800 thousand -- how did you arrive at that figure?

Senator Traynor: Through Garrison Committee - Representative Dorso and Senator Gary Nelson -- along with an estimate by the State Water Commission and the State Health Department.

Senator Heitkamp: Fiscal side? If Minnesota and Canada are involved -- looking ahead to litigation -- think ½ is enough?

Senator Traynor: Legal services are required -- not to be for litigation defense -- this would be to set up meetings, etc.

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Senate Appropriations Committee

Bill/Resolution Number SB2285

Hearing Date February 19, 2001

Senator Heitkamp: Safe to say no litigation?

Senator Traynor: Don't know; personally have felt that the sooner to court the better off we'd be.

Senator Andrist: Seems like it's between a rock and a hard place --- Could we use Water Resources Trust fund instead of general funds?

Senator Traynor: Up to the Appropriations Committee.

Senator Fischer, District 46, Fargo: spoke in support of the bill (a copy of his written testimony is attached). Believes the sum could be reduces, partly because of the Supreme Court findings (a copy of such is attached).

Senator Nething: How much less?

Senator Fischer: Lots of people feel the project watch results here are not a part of incompetency on behalf of the corp.; nor a question of their expertise --- but it is in the area of decision making --- often times the committee has no shows then take no minutes, so no records for transactions that might have been made, proposed.

Senator Andrist: Committee talk -- consider an emergency clause?

Senator Fischer: Not on the Committee so not sure. Our Natural Resources Committee did not discuss an emergency clause.

Senator Andrist: Advantage?

Senator Fischer: Yes, allows training, the process to get started

Senator Bowman: If we incorporate this -- will we lose federal dollars?

Senator Fischer: No.

Senator Heitkamp: In your committee -- where would the dollars come from? Not out of general fund? Out of Water Resources Fund?

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Senate Appropriations Committee

Bill/Resolution Number SB2285

Hearing Date February 19, 2001

Senator Fischer: No discussion; that's the reason it was sent to Appropriations.

Senator Gary Nelson, District 22, Cass County, spoke in support of the bill. Believes this is the right approach -- perhaps get the House to amend emergency --- if Senate has enough votes.

Perhaps the sum is high, but believe it is time North Dakota needs to take control, it's a worthy cause if we go to the Water Resource Fund.

Senator Nething: Legislature 800 thousand comes?

Senator Gary Nelson: 800 thousand covers cost -- authorize FTE is the question -- Water Commission perhaps could answer that.

Senator Robinson: Impact to SB2256? Bonding companion or?

Senator Gary Nelson: Can't answer that.

Senator Tallackson: Can't see this without the corp. putting up a fight? Testifying?

Senator Gary Nelson: There was a lot of discussion during the Interim Committee meetings with the Garrison Overview Committee --- Corp hasn't contacted regarding either of the two meetings nor did they make an appearance. Perhaps there will be a fight after --- if we do, can't see more delay being beneficial than not having control of it.

Senator Heitkamp: If we move forward -- take the lead, get the permit --and move the water; then downstream individuals bring suit against us --- we defend? Enough fiscal dollars there?

Senator Gary Nelson: The criteria will be followed regarding health and other procedures --- can't anticipate nor can we stop law suits.

Senator Heitkamp: Strong opposition --- many feel sure that litigation will always follow.

Senator Gary Nelson: If Corp had moved -- maybe law suits would be in process; they haven't done anything -- been a delay of issuing permits --- we still have some liabilities.

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Senate Appropriations Committee

Bill/Resolution Number SB2285

Hearing Date February 19, 2001

Senator Fischer: Take over --but abide with federal rules; make sure all are approved -- we assure administration /jurisdiction is followed.

Sandy Tabor Attorney General's Office, distributed document regarding the cost of ½ FTE for Water Commission 404 Assumption Legal Work (a copy of which is attached).

Senator Heitkamp: Is the Attorney General fearful of litigation.

Sandy Tabor: Not a detailed discussion. Federal requirements are tight but I can assure you that the state requirements are even tighter. If litigation, yes the state would take care of it.

Senator Heitkamp: Corp issued permit -- they back it; if state issues permit, tab could be higher?

Sandy Tabor: Correct in your analysis; but Corp also same way.

Senator Bowman: Problem is they did zero. Excess water, figure cost versus legal cost?

Sandy Tabor: It is already an enormous cost -- continues to be an expense to many -- state and individuals.

Dale Frank, Interim Director Water Commission addressed the bill in a neutral position.

Believes the 800 thousand is broken down as 500 thousand salary, 285 operating (building rent, training, IT, consulting fees) and 15 thousand for equipment. Taking court's ruling into consideration -- not opposed to doing the 404.

Senator Nething: Testify given here similar to that given at the Committee hearing?

Dale Frenk: Yes

Senator Nething: Unless expanded --- effective at 80 thousand?

Dale Frenk: Much jurisdiction --- control in limbo.

Senator Heitkamp: Bonding out of the Water Development Trust fund --still support?

Dale Frenk: It was not part of the executive budget --- requested 36 million -- would need to prioritize again.

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Senate Appropriations Committee

Bill/Resolution Number SB2285

Hearing Date February 19, 2001

Senator Heitkamp: Against if you're 800 thousand short?

Dale Frenk: State Water Commission will do what that can if this is passed.

February 20 - Full Committee (Tape #1, Side A, Meter No. 0.0-6.4)

Senator Nething reopened the hearing on SB2285.

Senator Nething offered an amendment. Discussion.

Senator Holmberg moved the amendments; seconded by **Senator Andrist**. Discussion. Verbal vote carried the amendments.

Senator Holmberg moved a DO PASS AS AMENDED; **Senator Andrist** seconded. Roll Call

Vote: 9 yes, 4 no, 1 absent and not voting.

Senator Solberg accepted the floor assignment for the amendment; **Senator Fischer** will be asked to carry the bill.

10124.0201
Title. *10 200*

Prepared by the Legislative Council staff for
Senate Appropriations
February 20, 2001

PROPOSED AMENDMENTS TO SENATE BILL NO. 2285

Page 1, line 9, replace "general" with "water development trust"

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

Senate Bill No. 2285 - State Water Commission - Senate Action

This amendment changes the funding for the Section 404 program from the general fund to the water development trust fund.

Date: 2-20-01

Roll Call Vote #: _____

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2285

Senate Appropriations Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number 10124.0201

Action Taken du pass as amended

Motion Made By Sen Holmberg Seconded By Sen Andrist

Senators	Yes	No	Senators	Yes	No
Dave Nething, Chairman	✓				
Ken Solberg, Vice-Chairman	✓				
Randy A. Schobinger					
Elroy N. Lindas		✓			
Harvey Tallackson	✓				
Larry J. Robinson		✓			
Steven W. Tomac		✓			
Joel C. Heitkamp		✓			
Tony Grindberg	✓				
Russell T. Thane	✓				
Ed Kringstad	✓				
Ray Holmberg	✓				
Bill Bowman	✓				
John M. Andrist	✓				

Total Yes 9 No 4

Absent _____

Floor Assignment Senator Solberg

If the vote is on an amendment, briefly indicate intent: kill with Sen Fischer

REPORT OF STANDING COMMITTEE

SB 2285: Appropriations Committee (Sen. Nothing, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (9 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). SB 2285 was placed on the Sixth order on the calendar.

Page 1, line 9, replace "general" with "water development trust"

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

Senate Bill No. 2285 - State Water Commission - Senate Action

This amendment changes the funding for the Section 404 program from the general fund to the water development trust fund.

2001 HOUSE NATURAL RESOURCES

SB 2285

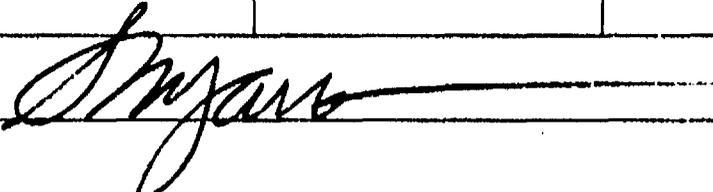
2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2285

House Natural Resources Committee

Conference Committee

Hearing Date March 16, 2001

Tape Number	Side A	Side B	Meter #
1	x		2206 to end
1		x	1 to 1100
Committee Clerk Signature 			

Minutes:

Chairman Earl Rennerfeldt, Vice Chair Jon O. Nelson, Rep. Brekke, Rep. DeKrey, Rep. Droydal, Rep. Galvin, Rep. Keiser, Rep. Klein, Rep. Nottestad, Rep. Porter, Rep. Weiler, Rep. Hanson, Rep. Kelsh, Rep. Solberg, Rep. Winrich.

Chairman Rennerfeldt: I will open the hearing on SB 2285. Clerk read the title.

Sen. Tom Fischer - District 46: Introduces bill. (See written testimony).

Rep. Solberg: Has the Corps ever come up with a legitimate reason why it takes years and years to get 404 permits?

Sen. Fischer: No, they have never had a reasonable response to anything. They claim that they have never turned down a 404 permit in 10-15 years, but when you don't make any decisions, pro or con, how can you say that. The biggest problem with the Corps is do nothing and

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House Natural Resources Committee

Bill/Resolution Number SB 2285

Hearing Date March 16, 2001

scheduling. They do not take minutes at meetings, imagine that, so the next meeting they don't have to recall what they said. They have very poor memories as well.

Vice Chair Nelson: Is New Jersey and Michigan the only two state that have taken state control.

Sen. Fischer: As far as I know.

Vice Chair Nelson: Thank you.

Sen. Fischer: In discussions with the State Water Commission, the bill is pretty straightforward. One of the things amended in here is actually the hiring of FTE's. That is what the \$800,000 is for, the administration.

Vice Chair Nelson: The six elements you had in your testimony, I would wonder about 4 and 5. The process and how likely is that approval going to take place?

Sen. Fischer: I think that can be accomplished. I have a couple of people here to testify that can relate to a project where it is completely apparent as to how they operate or don't operate.

Rep. Keiser: What has been the response of our delegation in Washington to this. We don't live in a vacuum? It is amazing to me that we are asking for the transfer of the liability without the funds. What does our delegation say?

Sen. Fischer: The delegation has written letters to the Corps., urging them on a particular project we are dealing with to make some movement of one kind or the other and they drag their feet. It has been studied to death. The Corps. just don't do anything. There is no point in applying for a 404 if they aren't going to make them available.

Rep. Keiser: You are not saying that Congress is still not responsible for legislation and oversight and appropriations for this department?

Sen. Fischer: Certainly, they appropriate for the Corps.

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House Natural Resources Committee

Bill/Resolution Number SB 2285

Hearing Date March 16, 2001

Chairman Rennerfeldt: The problem there, in other words, Congress can't get their hands around that giant bureaucracy either?

Sen. Fischer: It is very interesting the way the Corps. Works. First of all you have the military corps and then you have the civilian corp. and from what I understand is they were there to keep an eye on the military corps, well now they keep an eye on each other and they don't do anything.

Rep. Galvin: Did you look around to see if there was anyone from the Corps of Engineers here?

Sen. Fischer: It would make no difference in my testimony Rep. Galvin.

Chairman Rennerfeldt: Any further questions of the committee?

Rep. Lois Delmore - District 43: I am in full support of the bill.

Steve McCullough - Attorney: (See written testimony).

Rep. Nottestad: I realize that when nothing happens, nothing happens. But in the case where the state would take over the 404 process and they would get pushed through quicker and that would be the purpose. What is the estimation of these going into the courts, rather than just being stalled by the Corps.

McCullough: I assume, my experience with the State Water Commission, the body that handles these situations, they are very professional and they do a very good job. I would assume that they would continue to do so. You cannot prevent someone from bring suit, however, if the State Water Commission does its job correctly, those suits will get tossed out fairly quickly. The administrative body is over and above board, the standard for overturning what the administrative body is arbitrary and capricious. In fact every time we go to the Corps those are the only two words they tell us are for certain. As long as you avoid doing something that is arbitrary and capricious, if you are the administrative body, you will prevail. There has been a

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House Natural Resources Committee

Bill/Resolution Number SB 2285

Hearing Date March 16, 2001

law suit brought against the Corps for not processing a law suit quick enough. So law suits can come from the other side. The state will not take over jurisdiction over all waters in ND. The Corps will retain jurisdiction over navigable waters which include the Red River, the Missouri River and some parts of the James River. (explains court case). When looking at the fiscal note, keep in mind that 90% of the water in ND does not fall under the 404 jurisdiction.

Rep. Nottestad: In the case of the problem with the Maple River. You are talking Indian artifacts, wouldn't that put it back into the Federal jurisdiction again?

McCullough: It may have to be heard by a Federal Court, but it wouldn't require the Corps to process the permit. The Corps would only process the permits on navigable waters. The state would finish up the process of this permit.

Rep. Nottestad: The point is, the court cases would be Federal?

McCullough: Probably. They move a little quicker than State cases.

Rep. Keiser: If the state were to take over the 404 process on non navigable waters. Would there be any other implications other than permitting, any other financial implications, or any other relative implications.

McCullough: Funding is just half the process, it is also enforcement. For example...

Rep. Keiser: Are you aware whether the fiscal note includes the enforcement as well as the permitting costs?

McCullough: I do not.

Jeffry J. Volk - Engineer for Maple River Dam Project: (See written testimony).

Also submitted testimony by Robert Thompson in support of bill (See written testimony).

Chairman Rennerfeldt: Any questions from the committee? Anyone else care to testify in favor of this bill? Any neutral testimony?

Todd Sando - Director Water Development Division ND State Water Commission: (See written testimony).

Rep. Porter: With the 404 program coming into the state, if we take it over, is there any way to capture the Federal funds that need to be spent operating it out of a Federal agency?

Sando: There are no Federal \$\$ that will be turned over to the states that run the program.

Rep. Keiser: If the state were to take over the program and given the compact that the state has entered, would we be in a different position relative to the issue of the burial grounds on the dam project?

Sando: We would be able as a state to assume the program and have jurisdiction over the tributaries so we would be able to process that. With the corps it just takes so much longer. If it was housed at the State Water Commission, it would be helpful.

Vice Chair Nelson: Are you aware of any other states in this region considering like proposals?

Sando: I am not aware of any other states in the Midwest that is looking at the assumption of the 404 program.

Rep. Porter: I have concerns over the path that the Legislature has taken recently of taking general fund expenditures and moving them into trust funds. Why wouldn't this expenditure be a general fund expenditure rather than a trust fund? What is going to happen when the Water Resources Trust Fund is down to the point where we can't afford the reoccurring expenses and we have five positions there to pay for?

Sando: The budget is working its way through appropriations and as people are aware the funding is coming from special funds, it would be moved out of the general funds.

Rep. Keiser: If we were to opt out of the 404 program, would we have the opportunity to say, it didn't work as well as we thought and we would like the Feds to take over, are they obligated to take it back?

Sando: We have been researching the assumption of the program, I haven't looked into what would happen if we had difficulties with it.

Julie Krenz - Attorney: You can opt out and turn it back over to the Corps of Engineers.

Chairman Rennerfeldt: The amendment you are proposing for us, can you go through that for us?

Sando: Since the amendment has been drawn up there has been conversations with the Governors office. One of the issues is we would like to have a trigger mechanism for expending of the funds. So this amendment says, (reads amendment) there is a concern as to how to spend this money.

Chairman Rennerfeldt: I have a note here from Bob Harms and they are coming up with some amendments to address the issues. So the state takes this over and we still have to deal with the Corps. We may save a little time but we still, they are still going to play the wait game, are we going to save any time?

Sando: One of the major issues is the Corps administers the program for the EPA and the EPA has oversight. If the state goes through the process and then asserts a program. What ever action we take the EPA administers and they can review it and they can overrule what our state program says. The EPA is over our shoulders and watching what we do.

Chairman Rennerfeldt: Any further questions from the committee? Anyone else to testify on this bill. Any opposition to this bill?

Arden Hanger: I want to testify in a neutral position on this bill. I don't see it as a perfect solution. But is something to shoot for.

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House Natural Resources Committee

Bill/Resolution Number SB 2285

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Testimony also submitted by Kathy Roll, Office of the Attorney General

And Bill Pfeifer, ND Chapter of the Wildlife Society

Chairman Rennerfeldt: Any questions. If not I will close the hearing on SB 2285.

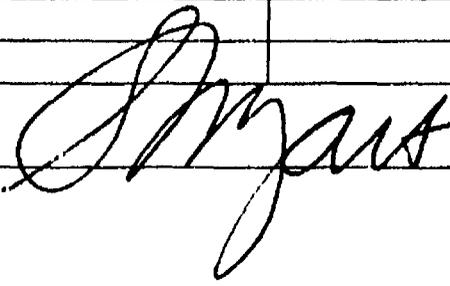
2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2285

House Natural Resources Committee

Conference Committee

Hearing Date March 23, 2001

Tape Number	Side A	Side B	Meter #
1	x		567 to 2250
Committee Clerk Signature 			

Minutes:

Chairman Earl Rennerfeldt, Vice Chair Jon O. Nelson, Rep. DeKrey, Rep. Drovdal, Rep. Galvin, Rep. Keiser, Rep. Klein, Rep. Nottestad, Rep. Porter, Rep. Weiler, Rep. Hanson, Rep. Kelsh, Rep. Solberg, Rep. Winrich.

Chairman Rennerfeldt: Okay, let's take SB 2285.

(Some discussion on the amendment.)

Rep. DeKrey: I move a Do Pass on the bill.

(Discussion on the amendments.)

Rep. Solberg: I second.

Chairman Rennerfeldt: I have a Do Pass on the bill. Any further discussion?

(Discussion on the FTE's, amendment addressing such and the re-referral to appropriations.)

Chairman Rennerfeldt: I have a motion for a Do Pass, the question has been called. Take the roll.

MOTION FOR A DO PASS

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House Natural Resources Committee

Bill/Resolution Number SB 2285

Hearing Date March 23, 2001

YES, 10 NO, 4

1 ABSENT AND NOT VOTING

CARRIED BY DEKREY

RE-REFERRED TO APPROPRIATIONS

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2285

Page 1, line 3, remove "and"

Page 1, line 4, after "appropriation" insert "; to provide an effective date; and to provide an expiration date"

Page 1, line 12, after the period insert "The state water commission is authorized five additional full-time equivalent positions to implement this Act."

Page 1, after line 12, insert :

"SECTION 3. EFFECTIVE DATE. This Act becomes effective on the date the state engineer certifies to the governor that a program has been designed to effectively assume responsibility for the section 404 program of the Clean Water Act and the state water commission is ready to assume those responsibilities. The governor shall notify the secretary of state and the legislative council of the effective date of this Act.

SECTION 4. EXPIRATION DATE. This Act is effective through June 30, 2005, and after that date is ineffective."

Renumber accordingly

Todd Sands



Date: 3-23-01
Roll Call Vote #:

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SS 2285

House Natural Resources Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS

Motion Made By Rep. DeKrey Seconded By Rep. Solberg

Representatives	Yes	No	Representatives	Yes	No
Earl Rennerfeldt - Chairman	✓		Lyle Hanson	✓	
Jon O. Nelson - Vice Chairman	✓		Scot Kelsh	✓	
Curtis E. Brekke			Lonnie B. Winrich	✓	
Duane DeKrey	✓		Dorvan Solberg	✓	
David Drovdal		✓			
Pat Galvin	✓				
George Keiser		✓			
Frank Klein	✓				
Darrell D. Nottestad	✓				
Todd Porter		✓			
Dave Weiler		✓			

Total (Yes) 10 No 4

Absent 1

Floor Assignment Rep. DeKrey

If the vote is on an amendment, briefly indicate intent:
Re refer to appropriations

REPORT OF STANDING COMMITTEE (410)
March 23, 2001 11:03 a.m.

Module No: HR-51-6524
Carrier: DeKrey
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2285, as engrossed: Natural Resources Committee (Rep. Rennerfeldt, Chairman) recommends DO PASS and BE REREFERRED to the Appropriations Committee (10 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2285 was rereferred to the Appropriations Committee.

2001 HOUSE APPROPRIATIONS

SB 2285

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2285

House Appropriations Committee

Conference Committee

Hearing Date April 2, 2001

Tape Number	Side A	Side B	Meter #
04-02-01 tape #1	3954 - 6220	0 - 1971	
Committee Clerk Signature <i>Kathie Hall</i>			

Minutes:

The committee was called to order, and opened the hearing on SB 2285.

Senator Tom Fisher: Had prepared written testimony, and read from it. Also handed out a Supreme Court decision synopsis.

Rep. Skarphol: Does this mean we can rid of the Corp. Along Lake Sakakawea?

Sen. Tom Fisher: The two that will not be affected are the Missouri and Red Rivers.

Rep. Deizer: If those two and their tributaries would fall under this, what liability does the state take on?

Sen. Tom Fisher: As far as the liabilities are concerned they won't be much different than the liabilities that we are facing now. We still work with the federal government, the EPA, all those people that have to sign off on permits. We aren't sidestepping any issues. The national historic preservation act, all those things have to be complied with. So we are not at any more risk than we are now, I think.

Rep. Delzer: Currently if there is a problem with the decision made, you have to sue the Corp.

Sen. Tom Fisher: The Corp hasn't made a decision in 15 years.

Rep. Delzer: The question is if we make decisions, are we opening ourselves up to lawsuits.

Sen. Tom Fisher: Yes, we could.

Senator Jack Traynor: Supports the bill. He served on the Garrison overview committee and that was the incubator for this bill. We heard testimony there about the difficulty in Cass County relative to the Maple River dam. At the hearing in the Senate on this bill, the attorney for the water district down there told us that they had been waiting for 6 ½ years for a ruling by the Corp on the application for a permit in connection with this dam. It took them 3 months just to set a meeting. That tells you about the procrastination that has been encountered and the result was that in the 6 ½ years the cost of construction of that projected dam rose \$1 million. The garrison overview committee decided this is a chance for the state to take over the permitting process. Gives an example of another instance in the Stump Lake area.

Rep. Glassheim: Where does the \$800,000 appropriation come from? Is that based on anything, could it be more, could it be less?

Sen. Jack Traynor: AS he recalls the testimony that was for 5 new positions that are needed in order to handle the processing of materials. At first the bill provided that the funds come from the general fund, but now it's been changed to the water development trust fund.

Rep. Carlisle: Question for Sen. Tom Fisher: You said you were waiting for 6 years. I assumed you contacted the congressional delegation, and the governor's office.

Sen. Tom Fisher: They had all written letters, to some avail. A year ago we went down met in Omaha. He put together a stringent schedule that he said would be met no matter what. The first time a deadline appeared for a meeting, well we're still waiting for that meeting that was supposed to happen in June of 2000.

Would like to address Rep. Delzer's question about litigation. Thinks that the costs that are being incurred by water resource districts as well as the state right now would supersede any legal fees that we would incur in administering this project.

Rep. Delzer: What is the rule on if we do this and years later we decide this was not the best way to have gone, what are the rules for giving it back? Do you know?

Sen. Tom Fisher: Not sure. An engineer can address that.

Rep. Wald: What projects are currently under 404?

Sen. Tom Fisher: Right now the projects that would require 404 are a drain in Fargo, Maple River Dam, Devils Lake. There are projects that have not applied for the simple reason of the Corp.

Rep. Wald: If we take over the responsibility of 404, and all these things that are hanging out there, is the Corp going to say you asked for it.

Sen. Tom Fisher: That's what we want. To take over the regulatory position, and the administration of the 404 permit process. It will require some people to administer that program as far as hearings and regulation. As far as costs, those are born by the sponsor of the project.

Rep. Delzer: Would these all be considered MR&I projects? Would they be getting any authority and spending from the water commission. Would we be allowing the water commission to approve what we have given them the authority to bond for?

Sen. Tom Fisher: Not necessarily. Thinks the water commission could be the agency that oversees the 404, as far as funding...

Rep. Delzer: Thinks they set up a wish list of projects all over the state. We give them bonding authority for at least as much tobacco money is available for them and the common schools trust fund. Are we allowing them to okay their own projects and then move ahead with them.

Sen. Tom Fisher: Doesn't know. It would be more outside entities coming to the water commission for the permit, more than the water commission regulating them. There would be a conflict there.

Rep. Delzer: Sees a conflict too. Do they need 404 authority for any of there MR&I projects.

Rep. Kempenich: Is the Corp's no action, actually there action, to purposefully do nothing. Is this by design.

Sen. Tom Fisher: No, they are just not acting. Thinks they are incompetent.

Rep. Skarphol: If we pass this bill and authorize the administration of 404's, who is going to pick up the tab for construction costs? If we take over administration of these projects, is the federal government going to bow out of funding them also?

Sen. Tom Fisher: The sponsor of the project. And no, the federal government has to keep funding the projects as before.

Rep. Curtis Brekke: Was on the Ramsey County Water board for 32 years, and had the opportunity to see the inadequacy of the Corp. Supports the bill.

Jeffrey Volk: Had prepared written testimony. He is a project engineer on the Maple River dam project. He feels it is very important for the state to take over the 404 projects. The

Corp hides and creates no action. They do not like to approve permits that are controversial. They do approve easy permits. They just and argue with each other. At the meetings all everyone does is argue. Then at the next meeting, everyone sits down and argues. Something needs to be done. As the projects sit around, no one else starts projects. There are water boards all over the eastern part of the state that want to do flood control that need permits that aren't starting. Inflation alone in these years of waiting have cost over \$1 million. The cost to deal with inaction has been close to \$250,000. Those are all state dollars, whether it be from the state of ND through the water commission or it be board money, its all ND dollars. Then still, nothing gets done. Gave another example of happenings in Sargent County. The difficult projects are not getting the permits approved and are not getting done. He wants the state to take jurisdiction and put accountability back into these projects.

Chairman Timm: If we would adopt this, and ND approved a project that included federal funds, does the Corp still have a voice in the project since it includes federal funds?

Jeffrey Volk: On federal projects the Corp would still be involved in the process, doesn't think it would hurt federal funding for the projects.

Chairman Timm: Would you still have problems with the Corp?

Jeffrey Volk: Doesn't see the problem with the Corp ever going away. The Corp has branches, the regulatory (permit process) and the project development branch (not too bad). The problem seems to be when the state wants to do a project. The Corp seems to approve their own projects.

Rep. Koppelman: You have been dealing with the Corp for a long time. Has this gotten worse?

Jeffrey Volk: He hasn't seen much improvement in the last 5 to 7 years. Before that the projects weren't that difficult.

Rep. Koppelman: How would you see this working if the bill is passed and the state assumes the authority, from a logistical standpoint.

Jeffrey Volk: The general dilemma we have is indecision. It takes like 3 months just to schedule a meeting. If you need numerous meetings, it could stretch into years. The other is just sticking to a schedule. Deadlines come and go and just disappear.

Todd Sando, Director Water Development Division: Had prepared written testimony, and read from it. He also had a proposed amendment.

Rep. Delzer: Do you foresee if the water commission has this, okaying your own projects?

Todd Sando: The state water commission does grant dam permits to our associated projects. It is not uncommon for us to be developing water projects and granting permits. We do have regulatory and project development functions already.

Rep. Glassheim: How many projects do you anticipate this going to be in a two year period?

Todd Sando: The Corp in a typical two year period has 1600 actions they act on in ND. We have over 2 ½ million acres of wetlands. There is a lot of potential impact on the wetlands.

Rep. Glassheim: Of the 1600 do most get handled in an expeditious manner. Is it just a few that are problems?

Todd Sando: There are a lot of projects that do go forward. Gave examples. The more controversial ones take the time.

Rep. Carlisle: Why wasn't this amendment proposed in the Senate?

Page 7

House Appropriations Committee

Bill/Resolution Number SB 2285

Hearing Date April 2, 2001

Todd Sando: Not sure. Thinks that everyone understood that if they had the money for FTE's they could hire the FTE's.

Rep. Skarphol: Do you see a shift in any financial responsibilities to the state with passage of this other than administration?

Todd Sando: The cost of the program for administration and litigation through the attorney general's office for possible legal services.

Rep. Wald: Do you know the balance of the trust fund if we approve this \$800,000.

Todd Sando: No.

Dale Frink, Interim State Engineer: The forecast is \$40.4 million into the water development trust fund. \$9.7 will be taken for agency operations.

Rep. Wald: Will this short change any water projects authorized in the water commission appropriation?

Dale Frink: No.

The chairman closed the hearing on this bill.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2285

House Appropriations Committee

Conference Committee

Hearing Date April 5, 2001

Tape Number	Side A	Side B	Meter #
04-05-01 tape #2	0 - 2000		
Committee Clerk Signature <i>Kathleen Hall</i>			

Minutes:

The committee was called to order, and opened committee work on SB 2285.

Chairman Timm: This is the bill that deals with the clean water act, the section 404. You should also have a set of amendments that have been proposed by Rep. Belter, and be explained by Rep. Monson.

Rep. Monson: This bill is supposed to do is remove the section 404 program permits from the Corp. Of Engineers to the State Water Commission. This bill is born out of frustration with the Corp. Of Engineers and their slow moving action on many different projects, mainly in the eastern part of the state. This amendment is supposed to put a sunset clause on the bill or at least provides for an effective date in section 3 and an expiration date, in section 4. He understands that if the water commission issues a permit, the only real liability to the state is supposed to be did the water commission give due diligence to the procedure. Whether the

project should have been done or not is not a problem with the state, it is just taking on the liability if they do the right procedure in issuing the permit.

Moves to adopt the amendment. Seconded by Rep. Koppelman.

Rep. Koppelman: Clarifies that the money in the original bill was for employees. The amendment clarifies that they cannot hire those employees unless the state assumes the responsibility.

Rep. Delzer: We've received some information that in Michigan and New Jersey it took a number of years after they started to apply to take over this procedure before they were given authority to do it. So even though we pass this bill I'm not sure it will happen at all in the next biennium. He questions the appropriation and we are not taking that out. We have set an effective date after approval. Does that affect the appropriation too, so that the appropriation is not available until after the effective date? (Has to repeat the question for Don, LC).

Don Wolf: Says he doesn't know, and would have to check on it.

Rep. Koppelman: The intention of the appropriation was to go for the FTE's. But it does say in the original language of the bill, that the sum is appropriated to the water commission for the purpose of assuming jurisdiction over and administering the section 404 program. He is not sure if there are costs incurred with that before hiring people. Maybe there needs to be some money available to make the application.

Chairman Timm: Believes that Rep. Belter's idea was that these 5 people be hired to start implementing, assuming the duties of the program. He wants to get this thing going.

Rep. Gulletson: The testimony provided by Todd Sando, lays out what that \$800,000 is to be spent on. It is salaries, operations and training, office and equipment and computers. All of

the \$800,000 is for that support. There is an additional amount that may be needed for the office of the attorney general.

Rep. Glassheim: Has a question on how this is to work: The money comes from the water development trust fund, what is the pecking order, is it possible that all those moneys would be spent and there would not be \$800,000 left?

(Apparently his question is answered by shaking heads, because the answer appears to be there is enough to cover this).

Rep. Kliniski: We just looked at this with the TMDL yesterday, and if all of the funds are spent out of that fund, we would be minus. That is only if every single project that is planned comes first, which would amount to \$28 million. They would have to spend that \$28 million and do every single project on the list, and it's highly unlikely.

Rep. Delzer: Under current law if they do that, then they dip into the common schools trust fund, and start taking that money.

Chairman Timm: Doesn't think they can do that.

(Lots of committee voices objecting).

Don Wolf, LC: Jeff Nelson is coming down to explain the bill. HE says that the appropriation does not become effective until the conditions in section 3 are in effect.

Rep. Wald: When we finished the water commission budgets HB 1023, that read that the state water commission is to fund the projects authorized in the tobacco bill last session which put 45% into education trust fund, 45% to water projects, and 10% for anti tobacco education. The way the water commission bill left here is that water had first dabs on the money including some for the education money. But as soon as enough revenue came in from additional tobacco

money, they would repay the education fund if they had to dip into that. Mr. Frank's opinion was that they would not have to dip into the education portion of the 45%.

Rep. Aarsvold: Asks if Celeste from OMB has any clarification.

Celeste, OMB: She understands that the money goes into the common schools trust fund, not ...

Rep. Warner: Our reading was that only the bonded projects could access the money before it was diverted from the common schools trust fund. These other bills don't fit that priority, they can't tap into that source.

Rep. Gulleason: The explanation of the trust funds, the second paragraph speaks to this.

Rep. Wald: We are paying entire administration costs of the water commission out of the tobacco money.

Chairman Timm: Asks Jeff Nelson to step up to the podium, and asks Rep. Delzer to ask the question again.

Rep. Delzer: If we adopt the amendment .0302, does the effective date in section 3 make it so that the appropriation does not become effective until the governor signs that the program is indeed capable of being taken over and agreed upon.

Jeff Nelson, Legislative Council: Yes, he believes so. That the effective date applies to the entire act, including the appropriation.

Chairman Timm: So the fear that the money could be spent on some other function is not valid?

Jeff Nelson: If the concern is that the money not be spent until the conditions in the effective date are satisfied, then yes.

Rep. Warner: Those moneys that are administration moneys which are being taken out of the water trust fund, and all of the other things that are appropriated out of the water resources trust fund, are significantly more money appropriated than what is in the fund. Is there is statute some pecking order for which will not receive funds if the money isn't there.

Jeff Nelson: Would have to do research on this. The agency head would probably have some discretion. Would assume if there is no directive from the legislative assembly as to what order, then I would assume it would be at the discretion of the head of the agency.

Rep. Warner: Most of these are probably water commission projects, but at least one is a health department project. Do we endanger the funding for the health department project?

Jeff Nelson: Again, he would have to assume that the executive would have to implement the programs specified.

Rep. Glassheim: Looking at page 1, line 12, and then at section 3. Are these the same date? Section 3 seems to require the state engineer to tell the governor that the water commission has designed a program and is ready to assume responsibilities. That seems to be one trigger. Page 1 line 12, seems to be upon approval of assumption by EPA they can get five FTE. Are there supposed to be two different dates? The water commission can say they have a plan, and certify. But then they don't get the money and personnel until approved by EPA?

Jeff Nelson: Believes that is correct. Theoretically those could be two different dates in time. The concern was that the FTE's would not be made available until the EPA has approved assumption of the 404 program. Again, the effective date becomes effective when the state engineer certifies to the governor that the program has been designed to effectively assume responsibility for the 404 program. The dates could be at different times, but practically the state engineer wouldn't certify that until EPA actually approves state assumption.

Rep. Glassheim: But then in section 2, the appropriation. That would kick in when the state engineer certifies to the governor?

Jeff Nelson: Yes, when the state engineer certifies to the governor.

Rep. Delzer: The appropriation is good only for this biennium, and if they have not assumed by then, they would have to come back and ask for another appropriation, is that correct?

Jeff Nelson: Yes.

Chairman Timm: If we adopt the amendment the act goes on for 4 years, but the appropriation is only good for 2 years?

Jeff Nelson: Yes.

Rep. Skarphol: The money becomes available at the effective date when the governor certifies, but the full time employees can't be hired until the EPA approves. In the intervening time period the money is available and the water commission has some liberties as to what they can do with it?

Jeff Nelson: Not exactly sure on the authority of the agency to transfer within line items.

Voice vote adopted the amendment.

Rep. Monson: Moves DO PASS AS AMENDED. Seconded by Rep. Koppelman.

Rep. Delzer: Not sure that we need to leave all that \$800,000 there. Doesn't think it will get used this biennium. He's still not sure if they can use that for operating before they get control of the program or not.

Rep. Koppelman: Is satisfied with Jeff Nelson's explanation. The effective date of the act is the effective date including the appropriation. Has a concern about moving it, because if it

Page 7

House Appropriations Committee

Bill/Resolution Number SB 2285

Hearing Date April 5, 2001

goes quicker than expected, then the money would not be there. If not, the money won't get spent.

Rep. Gulleason: Would predict as part of the EPA consideration of allowing the state jurisdiction, they would look to see if they have in place in the plan the appropriate number of personnel to manage, so she suggests the money needs to be there.

Vote on Do Pass as Amended : 19 yes, 1 no, 1 absent and not voting. Motion passes.

Rep. Monson is assigned to carry the bill to the floor.

SB 2285
4-201

PROPOSED AMENDMENT TO ENGROSSED SENATE BILL NO. 2285

Page 1, line 1, after "Act" insert "to create and enact a new subsection to section 2 of chapter 594 of the 1993 Session Laws relating to employment of personnel to administer the section 404 program of the Clean Water Act;"

Page 1, after line 5, insert:

"SECTION 1. A new subsection to section 2 of chapter 594 of the 1993 Session Laws is created and enacted as follows:

To employ full-time personnel and such other personnel as are necessary for the assumption and administration of the section 404 program of the Clean Water Act as appropriated funds permit."

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2285

Page 1, line 3, remove "and"

Page 1, line 4, after "appropriation" insert "; to provide an effective date; and to provide an expiration date"

Page 1, line 12, after the period insert "Upon approval of state assumption of the section 404 program by the environmental protection agency, the state water commission is authorized five additional full-time equivalent positions to implement this Act."

Page 1, after line 12, insert:

"SECTION 3. EFFECTIVE DATE. This Act becomes effective on the date the state engineer certifies to the governor that a program has been designed to effectively assume responsibility for the section 404 program of the Clean Water Act and the state water commission is ready to assume those responsibilities. The governor shall notify the secretary of state and the legislative council of the effective date of this Act.

SECTION 4. EXPIRATION DATE. This Act is effective through June 30, 2005, and after that date is ineffective."

Renumber accordingly

Date: 4-5-01
Roll Call Vote #: ~~13000005~~

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2285

House APPROPRIATIONS Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number 10124.0302

Action Taken Motion to adopt amendment

Motion Made By Rep. Monson Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Timm - Chairman					
Wald - Vice Chairman					
Rep - Aarsvold			Rep - Koppelman		
Rep - Boehm			Rep - Martinson		
Rep - Byerly			Rep - Monson		
Rep - Carlisle			Rep - Skarphol		
Rep - Delzer			Rep - Svedjan		
Rep - Glassheim			Rep - Thoreson		
Rep - Gulletson			Rep - Warner		
Rep - Huether			Rep - Wentz		
Rep - Kempenich					
Rep - Kerzman					
Rep - Kliniske					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

passed

Date: 4-5-01
 Roll Call Vote #: 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2285

House APPROPRIATIONS Committee

Subcommittee on _____

or
 Conference Committee

Legislative Council Amendment Number 10124.0302

Action Taken DO PASS AS AMENDED.

Motion Made By Rep Monson Seconded By Rep Koppelman

Representatives	Yes	No	Representatives	Yes	No
Timm - Chairman	✓				
Wald - Vice Chairman	✓				
Rep - Aarsvold	✓		Rep - Koppelman	✓	
Rep - Boehm	✓		Rep - Martinson	✓	
Rep - Byerly	✓		Rep - Monson	✓	
Rep - Carlisle	✓		Rep - Skarphol	✓	
Rep - Delzer	✓		Rep - Svedjan	✓	
Rep - Glassheim		✓	Rep - Thoreson	✓	
Rep - Gulleson	✓		Rep - Warner	✓	
Rep - Huether			Rep - Wentz	✓	
Rep - Kempenich	✓				
Rep - Kerzman	✓				
Rep - Kliniske	✓				

Total (Yes) 19 No 1

Absent 1

Floor Assignment Rep Monson

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

2001 SENATE NATURAL RESOURCES

CONFERENCE COMMITTEE

SB 2285

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2285

Senate Natural Resources Committee

Conference Committee

Hearing Date 4-13-01

Tape Number	Side A	Side B	Meter #
1	x		Start - 4.7
Committee Clerk Signature <i>Jamie James</i>			

Minutes:

SENATOR FISCHER opened the Conference Committee meeting on SB 2285.

Roll was taken with all present including SENATOR FISCHER, TRAYNOR, EVERY and REPRESENTATIVES NELSON, DEKREY and SOLBERG.

All members were in agreement as to how to proceed with SB 2285.

REPRESENTATIVE DEKREY made a motion for the House to recede to the House Amendments and to Amend removing Section 4.

REPRESENTATIVE NELSON second the motion.

SENATOR FISCHER called for roll vote on SB 2285 indicating 6 YAYS, 0 NAYS AND 0 ABSENT OR NOT VOTING.

SENATOR FISCHER closed the Conference Committee on SB 2285.

REPORT OF CONFERENCE COMMITTEE

SB 2285, as engrossed: Your conference committee (Sens. Fischer, Traynor, Every and Reps. Nelson, DeKrey, Solberg) recommends that the **HOUSE RECEDE** from the House amendments on SJ page 1235, adopt amendments as follows, and place SB 2285 on the Seventh order:

That the House recede from its amendments as printed on page 1235 of the Senate Journal and page 1363 of the House Journal and that Engrossed Senate Bill No. 2285 be amended as follows:

Page 1, line 3, remove "and"

Page 1, line 4, after "appropriation" insert "; and to provide an effective date"

Page 1, line 12, after the period insert "The state water commission is authorized five additional full-time equivalent positions to implement this Act."

SECTION 3. EFFECTIVE DATE. This Act becomes effective on the date the state engineer certifies to the governor that a program has been designed to effectively assume responsibility for the section 404 program of the Clean Water Act and the state water commission is ready to assume those responsibilities. The governor shall notify the secretary of state and the legislative council of the effective date of this Act."

Renumber accordingly

Engrossed SB 2285 was placed on the Seventh order of business on the calendar.

=====
REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE) - 420
=====

07398

(Bill Number) SB 2285 (, as (re)engrossed):

Your Conference Committee

For the Senate:

Thomas Ficher, Chairman ✓
John Traynor ✓
Michael Every ✓

For the House:

Jon Nelson ✓
Duane DeKrey ✓
Dorvan Solberg ✓

[] recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)
the (Senate/House) amendments on (SJ/HJ) page(s) 35 -

[] and place on the Seventh order.

[x] , adopt (further) amendments as follows, and place
2285 on the Seventh order:

[] having been unable to agree, recommends that the committee be discharged
and a new committee be appointed.

((Re)Engrossed) was placed on the Seventh order of business on the
calendar.

DATE: / /

CARRIER:

LC NO. of amendment

LC NO. of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

=====

(1) LC (2) LC (3) DESK (4) COMM.

2001 TESTIMONY

SB 2285

Maple River Dam - Chronology of Project

<u>Date</u>	<u>Event</u>
28-Jul-94	CCJWRD hand delivers section 404 permit application to USACE Bismarck
29-Sep-94	Meeting with USACE in Bismarck
26-Oct-94	Meeting with USACE in Fargo re: need for Environmental Impact Statement
04-Nov-94	Letter from USACE Omaha re: requirement of EIS and possible contractors to prepare the same
04-Jan-95	USACE approval of hiring of HDR Engineering, Inc. to prepare EIS
09-Feb-95	Notice of Intent to Prepare EIS published in F.R. (indicating Final EIS in early 1996)
15-Mar-95	Public scoping meeting and Regulatory Agency scoping meeting in Casselton
31-Mar-95	Scoping Summary Document issued by USACE
15-Feb-96	Draft EIS provided by HDR Engineering, Inc. to USACE Omaha for comments
15-Apr-97	Preliminary DEIS distributed by USACE to CCJWRD and other agencies for comments
Oct-98	Draft Environmental Impact Statement formally issued by USACE
10-Feb-99	Notice of public hearings on DEIS and section 404 permit in Enderlin and Fargo
25-Feb-99	USACE holds public hearings on DEIS and section 404 permit in Enderlin and Fargo
12-Mar-99	Deadline for receipt of written comments on DEIS and section 404 permit
18-May-99	Meeting with USACE and Native American representatives
14-Oct-99	Meeting with USACE and Native American representatives (no tribal reps showed)

Maple River Dam - Chronology of Project

<u>Date</u>	<u>Event</u>
16-Nov-99	Meeting with USACE and Native American representatives
29-Nov-99	Additional comment period extended to Indian tribes by USACE closes
29-Feb-00	Meeting with USACE, ACHP and Native American reps (USACE sets new schedule)
31-Mar-00	Meeting with offices of complete Congressional delegation
11-Apr-00	Letter from Senators and Congressman to USACE re: timetable for decision
13-Apr-00	Meeting with USACE Omaha (Colonel Tillotson) re: problems with Maple River Dam
15-Jun-00	According to USACE schedule of Feb. 29, 2000, deadline for tribal walk-throughs re: TCP's
01-Jul-00	According to USACE schedule of Feb. 29, 2000, deadline for tribal claims of TCP's
04-Aug-00	USACE letter to CCJWRD re: extension of TCP claim deadline
16-Aug-00	Extended deadline for submission of claims of TCP's set on August 8, 2000
10-Sep-00	According to USACE schedule of Feb. 29, 2000, meeting re: MOA on cultural issues
30-Sep-00	According to USACE schedule set on Feb. 29, 2000, deadline for issuance of Final EIS
15-Oct-00	Extended deadline for submission of claims of TCP's
29-Dec-00	Extended deadline for submission of claims of TCP's
31-Dec-00	According to USACE schedule of Feb. 29, 2000, issuance of section 404 permit
17-Jan-01	Meeting with USACE and Native American representatives
10-May-01	New deadline for receipt of claims of TCP's

Maple River Dam - Chronology of Project

<u>Date</u>	<u>Event</u>
???	Actual issuance of Final EIS
???	Actual issuance of 404 permit

Maple River Dam - Meaning of Abbreviations

<u>Acronym</u>	<u>Meaning of Term</u>
CCJWRD	Cass County Joint Water Resource District
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FR	Federal Register
MOA	Memorandum of Agreement
Section 404	Provision of the federal Clean Water Act that requires a federal permit to place dredged or fill materials into "waters of the United States."
TCP	Traditional Cultural Property
USACE	United States Army Corps of Engineers

**Testimony for the Senate Natural Resources Committee
Senate Bill 2285**

February 1, 2001

**Presented by:
Jeffrey J. Volk, PE & LS
Moore Engineering, Inc., Project Engineer**

I stand before you today to offer my support for Senate Bill 2285. Having the North Dakota State Water Commission assume the jurisdiction of Section 404 of the Clean Water Act is the right thing to do for the State of North Dakota. I am a Registered Professional Engineer in North Dakota employed by Moore Engineering, Inc. in West Fargo. I have spent most of my professional career helping political subdivisions in North Dakota plan and construct water development projects.

My experience with projects that have required section 404 permits is generally unreasonable delays from excessive over-regulation and added cost to the project. The current permit process in North Dakota is grossly inadequate and in my opinion does not work. I believe it is not working primarily because the federal employees responsible for the process are not capable of getting through the process. When supervisors of the incompetent employees are unable, or unwilling, to address the problem, nothing gets done in a timely or reasonable fashion.

It is also apparent that personal agendas of the decision-makers, who generally oppose water projects, are able to over-ride the permit process. As you well know, many of these water projects can get very issue driven, with projects proponents trying to get projects built to develop water infrastructure, while environmental interests are trying to prevent water projects, especially flood control and drainage projects. Currently, the Corps allows the opponents of water projects to demand and receive unreasonable analyses and costly

mitigation for perceived unproven impacts to the environment. I believe this is a result of several things. First, the decision-makers live and work hundreds or thousands of miles from North Dakota. One of the stated purposes for an Environmental Impact Statement is to determine if the project is in the best interest of the public. How can the public be served by an agency that is located several states away? Second, generally the Federal Government does not have a history of being efficient and by its nature has a hard time dealing with incompetence.

I believe if North Dakota assumes jurisdiction of the Section 404 program, the permits will be administered in a more reasonable timeframe by people who better understand the local issues, substantially reducing the cost to fully develop water projects. You heard earlier of the many years of delay the Cass County Joint Water Resource District has experienced for the Maple River Dam Project. The chairman of the Water Resource District and I personally drove that permit application to the Bismarck office of the Omaha District US Army Corps of Engineers in the summer of 1994. Now nearly 7 years later, we still have no permit decision. The effects of this lengthy delay are unnecessary extended confrontations between project proponents and opponents as well as a higher unreasonable project costs.

These increased project costs come from two factors, higher construction costs due to inflation and much higher project development costs. For the Maple River Dam project, it has been very expensive to keep the required staff involved with the lengthy environmental reviews and permit processing. For this project, the Water Resource District has under contract an engineer, attorney, archaeologist and an architectural historian. Each of these also have support staff to meet the wishes of the COE. My estimate would be that six years of inflation has already raised the project cost at least \$1,000,000, while the added project administration costs are probably over \$250,000.

Another added cost to the communities developing projects and to the State of North Dakota are the lost benefits from not getting projects built in a timely fashion. Generally, projects that are being delayed by the existing cumbersome section 404 process are projects that will provide substantial benefits. Each year a project is delayed, these benefits are unrealized. A 1994 economic analysis for the Maple River Dam project calculated average annual direct flood damage reduction benefits of \$1,165,000 and average annual secondary benefits of \$3,140,000. The combined \$4,305,000 in annual benefits have been lost. What

is really unfortunate for this project is the large benefit area that received substantial flood damages during the 1997 spring flood, many of which could have been reduced or eliminated had the dam been constructed.

Another project I was involved with was the Sargent County Drain # 11 channel cleanout project. This project demonstrated how the Omaha District Corps of Engineers, the United States Fish & Wildlife Service, the Environmental Protection Agency and the United States Justice Department utilized an alleged violation of section 404 of the Clean Water Act to threaten and intimidate the Sargent County Water Resource District, Radniecki Construction Company, and Moore Engineering, Inc. Eventually, the State of North Dakota was also brought into the lawsuit as a defendant.

The case involved the cleanout of 25 miles of Sargent County Drain # 11. This channel was originally constructed in 1917 through three large wetland areas. It was clear from the original plans that the intent of the project was to improve drainage in western Sargent County as well as to drain these wetland basins. Section 404 has a clear exemption in it allowing projects to be maintained without the need for acquiring a permit. The Corps of Engineers, with support from the US Fish & Wildlife Service, alleged the cleanout project resulted in improvements to the channel, thereby requiring a section 404 permit. For seven years, the Corps of Engineers, US Fish & Wildlife Service, Environmental Protection Agency, and the US Justice Department demanded that Sargent County basically destroy Drain #11 below each of the wetlands so the wetlands could be restored.

This case was a clear example of the ability of a few federal employees, from several different agencies, attempting to utilize section 404 of the Clean Water Act to accomplish their personal agendas. The total cost of this lawsuit had to have been over \$1,000,000. The federal government hired an expert witness who alone billed over \$200,000 for his services long before the trial started.

Reasonable people administering the section 404 program would not have allowed this lawsuit to have been filed, much less let it proceed for many years, with no apparent accountability by the federal employees representing the plaintiff, the United States of America. This case is a clear example of over-zealous regulators with authority to enforce laws. The judge for this case, Rodney Webb, even made a point of this in his "Memorandum and Order" stating in part "Mr. Keller's views struck the court as being colored by his

personal emotions and convictions. ...and he was quite uncompromising in his views. Mr. Keller's general credibility was questionable as he failed to acknowledge even obvious facts when adverse to his position." Mr. Keller was an employee of the Omaha District Corps of Engineers responsible for enforcement of violations of section 404 of the Clean Water Act.

In summary, it is important that North Dakota assume jurisdiction over and administration of section 404 of the Clean Water Act. The current process for administering section 404 is not working. The process allows individuals to hide behind the regulations of this Act as well as several other Acts, to delay and prevent the construction of worthwhile water projects. The federal process does not require these individuals to be accountable for their actions or decisions. Time means nothing to them. Taking 3 months to schedule a meeting is a good example of how bad the current process works. I firmly believe that having North Dakota employees administering the process will bring accountability to the program. We cannot assume that having the North Dakota State Water Commission administer the section 404 program will automatically allow all project permits be approved. It is apparent however, that it will allow the permit process to proceed in a timely manor and in a reasonable fashion.

Thank you for allowing me to discuss this important issue with you today. I strongly urge you to recommend a DO PASS on Senate Bill 2285.

TO: Natural Resources Committee
North Dakota Senate

FROM: Robert Thompson
Member of North Cass Water Resource Board
Member of North Dakota State Water Commission

DATE: February 1, 2001

SUBJECT: Support of Senate Bill 2285

I support Senate Bill 2285 for the purpose of state operation of the Section 404 program. The Omaha Regulatory Branch of the Corps of Engineers has failed to timely and accurately implement the Section 404 program resulting in excess project costs and delay of project implementation.

The designing of state projects avoiding Section 404 permit requirements is increasing project costs substantially and is resulting in higher project operating costs.

North Dakota has not been aggressive enough in project implementation, which is exemplified by the Devils Lake dilemma caused by lack of direction by the Federal Government. Minnesota develops their resources for the public beneficial use in a much more aggressive manner. North Dakota needs to challenge the Federal Government blanket policies.

Thank you.

TESTIMONY ON SENATE BILL 2285

Senate Natural Resources Committee

Todd Sando, Director, Water Development Division
North Dakota State Water Commission

February 1, 2001

Mr. Chairman and members of the Natural Resources Committee, my name is Todd Sando. I am the Director of the Water Development Division of the North Dakota State Water Commission. On behalf of the State Engineer, I would like to provide some background information regarding North Dakota's effort to assume responsibility for administration of the Section 404 permitting requirements of the Clean Water Act.

Section 404 of the Clean Water Act requires a permit prior to placement of dredged or fill material into waters of the United States. This permitting program is currently administered by the Corps of Engineers in North Dakota through their Regulatory Office here in Bismarck in cooperation with the Environmental Protection Agency.

The Clean Water Act provides that states may assume responsibility for administration of the permitting requirements of Section 404. As of this date, only two states, Michigan and New Jersey, have successfully assumed administration of the program. North Dakota has taken several steps toward this goal including the passage of enabling legislation in 1993. Draft administrative rules were also developed, but the rule adoption process was not completed, due to the determination that federal funding was not available for program operation. There were also concerns about potential liability for the state if a permit denial were deemed to constitute a taking.

The Section 404 permitting authority cannot be assumed for waters that have been traditionally considered navigable by the Corps of Engineers. The Corps would retain both their Section 10 and Section 404 authority for these waters. In North Dakota, these waters include the Missouri River system, the Lower James River, the Upper Des Lacs, the Red River, and the Bois De Sioux. The Corps would also retain Section 404 authority for wetlands adjacent to these waters.

There are six basic elements required of an application to assume the program:

1. Letter from the Governor requesting state assumption
2. Complete state program description
3. Attorney General's statement that state law provides adequate authority
4. Memorandum Of Agreement with EPA Regional Administrator
5. Memorandum Of Agreement with Secretary of the Army
6. Copies of all applicable State statutes

Upon receipt of a complete application, the EPA is required to provide copies to interested federal agencies, provide up to 45 days for comment, conduct a public hearing in the state, and issue a decision within 120 days. The EPA may approve or deny the application based upon whether the state's program fulfills the requirements of the Clean Water Act.

The regulations do not specifically require a state to have a functioning dredge and fill permit program in place prior to applying for state assumption. However, in prior comments, EPA noted that both Michigan and New Jersey had programs operating for several years prior to state assumption and they noted that such an approach would be beneficial to North Dakota's effort to assume the program.

There are two possible options for initiating operation of a state program prior to assumption. One, suggested by EPA in the past, would be to operate initially under a State Program General Permit issued by the Corps of Engineers identifying the areas of responsibility and jurisdiction for which the state would operate their program under the supervision of the Corps. Another option would be to simply operate a state program concurrently with the federal program. Either option would provide us with an opportunity to develop our program prior to assumption and would provide the EPA with a record and a means of assessing the adequacy of the state program once we did apply for assumption. While, this step is not specifically required in the regulations, based on the prior comments received from EPA, such an approach may weigh in our favor when EPA considers our application for assumption.

The State Water Commission provided a cost estimate for running such a program of \$800,000 per biennium. This estimate was based upon a requirement of 5 new full time employees, including training, operational costs, and additional rental office space. Since the development of that estimate, the U.S. Supreme Court issued a ruling which will have widespread ramifications for the Section 404 permitting program, especially in a prairie-pothole region such as North Dakota. Specifically the Supreme Court ruled that isolated wetlands are outside the jurisdiction of the Corps of Engineers Section 404 permitting authority. This should significantly reduce the volume

of permit actions to be addressed, as there are approximately 2 1/2 million acres of isolated wetlands in North Dakota.

In light of this court decision, the extent of the jurisdiction of the program is still being defined. We know that the traditionally navigable waters listed earlier and their adjacent wetlands cannot be assumed by the state. Any waters tributary to those traditionally navigable waters will be jurisdictional and can be assumed by the state. Small isolated wetlands will not be jurisdictional. The Corps and EPA are still in the process of formulating a policy for the other waters.

The extent to which the recent court decision may reduce the workload and associated cost of running such a program is difficult to quantify at this time. The local Regulatory Office of the Corps of Engineers has been processing a total of approximately 1600 actions a year. The majority of these actions have involved waters for which authority could be assumed by the state. Until the Corps and EPA have further defined their jurisdictional policy in light of the recent Supreme Court decision, it is difficult to quantify the expected workload.

It should be noted that the cost estimate of \$800,000 did not include any estimate of legal fees. Due to the potentially litigious nature of the program, legal services would be required. Past estimates have included funding for an attorney on a half time basis. The need for legal services would be significant during the period of program start up and also for those actions involving litigation. The Office of the Attorney General has estimated that fees for a half time attorney would be approximately \$90,000 per biennium.

If this legislation is approved, the first step would be to update the draft rules and initiate the adoption of the required administrative rules. This step would be required to complete the application process, as the rules would need to be enacted prior to the development of the Attorney General's statement. Some staff additions may be required to complete the application process. It would then need to be decided whether the state should initiate startup of a state program prior to filing an application for assumption either through a State Program General Permit or by simply running a state program concurrently with the existing federal program.

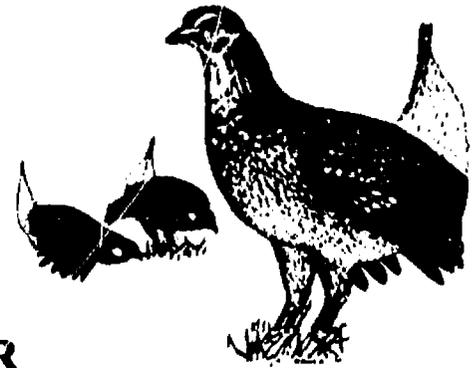
In conclusion, the N.D. State Engineer is neutral on the assumption of the 404 program. There are both advantages and disadvantages associated with state assumption of the 404 permitting program. We may be able to develop a program that is more responsive to the needs of the citizens of North Dakota. However, it is important to remember that any program developed by the state will need to provide the same level of environmental protection afforded through the Corps' operation of the program.



North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



**TESTIMONY OF BILL PFEIFER
NORTH DAKOTA CHAPTER OF THE WILDLIFE SOCIETY
PRESENTED TO THE SENATE NATURAL RESOURCE COMMITTEE
ON SB 2285, FEBRUARY 1, 2001**

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I'm Bill Pfeifer speaking on behalf of the North Dakota Chapter of The Wildlife Society. The Wildlife Society opposes SB 2285 because North Dakota's past track record concerning water management has been questionable.

The Clean Water Act, as administered by the Environmental Protection Agency, is intended to assure the American public that the aquatic environment is maintained at a level consistent with certain standards, that the rules are followed.

Assuming the responsibility of administering the 404 program is a major undertaking and should not be taken lightly, is North Dakota prepared to provide the proper evaluation and analysis of each project requiring a 404 permit? Is North Dakota prepared to financially enter litigation cases such as riprapping along the Missouri River?

It is because of these and other doubts that The Wildlife Society opposes SB 2285.

**Testimony for the House Natural Resources Committee
Senate Bill 2285**

March 16, 2001

**Presented by:
Jeffry J. Volk, PE & LS
Moore Engineering, Inc., Project Engineer**

I stand before you today to offer my support for Senate Bill 2285. Having the North Dakota State Water Commission assume the jurisdiction of Section 404 of the Clean Water Act is the right thing to do for the State of North Dakota. I am a Registered Professional Engineer in North Dakota employed by Moore Engineering, Inc. in West Fargo. I have spent most of my professional career helping political subdivisions in North Dakota plan and construct water development projects.

My experience with projects that have required section 404 permits is generally unreasonable delays from excessive over-regulation and added cost to the project. The current permit process in North Dakota is grossly inadequate and in my opinion does not work. I believe it is not working primarily because the federal employees responsible for the process are not capable of getting through the process. When supervisors of the incompetent employees are unable, or unwilling, to address the problem, nothing gets done in a timely or reasonable fashion.

It is also apparent that personal agendas of the decision-makers, who generally oppose water projects, are able to over-ride the permit process. As you well know, many of these water projects can get very issue driven, with projects proponents trying to get projects built to develop water infrastructure, while environmental interests are trying to prevent water projects, especially flood control and drainage projects. Currently, the Corps allows the opponents of water projects to demand and receive unreasonable analyses and costly

mitigation for perceived unproven impacts to the environment. I believe this is a result of several things. First, the decision-makers live and work hundreds or thousands of miles from North Dakota. One of the stated purposes for an Environmental Impact Statement is to determine if the project is in the best interest of the public. How can the public be served by an agency that is located several states away? Second, generally the Federal Government does not have a history of being efficient and by its nature has a hard time dealing with incompetence.

I believe if North Dakota assumes jurisdiction of the Section 404 program, the permits will be administered in a more reasonable timeframe by people who better understand the local issues, substantially reducing the cost to fully develop water projects. You heard earlier of the many years of delay the Cass County Joint Water Resource District has experienced for the Maple River Dam Project. The chairman of the Water Resource District and I personally drove that permit application to the Bismarck office of the Omaha District US Army Corps of Engineers in the summer of 1994. Now nearly 7 years later, we still have no permit decision. The effects of this lengthy delay are unnecessary extended confrontations between project proponents and opponents as well as a higher unreasonable project costs.

These increased project costs come from two factors, higher construction costs due to inflation and much higher project development costs. For the Maple River Dam project, it has been very expensive to keep the required staff involved with the lengthy environmental reviews and permit processing. For this project, the Water Resource District has under contract an engineer, attorney, archaeologist and an architectural historian. Each of these also have support staff to meet the wishes of the COE. My estimate would be that six years of inflation has already raised the project cost at least \$1,000,000, while the added project administration costs are probably over \$250,000.

Another added cost to the communities developing projects and to the State of North Dakota are the lost benefits from not getting projects built in a timely fashion. Generally, projects that are being delayed by the existing cumbersome section 404 process are projects that will provide substantial benefits. Each year a project is delayed, these benefits are unrealized. A 1994 economic analysis for the Maple River Dam project calculated average annual direct flood damage reduction benefits of \$1,165,000 and average annual secondary benefits of \$3,140,000. The combined \$4,305,000 in annual benefits have been lost. What

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The case involved the cleanout of 25 miles of Sargent County Drain # 11. This channel was originally constructed in 1917 through three large wetland areas. It was clear from the original plans that the intent of the project was to improve drainage in western Sargent County as well as to drain these wetland basins. Section 404 has a clear exemption in it allowing projects to be maintained without the need for acquiring a permit. The Corps of Engineers, with support from the US Fish & Wildlife Service, alleged the cleanout project resulted in improvements to the channel, thereby requiring a section 404 permit. For seven years, the Corps of Engineers, US Fish & Wildlife Service, Environmental Protection Agency, and the US Justice Department demanded that Sargent County basically destroy Drain #11 below each of the wetlands so the wetlands could be restored.

This case was a clear example of the ability of a few federal employees, from several different agencies, attempting to utilize section 404 of the Clean Water Act to accomplish their personal agendas. The total cost of this lawsuit had to have been over \$1,000,000. The federal government hired an expert witness who alone billed over \$200,000 for his services long before the trial started.

Reasonable people administering the section 404 program would not have allowed this lawsuit to have been filed, much less let it proceed for many years, with no apparent accountability by the federal employees representing the plaintiff, the United States of America. This case is a clear example of over-zealous regulators with authority to enforce laws. The judge for this case, Rodney Webb, even made a point of this in his "Memorandum and Order" stating in part "Mr. Keller's views struck the court as being colored by his

personal emotions and convictions. ...and he was quite uncompromising in his views. Mr. Keller's general credibility was questionable as he failed to acknowledge even obvious facts when adverse to his position." Mr. Keller was an employee of the Omaha District Corps of Engineers responsible for enforcement of violations of section 404 of the Clean Water Act.

In summary, it is important that North Dakota assume jurisdiction over and administration of section 404 of the Clean Water Act. The current process for administering section 404 is not working. The process allows individuals to hide behind the regulations of this Act as well as several other Acts, to delay and prevent the construction of worthwhile water projects. The federal process does not require these individuals to be accountable for their actions or decisions. Time means nothing to them. Taking 3 months to schedule a meeting is a good example of how bad the current process works. I firmly believe that having North Dakota employees administering the process will bring accountability to the program. We cannot assume that having the North Dakota State Water Commission administer the section 404 program will automatically allow all project permits be approved. It is apparent however, that it will allow the permit process to proceed in a timely manor and in a reasonable fashion.

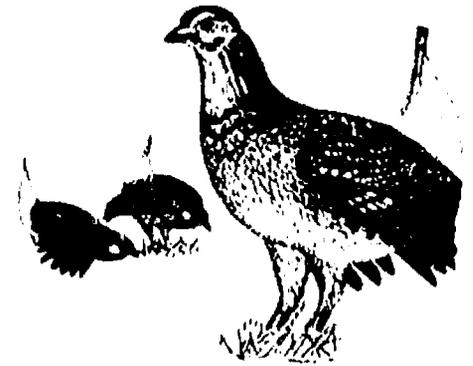
Thank you for allowing me to discuss this important issue with you today. I strongly urge you to recommend a DO PASS on Senate Bill 2285.



North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



**TESTIMONY OF BILL PFEIFER
NORTH DAKOTA CHAPTER OF THE WILDLIFE SOCIETY
PRESENTED TO THE HOUSE NATURAL RESOURCE COMMITTEE
ON SB 2285, MARCH 16, 2001**

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I'm Bill Pfeifer speaking on behalf of the North Dakota Chapter of The Wildlife Society. The Wildlife Society opposes SB 2285 because of the uncertainties.

This Bill, which is intended to expedite the 404 permit issuance process, now the responsibility of the Corps of Engineers, lacks specifics such as: Which waters would be involved? Which waters are considered navigable streams? Are tributaries of the navigable streams included? How realistic is the \$800,000 fiscal note guess when the responsibilities are not identified? --it could be much more. Also, is the state of North Dakota prepared to handle a major litigation should such occur?

At this time, it's difficult to visualize just how the program would function given the responsibilities are not identified. Does the assumption of these responsibilities include some lakes, which lakes? ; some or all navigable streams; some or all tributaries. Will the same wetlands be included pending the interpretation of the recent federal court case?

The \$800,000 fiscal note is really only a guess. The Corps estimated cost of running this regulatory program was provided ten years ago and the Corps claimed the program was greatly underfunded at that time. Much of the cost is due to the technical nature of the complexities of the federal regulations, the scientific needs, and the constant coordination on the local and federal level. In addition, the Environmental Protection Agency (EPA) is involved in selected 404 violations and these EPA costs are above and beyond the estimated expenses.

There is a concern about the time lag of the Corps in determining the issuance of 404 permits. If the state is to assume the responsibilities of issuing 404 permits, the EPA regulations will have to be followed. The state criteria would be required to be as, or more strict, than EPA criteria. Additionally, the state could not overlook the quality in details just to issue a "quicky" permit. EPA does retain final authority to override state decisions.

Presently, the Corps of Engineers shoulders the financial costs of carrying out the Clean Water Act through the 404 permit system. The Wildlife Society is of the opinion that it would be a mistake for the state of North Dakota to assume the 404 permit system by planning to save time and money by "cutting corners." Therefore, The Wildlife Society opposes SB 2285 and requests a DO NOT PASS.

House Natural Resources Committee

Testimony of Senator Tom Fischer

Mister Chairman, members of House Natural Resources Committee

SB 2285 appropriates \$800,000 for the purpose of assuming jurisdiction and administration of the 404 Permit process of the Clean Water Act.

The 404 permit process in North Dakota deals with everything from drains to dams and at the present is being administrated by the Corps of Engineers which is riddled with incompetence. A permit which should take approximately 18 months by their own rule can and does take up to 7 years if luck is with you. Through delays created by lack of simple decision making and not keeping schedules that they set the most simple of projects are not going forward. In a case that I am very familiar with the permit was applied for in 1994 and has yet to be acted on one way or the other.

There are six elements required of the state to assume the program

1. A letter from the governor requesting state assumption of the 404
2. Complete state program description
3. Attorney General's statement that the state law provides adequate authority.
4. Memorandum of Agreement with EPA regional administrator
5. Memorandum of agreement with Secretary of the Army
6. Copies of all applicable state statutes.

We have the opportunity to use either New Jersey's or Michigan's plan and I have asked for copies of all of the New Jersey's implementation documents which we should have shortly.

The time has come to assume this program and plan and execute these permits using our own experts rather than someone with no knowledge of the project 1000 miles away. Thank you Mr. Chairman.

ENGROSSED SENATE BILL NO. 2285 - WATER COMMISSION
ASSUMPTION OF 404 PROGRAM - EFFECT ON BILLABLE LEGAL SERVICES
KATHY ROLL, OFFICE OF ATTORNEY GENERAL

Engrossed Senate Bill No. 2285 provides for the Water Commission to assume jurisdiction over and administer the 404 Assumption program of the Clean Water Act. As amended, funding for those duties is from the Water Development Trust Fund. The Office of Attorney General provides legal services to the Water Commission. Currently, all legal services provided for 404 Assumption matters are billable. 2001 Engrossed House Bill No. 1023 exempts the Water Commission from payment of Office of Attorney General legal fees if the Water Development Trust Fund would pay such fees. Although the fiscal note for Engrossed Senate Bill No. 2285 indicates the Water Commission will be able to pay for Attorney General legal services, the exemption provision contained in Engrossed House Bill No. 1023 will not allow such payment.

Currently, this office bills the Water Commission for non-general fund legal services provided. If Engrossed House Bill No. 1023 passes in its current form, this office will be unable to bill its legal services even for the services that are currently billed. Assuming Engrossed House Bill No. 1023 is amended to provide that Attorney General legal services can be billed, the Office of Attorney General's salaries and wages, operating expenses and equipment needs to be increased by \$76,000 from other funds for a .5 FTE assistant attorney general relating to the 404 Assumption program. An increase in FTE is not necessary.

If Engrossed House Bill No. 1023 is not amended, in order to provide legal services for the 404 Assumption program the \$76,000 for the .5 FTE assistant attorney general will need to be funded from the General Fund.

**To: House Natural Resources Committee
North Dakota House of Representatives**

**From: Robert Thompson
North Cass Water Resource Board
State Water Commission**

Date: March 16, 2001

Subject: Support of Senate Bill 2285

I support Senate Bill 2285 for the purpose of state operation of the Section 404 program. The Omaha Regulatory Branch of the Corps of Engineers has failed to timely and accurately implement the Section 404 program resulting in excess project costs and delay of project implementation.

The designing of state projects avoiding Section 404 permit requirements is increasing project costs substantially and is resulting in higher project operating costs.

North Dakota has not been aggressive enough in project implementation, which is exemplified by the Devils Lake dilemma caused by lack of direction by the Federal Government. Minnesota develops their resources for the public beneficial use in a much more aggressive manner. North Dakota needs to challenge the Federal Government blanket policies.

The State Water Commission needs operation of the Section 404 program as a tool for completing water projects and thus, I recommend a do pass on Senate Bill 2285.

Thank you.

Written Testimony of Steven E. McCullough

In Support of S.B. 2285

Before the N.D. House Natural Resources Committee

Friday, March 16, 2001

My name is Steven E. McCullough. I am an attorney with the law firm of Ohnstad Twichell, P.C. Our office represents following Water Resource Districts in North Dakota: (1) Maple River Water Resource District; (2) Southeast Cass Water Resource District; (3) Rush River Water Resource District; (4) North Cass Water Resource District; (5) North Cass & Rush River Water Resource District; (6) Maple River & Barnes County Joint Water Resource District; (7) Maple River & Ransom County Joint Water Resource District; (8) Maple River & Rush River Joint Water Resource District; (9) Cass County Joint Water Resource District; (10) Cass County & Richland County Joint Water Resource District; (11) Ransom County Water Resource District; (12) Richland County Water Resource District; (13) Steele County Water Resource District; (14) Sheyenne River Joint Water Resource District; and (15) Red River Joint Water Resource District.

I am testifying today on behalf the Cass County Joint Water Resource District, who is an applicant for pending permit under section 404 of the Clean Water Act. I urge passage of Senate Bill 2285, which provides for the funding of a state program for the administration of section 404 permitting within certain waters within the State of North Dakota. My testimony today encompasses two major areas: (1) the need for a state program (as shown through the presently pending permit application in regard to the proposed Maple River Dam in Cass County, North Dakota), and (2) the costs of funding a program and of not funding a program. In order to facilitate my testimony a copy of chronology of events regarding the Maple River Dam project is attached to this written testimony.

The Need For a State Program to Process Section 404 Permits Cannot Be Disputed.

The Cass County Joint Water Resource District was created in 1987 to serve as the local sponsor for a flood prevention dam on the Maple River near Enderlin, North Dakota. The idea of a Maple River Dam was first recommended in January of 1984, as part of a four-pronged attack to ameliorate flooding in the Maple-Sheyenne River Basin (the other three prongs being the raising of the pool behind Baldhill Dam, the West Fargo Diversion and the Horace Diversion, all of which have been built or are in the process of being built). In order to build the dam, a permit is required under section 404 of the Clean Water Act. Accordingly, **on July 28, 1994, a permit application was hand delivered to the United States Army Corps of Engineers (USACE) in Bismarck, North Dakota.**

In November of 1994, the USACE determined that an Environmental Impact Statement (EIS) would be required for the proposed Maple River Dam. On February 9, 1995, the USACE published in the Federal Register a formal Notice of Intent to Prepare EIS. This formal notice indicated a Final EIS was expected in early 1996. This was in keeping with the USACE internal guidelines which indicated it should take approximately one year to process an EIS. According to the USACE, a decision on a 404 permit will usually be made within 90 days of the issuance of the Final EIS.

In keeping with this schedule, scoping meetings were held on March 15, 1995, to determine the issues of significance for the EIS and section 404 process. The scoping meetings developed input from the public, other governmental agencies and Native American representatives. Scoping comments were received until the end of March, 1995, with no apparent insurmountable problems to the Dam.

In keeping with this schedule, the consultant hired to actually prepare the EIS submitted a proposed Draft EIS to the USACE on February 15, 1996. Unfortunately for the people of Eastern North Dakota, at this point the processing of this permit by the USACE began to move so slowly as to be almost imperceptible. For reasons known only to the USACE, the Draft EIS was not formally issued until October, 1998. The USACE had the Draft EIS in its possession for 32 months before formally issuing it. The Draft EIS was issued over 2 ½ years after the USACE's own regulations indicated a Final EIS should have been issued.

The USACE then took nearly 5 months to schedule the public comment hearings on the Draft EIS and the section 404 permit, which hearings were held on February 29, 1999. Pursuant to the USACE regulations, the deadline for the receipt of written comments on the Draft EIS was March 12, 1999. None of the comments brought to light any new issues from those presented at the scoping meetings, held some 4 years earlier.

It thus appeared a Final EIS would be issued in the spring of 1999 and the section 404 permit issued in the summer of 1999. Unfortunately, this did not happen. In October of 1999, the USACE extended an additional comment period to Indian tribes. The USACE allowed the additional comment period until November 29, 1999. As before, no new issues were raised by any Indian tribe.

Thinking that the EIS and section 404 permit process would be shortly finalized, a meeting was held on February 29, 2000 (the earliest the USACE was able to schedule a meeting after November 29, 1999) between various Native Americans, and representatives of the USACE, the North Dakota State Historic Preservation Office and the Cass County Joint Water Resource District. The purpose of the meeting was to come to an agreement concerning certain cultural issues so the section 404 permit could be issued. However, the Native Americans present indicated they would never sign any agreement. Despite the fact Indian tribes had already been given two comment periods, the Indians were given a deadline of July 1, 2000, to present a report of their claims in this area.

When the Indians did not meet this deadline, the USACE extended the deadline, this time until August 1, 2000. When the Indians did not meet this deadline, the USACE extended the deadline again, this time until August 16, 2000. When the Indians did not meet this deadline, the USACE extended the deadline again, this time until October 15, 2000. When the Indians did not meet this deadline, the USACE extended the deadline again, this time until December 29, 2000.

Of course the Indians did not meet the December, 2000, deadline either. This time a meeting was held on January 17, 2001, among certain Indians, USACE officials, representatives of the North Dakota State Historic Preservation office and members of the Cass County Joint Water Resource District. At this meeting the USACE gave the Indian representatives until "early summer" of 2001 to present their report of their claims. Subsequently, the USACE has told the Cass County Joint Water Resource District that the Indians claim not to have the funds to prepare their report. Thus, after extending the deadline at least five times the USACE recently informed the Cass County Joint Water Resource District that it (the Water Resource District) should prepare a report of the claims of the Indian tribes.

The long and the short of it is that the section 404 permit application for the Maple River Dam has been pending before the USACE for almost seven years with no real end in sight to the process. This is just one example of the way the USACE treats (or refuses to treat

permits). There can be no question that there is a need to get a more responsive system in place for the processing of section 404 permits. The example of the Maple River Dam project brings this need into crystal clarity. If the USACE could just make a decision on the permit process, the people of Eastern North Dakota would be able to take some action to prevent the flooding that has occurred so frequently. (For example, if the USACE had followed its schedule the Dam may very well have been built before the disastrous flood of 1997 and would have provided some flood protection as far upstream in the basin as Grand Forks!) With no decision, the people of Eastern North Dakota are stuck in limbo, not knowing if they will get the Dam and not knowing if they should try to develop other (perhaps more costly and less efficient) alternatives for flood control. What this delay really shows, however, is that the actual costs to the state of North Dakota in implementing such a process will be minimal.

The Actual Costs to the State Will Be Minimal.

There are two major issues that need addressing in relation to the costs of funding a section 404 program. The first relates to the costs to the State of North Dakota if a program is not funded. The second relates to whether the \$800,000 per biennium price tag may actually be too high. Each of these major issues is addressed in turn.

In considering the costs to the State of implementing a section 404 program, it cannot be stressed enough that under the present system of USACE administration of the complete section 404 program the State of North Dakota, and its citizens are incurring additional costs. These costs are the direct result of the delays caused by the USACE's failure to timely process applications. Again, the proposed Maple River Dam project provides an excellent example.

The delay of processing a section 404 permit application necessarily results in an increased price to complete the project. The estimate for the cost of the proposed Maple River Dam, as set forth in the Draft EIS, was roughly \$14,000,000. Because of the delays, however, the Cass County Joint Water Resource District estimates inflation alone has pushed this cost up by at least 1 million dollars. Further, and following the maxim that work expands to fit the time allotted it, the Cass County Joint Water Resource District estimates that roughly it has incurred an additional \$250,000 of administrative expenses (on such things as travel, attendance at repetitive meetings scheduled by the USACE which would not have been necessary had a decision on the permit been issued in a timely fashion, etc.).

While the entire 1.25 million dollars is a cost which ultimately has to be borne by the citizens of the State of North Dakota, a substantial portion will likely come *directly* out of state coffers. The Maple River Dam is a project which has consistently been supported by the State Water Commission. It will be eligible for and likely receive cost sharing from the State Water Commission at the 50% level. If the State of North Dakota had processed the section 404 permit application, it is unlikely the State would have allowed the application to languish the way the USACE has allowed. Assuming the State of North Dakota had processed the application in a timely fashion, there would have been a direct savings to the State of well over \$600,000. Again, this is only one project.

In addition to these direct costs there are hidden costs that are paid by the State and its citizens. The Cass County Joint Water Resource District obtained an analysis of the both the primary and secondary benefits of the building of the Maple River Dam. The primary benefits are,

of course, the reductions in flood damages. The average annual primary benefits are 1.165 million dollars. The combined average annual benefits, both primary and secondary, are 4.305 million dollars.

As noted above, the Maple River Dam should have been built prior to the 1997 flood, had the USACE processed the permit according to its own internal guidelines. While there is no end in sight, the earliest the Dam could be built would be 2002. This means there will have been at least six years of lost benefits of the Dam. **This has resulted in a loss to the State of North Dakota and its citizens of over 25 million dollars on this one project alone.** Clearly, the State would ultimately save money if it were to assume the section 404 permit program.

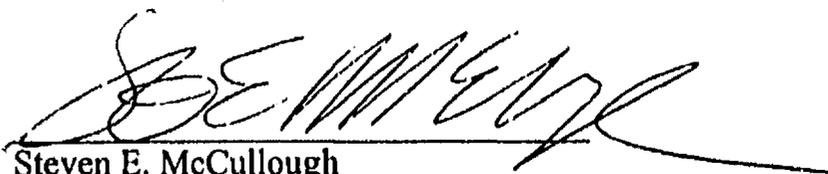
Further, it is questionable whether the \$400,000 per year price tag placed on the State program is too high. Several things must be noted. First, the State will not take over the section 404 permit process for the entire State. The USACE will retain jurisdiction over navigable waters (as that term is defined by the Federal Act). Navigable waters in North Dakota include the Missouri River, the Red River, parts of the Souris River and James River and it is believed the USACE will attempt to designate other areas as navigable waters, including Devils Lake.

Outside of these navigable waters the jurisdiction of the USACE in North Dakota has primarily been because of USACE regulations governing isolated wetlands because of migratory waterfowl (basically prairie potholes). The United States Supreme Court recently issued a decision which removed that jurisdiction from the USACE. In a recent discussion with a USACE official after that decision, I was told "the decision could eliminate 90% of North Dakota's waters from the section 404 requirements." This limiting of jurisdiction, combined with the USACE's retention of jurisdiction over navigable waters, makes it questionable if the \$400,000 per year cost is too high.

Conclusion

In conclusion, I urge support and ultimate passage of Senate Bill 2285. It is desperately needed to ensure timely processing of section 404 permits, which are so crucial to flood control projects throughout the State of North Dakota. The costs of the program are well outweighed by the benefits which will inure to the State and its citizens by passage of the bill.

Respectfully submitted,



Steven E. McCullough
Attorney for Cass County Joint Water Resource District
OHNSTAD TWICHELL, P.C.
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P.O. Box 458
West Fargo, ND 58078-0458

Maple River Dam - Chronology of Project - S.B. 2285

<u>Date</u>	<u>Event</u>
28-Jul-94	CCJWRD hand delivers section 404 permit application to USACE Bismarck
29-Sep-94	Meeting with USACE in Bismarck
26-Oct-94	Meeting with USACE in Fargo re: need for Environmental Impact Statement
04-Nov-94	Letter from USACE Omaha re: requirement of EIS and possible contractors to prepare the same
04-Jan-95	USACE approval of hiring of HDR Engineering, Inc. to prepare EIS
09-Feb-95	Notice of Intent to Prepare EIS published in F.R. (indicating Final EIS in early 1996)
15-Mar-95	Public scoping meeting and Regulatory Agency scoping meeting in Casselton
31-Mar-95	Scoping Summary Document issued by USACE
15-Feb-96	Draft EIS provided by HDR Engineering, Inc. to USACE Omaha for comments
Mar-96	Date Final EIS should have been issued
Jun-96	Date 404 Permit should have been granted and construction begun on Maple River Dam
15-Apr-97	Preliminary DEIS distributed by USACE to CCJWRD and other agencies for comments
Oct-98	Draft Environmental Impact Statement formally issued by USACE

Maple River Dam - Chronology of Project - S.B. 2285

<u>Date</u>	<u>Event</u>
10-Feb-99	Notice of public hearings on DEIS and section 404 permit in Enderlin and Fargo
25-Feb-99	USACE holds public hearings on DEIS and section 404 permit in Enderlin and Fargo
12-Mar-99	Deadline for receipt of written comments on DEIS and section 404 permit
18-May-99	Meeting with USACE and Native American representatives
14-Oct-99	Meeting with USACE and Native American representatives (no tribal reps showed)
16-Nov-99	Meeting with USACE and Native American representatives
29-Nov-99	Additional comment period extended to Indian tribes by USACE closes
29-Feb-00	Meeting with USACE, ACHP and Native American reps (USACE sets new schedule)
31-Mar-00	Meeting with offices of complete Congressional delegation
11-Apr-00	Letter from Senators and Congressman to USACE re: timetable for decision
13-Apr-00	Meeting with USACE Omaha (Colonel Tillotson) re: problems with Maple River Dam
15-Jun-00	According to 2/29/00 USACE schedule, deadline for Indian walk-throughs to determine claims of TCP
01-Jul-00	According to 2/29/00 USACE schedule, deadline for reports from Indians re: claims of TCP's

Maple River Dam - Chronology of Project - S.B. 2285

<u>Date</u>	<u>Event</u>
04-Aug-00	USACE letter to CCJWRD re: extension of TCP claim deadline
16-Aug-00	Extended deadline for submission of claims of TCP's set on August 8, 2000
01-Sep-00	According to 2/29/00 USACE schedule, deadline for comments to USACE re: cultural issues
10-Sep-00	According to 2/29/00 USACE schedule, date of meeting to finalize draft MOA re: cultural issues
30-Sep-00	According to 2/29/00 USACE schedule, deadline for issuance of Final EIS
15-Oct-00	Extended deadline for submission of claims of TCP's
29-Dec-00	Extended deadline for submission of claims of TCP's
31-Dec-00	According to 2/29/00 USACE schedule, deadline for issuance of section 404 permit
17-Jan-01	Meeting with USACE and Native American representatives
10-May-01	New deadline for receipt of claims of TCP's
???	Actual issuance of Final EIS
???	Actual issuance of 404 permit

Maple River Dam - Meaning of Acronyms - S.B. 2285

Acronym Meaning of Term

ACHP	Advisory Council on Historic Preservation
APE	Area of Potential Effect
CCJWRD	Cass County Joint Water Resource District
CFR	Code of Federal Regulations
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FOIA	Freedom of Information Act
FR	Federal Register
GPRTCA	Great Plains Regional Tribal Chairman's Association
MOA	Memorandum of Agreement
NAGPRA	Native American Graves Protection and Repatriation Act
NDIRC	North Dakota Intertribal Reinterment Committee
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NR or NRIHP	National Register or National Register of Historic Places
PA	Programmatic Agreement
SHPO	State Historic Preservation Office
Section 106	Provision of National Historic Preservation Act that requires identification, evaluation and mitigation of adverse effects on historic properties whenever there is a federal undertaking.
Section 404	Provision of the federal Clean Water Act that requires a federal permit to place dredged or fill materials into "waters of the United States."
TCP	Traditional Cultural Property
THPO	Tribal Historic Preservation Office
TMBC	Turtle Mountain Band of Chippewa
USACE	United States Army Corps of Engineers

TODD
SANDO

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2285

Page 1, line 1, after "Act" insert "to create and enact a new subsection to section 2 of chapter 594 of the 1993 Session Laws relating to employment of personnel to administer the section 404 program of the Clean Water Act;"

Page 1, after line 5, insert::

"Section 1. A new subsection to section 2 of chapter 594 of the 1993 Session Laws is created and enacted as follows:

To employ full-time personnel and such other personnel as are necessary for the administration of the section 404 program of the Clean Water Act as appropriated funds permit."

Renumber accordingly

Senator Tom Fisker

SB 2285

Mister Chairman, members of Senate Appropriations Committee.

SB 2285 appropriates \$800,000 for the purpose of assuming jurisdiction and administration of the 404 Permit process of the Clean Water Act.

The 404 permit process in North Dakota deals with everything from drains to dams and at the present is being administrated by the Corps of Engineers which is riddled with incompetence. A permit which should take approximately 18 months by their own rule can and does take up to 7 years if luck is with you. Through delays created by lack of simple decision making and not keeping schedules that they set the most simple of projects are not going forward.

In a case that I am very familiar with the permit was applied for in 1994 and has yet to be acted on one way or the other.

Senator Tom Hooper

SB 2285

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January 12, 2001

**SUPREME COURT STRIKES DOWN FEDERAL JURISDICTION
OVER ISOLATED WATERS**

The United States Supreme Court on January 9th ruled 5-4 that federal authority under the Clean Water Act (CWA) does not extend to isolated waters. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S. January 9, 2001). The Court's decision, which dealt specifically with the Section 404 permitting program under the CWA, effectively leaves the protection of isolated waters to state and local governments. "Isolated" waters are those waters, including wetlands, that are not connected or adjacent to interstate or navigable waters.

The Court's decision has important implications for municipalities, mining companies, utilities, developers and others seeking to conduct activities in such waters. The U.S. Army Corps of Engineers is expected to issue guidance on the decision to its field offices prior to January 20, 2001. The decision, however, appears to eliminate from CWA jurisdiction isolated waters and wetlands such as prairie potholes, vernal pools, and ponds. The Court's decision has implications for other environmental statutes, as well as congressional action, as discussed below.

The Decision

The case was brought by a group of 23 Illinois municipalities that organized themselves into a municipal corporation known as the Solid Waste Agency of Northern Cook County. SWANCC purchased a 533 acre site for disposing of baled nonhazardous solid waste, but the Corps denied the permit required under Section 404 of the CWA to fill 17.6 acres of small, seasonal ponds (isolated waters). SWANCC then sought judicial review in the federal courts of the denial of the permit by the Corps.

Section 404 of the Clean Water Act requires a permit for the discharge of dredged or fill material into "navigable waters." Section 502(7) of the Act defines "navigable waters" as "waters of the United States, including the territorial seas." Under Corps regulations, "waters of the United States" include not only interstate and traditionally navigable waters and their adjacent wetlands, but all other waters, including intrastate lakes, streams and wetlands, "the use, degradation or destruction of which could affect interstate commerce." 33 C.F.R. § 328.3(a)(3). The Corps asserted jurisdiction over the site chosen by SWANCC on grounds that use of the area as habitat for migratory birds established the necessary connection to interstate commerce under Corps regulations.

The Court held that the Corps' assertion of jurisdiction over isolated waters on the basis of the "migratory bird rule" exceeds the authority granted under Section 404(a) of the CWA. The Court based its decision on the CWA alone, thereby avoiding the constitutional question of whether the regulation was within Congress' power under the Commerce Clause.

The Court held that the agencies' expansive definition of the term "waters of the United States" was so broad that the word "navigable" was effectively eliminated from the statutory term, "navigable waters." The term "navigable," according to the Court, demonstrates that in enacting

the CWA, Congress had in mind "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." In Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Court upheld jurisdiction over wetlands "adjacent" to navigable waters. In that case, the Court ruled that Congress intended the term "navigable waters" to include at least some waters that would not be deemed "navigable" under the classical understanding of that term. However, the Court yesterday noted that there is a difference between giving the term "navigable" limited effect, and giving the term no effect at all.

In addition, the Court ruled that even if the CWA's grant of authority in Section 404 were not clear, the Court would not defer to the agencies' interpretation of the Act in this case because the regulation raised constitutional questions. The Court stated that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." The majority stated that allowing the Corps and EPA to claim jurisdiction over isolated waters such as ponds and mudflats would result in a "significant impingement of the State's traditional and primary power over land and water use," the regulation of which is traditionally performed by local governments. Rather than readjusting the federal-state balance under the CWA, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" as expressed in Section 101(b) of the CWA. The Court found "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as the one at issue," and therefore, rejecting the agencies' request for deference, read the statute to avoid such significant constitutional and federalism questions.

The four dissenters asserted that the Court's previous decision in Riveride recognized that Congress had "acquiesced" in the Corps' understanding of its jurisdiction to include isolated waters. The dissent argued further that, with respect to the Court's decision in Riverside to uphold federal jurisdiction over wetlands adjacent to navigable waters, "once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute's protection to those waters or wetlands that happen to lie near a navigable stream."

Implications of the Decision

According to one Corps official, isolated waters may account for as much as 10 percent of "waters of the United States," including wetlands, or about 10 million acres nationwide. The Court's decision has a number of implications, including the following:

- *Guidance from the agencies.* The Corps and EPA are likely to issue guidance, perhaps before the end of the current Administration on January 20th, to their field staff on how to implement the Court's decision. The guidance may attempt to limit the reach of the Court's decision. Any such guidance can be reviewed by the new Administration that takes office on January 20, 2001.
 - *A push for federal legislation.* The elimination of isolated waters from federal jurisdiction may result in congressional efforts to amend the Act. EPA Administrator Carol Browner has called for such action. However, the Court in its opinion signaled that such legislation could raise constitutional questions. While the Court was not required to address the issue directly, the Court indicated that questions would arise involving Congress' authority to regulate isolated waters consistent with the Commerce Clause of the Constitution.
 - *A push for state legislation.* The decision appears to leave the protection of isolated waters exclusively to state and local governments. States and local governments may respond to
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the Court's decision by enacting or strengthening state and local laws, or intensifying enforcement of existing laws, in order to protect isolated waters.

- ***Less involvement with FWS under the ESA.*** Consultations with the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act are triggered by applications for a federal permit, often by applications under Section 404 of the CWA. A reduction of waters subject to jurisdiction under the CWA could result in a decrease in the number of Section 7 ESA consultations. For example, we know of one developer attempting to develop a business park in the western United States. The property contains isolated waters in which plants protected under the ESA have grown. Because plants on private property are not subject to the ESA unless a federal permit is required in connection with the property, this case may have eliminated both the Section 404 and ESA problems confronting this developer.
- ***More environmental litigation.*** The Court's decision is likely to elicit constitutional challenges to the reach of other environmental statutes and programs that impinge on state authority because dicta in the decision suggests that the Court is prepared to scale back the deference given by the courts to federal agency interpretations of such statutes. (Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

For additional information, please contact Bob Szabo (202-298-1920, rgs@vnf.com), Howard Bleichfeld (202-298-1945, hsb@vnf.com) or Sam Kalen (202-298-1826, smk@vnf.com) with the law firm of Van Ness Feldman, P.C.

SB 2285

Andy Faber

Cost of 1/2 fte for Water Commission 404 Assumption Legal Work for the 2001-03 Blerinium

If we employ the person - AG's costs

	Total	Salary	Benefits
Salaries & Benefits - .5 fte	56,994	40,035	16,959
Operating Expenses	15,558		
Equipment	3,300		
Total	75,852		

Billings to Water Commission

Biennial hours - full-time	4,160		
Biennial hours - half-time	2,080		
Leave/other nonbillable time	312	15%	
Net billable time	1,768		
Billable hourly rate	\$ 54.81		
Total Estimated Cost	96,904		

TESTIMONY ON ENGROSSED SENATE BILL 2285

House Natural Resources Committee

Todd Sando, Director, Water Development Division
North Dakota State Water Commission

March 16, 2001

Mr. Chairman and members of the Natural Resources Committee, my name is Todd Sando. I am the Director of the Water Development Division of the North Dakota State Water Commission. On behalf of the State Engineer, I would like to provide some background information regarding North Dakota's effort to assume responsibility for administration of the Section 404 permitting requirements of the Clean Water Act.

Section 404 of the Clean Water Act requires a permit prior to placement of dredged or fill material into waters of the United States. This permitting program is currently administered by the Corps of Engineers in North Dakota through their Regulatory Office here in Bismarck in cooperation with the Environmental Protection Agency.

The Clean Water Act provides that states may assume responsibility for administration of the permitting requirements of Section 404. As of this date, only two states, Michigan and New Jersey, have successfully assumed administration of the program. North Dakota has taken several steps toward this goal including the passage of enabling legislation in 1993. Draft administrative rules were also developed, but the rule adoption process was not completed, due to the determination that federal funding was not available for program operation. There were also concerns about potential liability for the state if a permit denial were deemed to constitute a taking.

The Section 404 permitting authority cannot be assumed for waters that have been traditionally considered navigable by the Corps of Engineers. The Corps would retain both their Section 10 and Section 404 authority for these waters. In North Dakota, these waters include the Missouri River system, the Lower James River, the Upper Des Lacs, the Red River, and the Bois De Sioux. The Corps would also retain Section 404 authority for wetlands adjacent to these waters.

There are six basic elements required of an application to assume the program:

1. Letter from the Governor requesting state assumption
2. Complete state program description
3. Attorney General's statement that state law provides adequate authority
4. Memorandum Of Agreement with EPA Regional Administrator
5. Memorandum Of Agreement with Secretary of the Army
6. Copies of all applicable State statutes

Upon receipt of a complete application, the EPA is required to provide copies to interested federal agencies, provide up to 45 days for comment, conduct a public hearing in the state, and issue a decision within 120 days. The EPA may approve or deny the application based upon whether the state's program fulfills the requirements of the Clean Water Act.

The regulations do not specifically require a state to have a functioning dredge and fill permit program in place prior to applying for state assumption. However, in prior comments, EPA noted that both Michigan and New Jersey had programs operating for several years prior to state assumption and they noted that such an approach would be beneficial to North Dakota's effort to assume the program.

There are two possible options for initiating operation of a state program prior to assumption. One, suggested by EPA in the past, would be to operate initially under a State Program General Permit issued by the Corps of Engineers identifying the areas of responsibility and jurisdiction for which the state would operate their program under the supervision of the Corps. Another option would be to simply operate a state program concurrently with the federal program. Either option would provide us with an opportunity to develop our program prior to assumption and would provide the EPA with a record and a means of assessing the adequacy of the state program once we did apply for assumption. While, this step is not specifically required in the regulations, based on the prior comments received from EPA, such an approach may weigh in our favor when EPA considers our application for assumption.

The State Water Commission provided a cost estimate for running such a program of \$800,000 per biennium. This estimate was based upon a requirement of 5 new full time employees, including training, operational costs, and additional rental office space. Since the development of that estimate, the U.S. Supreme Court issued a ruling which will have widespread ramifications for the Section 404 permitting program, especially in a prairie-pothole region such as North Dakota. Specifically the Supreme Court ruled that isolated wetlands are outside the jurisdiction of the Corps of Engineers Section 404 permitting authority. This should significantly reduce the volume

of permit actions to be addressed, as there are approximately 2 1/2 million acres of isolated wetlands in North Dakota.

In light of this court decision, the extent of the jurisdiction of the program is still being defined. We know that the traditionally navigable waters listed earlier and their adjacent wetlands cannot be assumed by the state. Any waters tributary to those traditionally navigable waters will be jurisdictional and can be assumed by the state. Small isolated wetlands will not be jurisdictional. The Corps and EPA are still in the process of formulating a policy for the other waters.

The extent to which the recent court decision may reduce the workload and associated cost of running such a program is difficult to quantify at this time. The local Regulatory Office of the Corps of Engineers has been processing a total of approximately 1600 actions a year. The majority of these actions have involved waters for which authority could be assumed by the state. Until the Corps and EPA have further defined their jurisdictional policy in light of the recent Supreme Court decision, it is difficult to quantify the expected workload.

It should be noted that the cost estimate of \$800,000 did not include any estimate of legal fees. Due to the potentially litigious nature of the program, legal services would be required. Past estimates have included funding for an attorney on a half time basis. The need for legal services would be significant during the period of program start up and also for those actions involving litigation. The Office of the Attorney General has estimated that fees for a half time attorney would be approximately \$90,000 per biennium.

If this legislation is approved, the first step would be to update the draft rules and initiate the adoption of the required administrative rules. This step would be required to complete the application process, as the rules would need to be enacted prior to the development of the Attorney General's statement. Some staff additions may be required to complete the application process. It would then need to be decided whether the state should initiate startup of a state program prior to filing an application for assumption either through a State Program General Permit or by simply running a state program concurrently with the existing federal program.

In conclusion, the N.D. State Engineer is neutral on the assumption of the 404 program. There are both advantages and disadvantages associated with state assumption of the 404 permitting program. We may be able to develop a program that is more responsive to the needs of the citizens of North Dakota. However, it is important to remember that any program developed by the state will need to provide the same level of environmental protection afforded through the Corps' operation of the program.

SB 2285
4-201

**Testimony for the House Appropriations Committee
Senate Bill 2285**

April 2, 2001

Presented by:
Jeffry J. Volk, PE & LS
Moore Engineering, Inc., Project Engineer

I stand before you today to offer my support for Senate Bill 2285. Having the North Dakota State Water Commission assume the jurisdiction of Section 404 of the Clean Water Act is the right thing to do for the State of North Dakota. I am a Registered Professional Engineer in North Dakota employed by Moore Engineering, Inc. in West Fargo. I have spent most of my professional career helping political subdivisions in North Dakota plan and construct water development projects.

My experience with projects that have required section 404 permits is generally unreasonable delays from excessive over-regulation and added cost to the project. The current permit process in North Dakota is grossly inadequate and in my opinion does not work. I believe it is not working primarily because the federal employees responsible for the process are not capable of getting through the process.

I believe if North Dakota assumes jurisdiction of the Section 404 program, permits will be administered in a more reasonable timeframe by people who better understand the local issues, substantially reducing the cost to fully develop water projects. You heard earlier of the many years of delay the Cass County Joint Water Resource District has experienced for the Maple River Dam Project. The chairman of the Water Resource District and I personally drove that permit application to the Bismarck office of the Omaha District US Army Corps of Engineers in the summer of 1994. Now nearly 7 years later, we still have no permit decision. The effects of this lengthy delay are unnecessary extended

confrontations between project proponents and opponents as well as a higher unreasonable project costs.

These increased project costs come from two factors, higher construction costs due to inflation and much higher project development costs. For the Maple River Dam project, it has been very expensive to keep the required staff involved with the lengthy environmental reviews and permit processing. For this project, the Water Resource District has under contract an engineer, attorney, archaeologist and an architectural historian. Each of these also has support staff to meet the wishes of the COE. My estimate would be that six years of inflation has already raised the project cost at least \$1,000,000, while the added project administration costs are probably over \$250,000.

Another added cost to the communities developing projects and to the State of North Dakota are the lost benefits from not getting projects built in a timely fashion. Generally, projects that are being delayed by the existing cumbersome section 404 process are projects that will provide substantial benefits. Each year a project is delayed, these benefits are unrealized. A 1994 economic analysis for the Maple River Dam project calculated average annual direct flood damage reduction benefits of \$1,165,000 and average annual secondary benefits of \$3,140,000. The combined \$4,305,000 in annual benefits have been lost. What is really unfortunate for this project is the large benefit area that received substantial flood damages during the 1997 spring flood, many of which could have been reduced or eliminated had the dam been constructed.

Another project I was involved with was the Sargent County Drain # 11 channel cleanout project. This project demonstrated how the Omaha District Corps of Engineers, the United States Fish & Wildlife Service, the Environmental Protection Agency and the United States Justice Department utilized an alleged violation of section 404 of the Clean Water Act to threaten and intimidate the Sargent County Water Resource District, Radnlecki Construction Company, and Moore Engineering, Inc. Eventually, the State of North Dakota was also brought into this lawsuit as a defendant.

This 7-year lawsuit was a clear example of the ability of a few federal employees, from several different agencies, attempting to utilize section 404 of the Clean Water Act to accomplish their personal agendas. The total cost of this lawsuit had to have been over \$1,000,000. The federal government hired an

expert witness who alone billed over \$200,000 for his services long before the trial started.

Reasonable people administering the section 404 program would not have allowed this lawsuit to have been filed, much less let it proceed for many years, with no apparent accountability by the federal employees representing the plaintiff, the United States of America. This case is a clear example of over-zealous regulators with authority to enforce laws. The judge for this case, Rodney Webb, even made a point of this in his "Memorandum and Order" stating in part "Mr. Keller's views struck the court as being colored by his personal emotions and convictions. ...and he was quite uncompromising in his views. Mr. Keller's general credibility was questionable as he failed to acknowledge even obvious facts when adverse to his position." Mr. Keller was an employee of the Omaha District Corps of Engineers responsible for enforcement of violations of section 404 of the Clean Water Act.

In summary, it is important that North Dakota assume jurisdiction over and administration of section 404 of the Clean Water Act. The current process for administering section 404 is not working. The process allows individuals to hide behind the regulations of this Act as well as several other Acts, to delay and prevent the construction of worthwhile water projects. The federal process does not require these individuals to be accountable for their actions or decisions. I firmly believe that having North Dakota employees administering the process will bring accountability to the program. We cannot assume that having the North Dakota State Water Commission administer the section 404 program will automatically allow all project permits be approved. It is apparent however, that it will allow the permit process to proceed in a timely manor and in a reasonable fashion, saving the State of North Dakota and the local jurisdictions significant project development costs.

Thank you for allowing me to discuss this important issue with you today. I strongly urge you to recommend a DO PASS on Senate Bill 2285.

SB 2285
4-2-01

TESTIMONY ON ENGROSSED SENATE BILL 2285

House Appropriations Committee

Todd Sando, Director, Water Development Division
North Dakota State Water Commission

April 2, 2001

Mr. Chairman and members of the Appropriations Committee, my name is Todd Sando. I am Director of the Water Development Division of the North Dakota State Water Commission. I am testifying today on behalf of the Interim State Engineer.

We have estimated that the cost of administering the permit program of Section 404 of the Clean Water Act to be \$800,000 per biennium. This estimate was predicated on the hiring of five new FTE's, a supervisor, three project managers, and one support staff. Currently, the Corps Regulatory Office here in Bismarck administers both the Section 404 and Section 10 regulatory programs. They have five professional level FTE's, 1 1/2 FTE administrative support staff, another professional level project manager in Omaha that provides support, and field support from personnel in Riverdale. They also plan to add another project manager in the near future.

Of the \$800,000 per biennium cost, \$500,000 would be used for salaries, \$265,000 for operations and training, and the remaining \$35,000 for office equipment including computers. It has also been estimated that the program would require \$97,000 of legal services from the Office of the Attorney General. It is anticipated that the legal costs could come out of the \$800,000 during the first biennium, as all the staff would not be hired immediately. However, the cost for the following biennium has been estimated at \$897,000 to account for legal costs.

The current bill does not include authorization for hiring of the five additional FTE's required to run the program. We are proposing an amendment to authorize the five FTE's.

SB 2285
4-2-01

House Appropriations Committee

Testimony of Senator Tom Fischer

SB 2285 - 404 Permit Process

Mister Chairman, members of the House Appropriations Committee.

SB 2285 appropriates \$800,000 for the purpose of assuming jurisdiction and administration of the 404 Permit process of the Clean Water Act.

The 404 permit process in North Dakota deals with everything from drains to dams and at the present is being administrated by the Corps of Engineers which is riddled with incompetence. A permit which should take approximately 18 months by their own rule can and does take up to 7 years if your lucky. Through delays created by lack of simple decision making and not keeping schedules that they set the most simple of projects are not going forward.

In a case that I am very familiar with the permit was applied for in 1994 and has yet to be acted on one way or the other.

There are six elements required of the state to assume the program

1. A letter from the governor requesting state assumption of the 404
2. Complete state program description
3. Attorney General's statement that the state law provides adequate authority.
4. Memorandum of Agreement with EPA regional administrator
5. Memorandum of agreement with Secretary of the Army
6. Copies of all applicable state statutes.

We have the opportunity to use either New Jersey's or Michigan's plan and I have a copy of the New Jersey's implementation documents and will get you a copy if you should so desire.

I have also passed out a copy of a synopsis of the Supreme Court decision against the Corps of Engineers which could substantially reduce the cost of implementation and administration of the program. There are others here who could address those issues.

Mr. Chairman, members of the committee the time has come to assume this program and plan and execute these permits using our own experts rather than some incompetent 1000 miles away. Thank you