

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WATER TOPICS OVERVIEW COMMITTEE

Tuesday, December 10, 2019
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Jim Schmidt, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Jim Schmidt, Chuck Damschen, Ron Guggisberg, Michael Howe, Bob Martinson, Jon O. Nelson, Todd Porter, Mark Sanford; Senators Curt Kreun, Gary A. Lee, Larry Luick, Larry J. Robinson, Donald Schaible, Ronald Sorvaag

Members absent: Representatives Tracy Boe, Denton Zubke; Senator David Hogue

Others present: Senator Rich Wardner, Dickinson, member of the Legislative Management
Chris Kadrmas, Legislative Council, Bismarck
See [Appendix A](#) for additional persons present.

It was moved by Senator Lee, seconded by Senator Kreun, and carried on a voice vote that the minutes of the August 1, 2019, meeting be approved as distributed.

STATE WATER COMMISSION UPDATE AND RESOURCES TRUST FUND

Chairman Schmidt called on Ms. Heide Delorme, Director, Administrative Services Division, State Water Commission, for a presentation ([Appendix B](#)) regarding the State Water Commission's project status summary.

In response to questions from Chairman Schmidt, Ms. Delorme said the State Water Commission approved a \$3.6 million loan request from Valley City from the revolving loan fund, which now has a balance of \$300,000 to \$400,000. She said the resources trust fund had \$73.5 million for the biennium as of November 2019.

Chairman Schmidt called on Mr. Chris Kadrmas, Fiscal Analyst, Legislative Council, for a presentation of memorandums entitled [Resources Trust Fund - 2017-19 and 2019-21 Biennium Update](#) and [North Dakota Taxable Sales and Purchases Quarterly Report for the Quarter Ending June 30, 2019](#).

In response to a question from Senator Sorvaag, Mr. Kadrmas said the information in the memorandums includes taxable online sales.

In response to a question from Representative Nelson, Mr. Kadrmas said he would provide data regarding how quickly the State Water Commission's funding buckets are being depleted.

Chairman Schmidt called on Mr. Richard Johnson, Commissioner, State Water Commission, regarding the commission's policy considerations and flood plans. Mr. Johnson said the commission lowered the threshold for projects requiring an economic analysis to \$200,000, which also is the threshold for projects requiring commission approval for funding. He said life cycle cost analyses will be performed for all projects, not just municipal projects, because the analyses allow for better evaluations of projects. He said requiring the economic and life cycle cost analyses does not add extra costs to projects. He said the analyses only require inputting data to a spreadsheet. He said the analyses benefit the state and project sponsors because the analyses require sponsors to look at alternatives, such as repairs or regionalization of water supply systems, which may be more cost-effective. He said the analyses help project sponsors better understand the overall costs the sponsors will incur from projects. He said the commission is reviewing project prioritization and incorporating the Department of Environmental Quality's schedule as a secondary factor for prioritization. He said approximately \$32.5 million remains in the commission's appropriation for flood-related projects to address spring flooding in 2020.

Chairman Schmidt said North Dakota Century Code provisions do not prohibit the State Water Commission from applying economic analyses to projects under \$1 million. He said the Water Topics Overview Committee received an email from Stutsman Rural Water indicating the emergency clause on the commission's appropriations bill was very beneficial.

In response to questions from Representative Nelson, Mr. Johnson said the Northwest Area Water Supply (NAWS) Project users should be involved in the NAWS project and commission meetings. He said governing models for other projects would not fit NAWS because NAWS is unique.

In response to questions from Chairman Schmidt, Mr. Johnson said the State Water Commission recently received a report on the assessments for the Southwest Pipeline Project. He said the commission wanted to know how other systems can obtain similarly fair lending rates as the Southwest Pipeline Project. He said Governor Doug Burgum, the commission's chairman, told the submitters of the report to develop some conclusions and return to the commission with an updated report. He said he will send the committee members a copy of the submitted report and will send the committee members a copy of the updated report once it is available.

Chairman Schmidt called on Mr. Duane Pool, Natural Resource Economist, State Water Commission, for a presentation (Appendices [C](#), [D](#), [E](#), and [F](#)) regarding the life cycle cost analysis and examples of life cycle cost analyses.

In response to a question from Senator Sorvaag, Mr. Pool said all projects are evaluated on a 50-year time frame.

In response to a question from Chairman Schmidt, Mr. Pool said the commission sometimes defers discussion of a lower priority project until the next meeting.

In response to a question from Senator Lee, Mr. Pool said insurance payments are not included as a deferred benefit in the State Water Commission's economic analyses because including insurance payments would constitute double counting a benefit.

In response to a question from Senator Luick, Mr. Pool said the State Water Commission's formulas do not take into account the damage to homes and properties onto which flood waters are diverted. He said data provided to the commission by projects' engineers are incorporated into the formulas.

Chairman Schmidt called on Mr. Garland G. Erbele, State Engineer, State Water Commission, for a presentation (Appendices [G](#) and [H](#)) regarding Missouri River level predictions for the spring.

MUNICIPAL WATER PROJECTS

Chairman Schmidt called on Mr. Blake Crosby, Executive Director, North Dakota League of Cities, for a presentation ([Appendix I](#)) regarding municipal water funding and examples of municipal water projects.

In response to a question from Senator Robinson, Mr. Crosby said about 270 cities in North Dakota rely on access to rural water supplies.

STATE FUNDING FOR WATER PROJECTS FROM SOURCES OTHER THAN THE STATE WATER COMMISSION

Chairman Schmidt called on Ms. Shannon Fisher, Program Manager, Drinking Water State Revolving Fund Program, and Ms. Elizabeth Tokach Duran, Program Manager, Clean Water State Revolving Fund Program, Department of Environmental Quality; and Ms. DeAnn Ament, Executive Director, Public Finance Authority, for a presentation ([Appendix J](#)) regarding affordability of water projects.

In response to questions from Chairman Schmidt, Ms. Fisher said she does not have a formal economic analysis process in place and relies on project engineers to perform cost analyses. She said the State Water Commission's economic analysis is used for projects co-funded by the drinking water state revolving fund and the commission. She said the federal government requires environmental assessments for projects funded through the drinking water state revolving fund because the fund receives federal dollars. She said she and her staff try to minimize the impact of the environmental assessments on sponsors.

Ms. Ament said North Dakota has received \$446 million from the United States Environmental Protection Agency for the clean water state revolving fund and drinking water state revolving fund. She said the state must provide a 20 percent match for federal dollars, and the Public Finance Authority provides the match through bonds. She said the interest rate for fund recipients is 2 percent, and one-fourth of the 2 percent constitutes an administrative fee.

In response to a question from Senator Luick, Ms. Ament said funding is available for new projects, projects to repair or replace equipment or systems, and refinancing projects. She said to qualify for refinancing, a project must have met federal requirements at the time the project was initiated.

In response to a question from Senator Wardner, Ms. Ament said the repayment source for the Public Finance Authority bonds is the loan repayment from the city. She said repayments exceed bond payment requirements.

In response to a question from Representative Nelson, Ms. Ament said the Public Finance Authority does not issue bonds for specific projects, and many bonds are refinanced.

In response to a question from Senator Lee, Ms. Ament said the Community Development Block Grant money is provided to the eight regions of the state and the Governor's fund.

RED RIVER VALLEY WATER SUPPLY PROJECT

Chairman Schmidt called on Mr. Brett Jochim, Chief Operating Officer, Advanced Engineering and Environmental Services, Inc., for a presentation ([Appendix K](#)) regarding the Red River Valley Water Supply Project engineering.

In response to questions from Senator Luick, Mr. Jochim said the break tanks are about 700 feet from the river. He said because the pipe is engineered by station depending on the pressure at the station point, the pipe wall thickness varies by location. He said the pipe is coated on the inside and outside.

In response to a question from Chairman Schmidt, Ms. Merri Mooridian, Administrative Officer/Deputy Project Manager for Red River Valley Water Supply Project Administration, Garrison Diversion Conservancy District, said the project's pollutant discharge elimination system permit for the outfall is expected to be received from the Department of Environmental Quality in January. She said the Environmental Protection Agency has reviewed the permit application and sent minor comments to the Department of Environmental Quality. She said she anticipates the request for project approval will be submitted to the State Water Commission in April, but the timing depends on the permit.

TRIBAL INTERESTS IN WATER

Chairman Schmidt called on Mr. Scott J. Davis, Executive Director, Indian Affairs Commission, for a presentation regarding tribal interests in water. Mr. Davis said there is increased attention on water issues on reservations. He said there is a history of treaties involving water rights. He said the tribes would like to have a dialog regarding how to share water rights and to describe the water needs of tribal members and others who live on reservations.

Chairman Schmidt called on Mr. Mike Faith, Chairman, Standing Rock Sioux Tribe, and Mr. Doug Crow Ghost, Director, Water Resources, Standing Rock Sioux Tribe, for a presentation ([Appendix L](#)) regarding tribal interests in water.

Mr. Doug Mund, Senior Project Manager, Bartlett & West, Inc., said an \$80 million project for the tribe was approved in 2000. He said in 2001, the project cost was calculated to be \$110 million, and now it is calculated to be more than \$140 million. He said the tribe needs an additional \$110 million to finish the second half of the project. He said the tribe is working with United States Senators John Hoeven and Kevin Cramer to increase the ceiling on the cost of projects funded through the Dakota Water Resources Act and are looking for existing funding sources. He said he would ask the Legislative Assembly to make state funding for water projects available to tribes.

Chairman Schmidt called on Mr. Lynn Gourneau, Vice Chairman, Turtle Mountain Band of Chippewa Indians, Mr. Kenneth Azure, Executive Director, Turtle Mountain Public Utilities Commission, and Mr. Daniel Heitzman, Engineer, Houston Engineering Inc., for a presentation (Appendices [M](#), [N](#), and [O](#)) regarding rural water issues.

Mr. Davis said the conversations between the state government and tribal governments about water needs and projects need to continue. He said the United States Geological Survey, Army Corps of Engineers, Congressional Delegation, and Red River water users also need to be part of the conversation. He said he hopes to have another report for the committee by March 2020.

Representative Nelson said the Turtle Mountain Public Utilities Commission provides quality water to residents on and off the reservation. He said there has been good collaboration with the tribe regarding easements and regionalization of the water supply. He said the state and tribes need to keep working together.

FARGO-MOORHEAD AREA DIVERSION PROJECT

Chairman Schmidt called on Mr. Joel Paulsen, Executive Director, FM Area Diversion Project, for a presentation ([Appendix P](#)) regarding the project, status of litigation, federal funding, the public-private partnership (P3), and land acquisition.

In response to questions from Chairman Schmidt, Mr. Paulsen said the developer bids for the P3 will be received before the 2021 legislative session begins, and he hopes to have them before the September 2020

meeting of the committee. He said requiring the bids to be submitted by September may reduce the number of developers that bid. He said technical bids will be due in September, and financial bids will be due in December. He said if none of the developers' bids is affordable, the project will be delivered as a traditional design-build project rather than a P3. He said changing course to deliver a traditional design-build project would lengthen the time to complete the project significantly beyond the current 6-year time frame. He said the project is the first split delivery P3 water resource project in the country. He said the Army Corps of Engineers established a P3 department, and the diversion project is the department's pilot project. He said the diversion authority has a signed funding agreement with the Army Corps of Engineers for \$750 million. He said two federal contracts have been awarded--one for the inlet control structure for \$46 million and one for the Wild Rice River control structure for \$59 million. He said \$280 million has been expended on in-town portions of the diversion project. He said the cost of the portions of the projects increased \$40 million because, under the diversion project's Plan B, the river flows in town can increase up to 37 feet rather than 35 feet. He said the higher river level in town requires additional buyouts and other projects. He said the diversion authority is intermingling funds to make up the extra cost. He said he hopes any homes sold back to owners due to lack of need will be sold back at less than the price for which the homes were acquired. He said Senator Hoeven's office and the Army Corps of Engineers have discussed providing \$75 million per year in federal funds for the project.

In response to questions from Representative Martinson, Mr. Paulsen said the federal government has committed to appropriating \$750 million to the federal components of the project. He said there is no certainty with federal funding, but the project has received \$130 million in federal funding so far. He said the project sponsors will have to work with the Congressional Delegation each year to have the federal funds appropriated. He said the project sponsors may ask the Legislative Assembly for an additional \$120 million for the project. He said the project needs \$870 million from North Dakota, and the project plans are based on receiving that amount. He said Minnesota provided the funds for flood protection in Moorhead. He said the funds from Minnesota will be expended next summer. He said he would provide the committee verification that Minnesota has provided \$5 million for Moorhead to the project.

Representative Martinson said the Legislative Assembly was told there would not be additional requests for state funds beyond the \$750 million appropriated for the project. He said Fargo Mayor Tim Mahoney sent an email to legislators saying \$750 million would be adequate.

Senator Sorvaag said the project sponsors told legislators additional requests would not be made if the full \$870 million requested for the project had been appropriated. He said the email from Mayor Mahoney indicated the \$750 million would be sufficient until the next biennium.

In response to a question from Senator Luick, Mr. Paulsen said the \$750 million the federal government has pledged to provide for the project would be a grant and would not have to be paid back.

In response to a question from Representative Nelson, Mr. Paulsen said the \$7 million received from Minnesota, out of a total of \$86 million requested from Minnesota, includes the \$5 million for project features in Moorhead. He said the entire amount from Minnesota will be used for flood control in Minnesota. He said none of the funds from North Dakota will be spent on work in Minnesota.

In response to questions from Chairman Schmidt, Mr. Paulsen said there is a small project to protect a Minnesota town close to the Fargo-Moorhead metro area. He said the small project is not necessarily part of the diversion project but is related to the diversion project. He said \$79 million of the Minnesota funds will be provided through the Minnesota Department of Natural Resources (DNR) hazard mitigation program. He said, in each bonding cycle, DNR will request Minnesota funding for the hazard mitigation program. He said DNR also may ask the Governor of Minnesota to include the diversion project in the Governor's budget. He said line item bonding requests sometimes require approval by the Minnesota Legislature. He said he will provide the committee accurate data regarding the percentage of benefits Minnesota will receive from the project and the percentage of funding Minnesota will provide to the project.

In response to a question from Representative Sanford, Mr. Paulsen said if any anticipated funding does not materialize or costs increase significantly, the project would use long-term, low-interest debt to be repaid with a sales tax levy, a special assessment, and a county levy to make up any shortfall. He said Ernst & Young was hired to consult on the project and explored all possible funding options. He said there is no guarantee federal dollars will be available for the project every year, but there is significant political support for the project at the federal level. He said the project needs to be completed, and if the federal dollars are not available, the local communities will take on more debt.

In response to a question from Senator Lee, Mr. Paulsen said the intake for the Wild Rice control structure costs more than the inlet control structure because the Wild Rice control structure will be built on the river system.

In response to questions from Senator Luick, Mr. Paulsen said low property evaluations and project impacts will take time to resolve. He said it has taken years just to identify the impacts. He said when the project creates an impact, he will work with those impacted to come up with a remedy.

ARMY CORPS OF ENGINEERS PROPOSED WATER USE RULE

Chairman Schmidt called on Ms. Jennifer Verleger, Assistant Attorney General, for a presentation ([Appendix Q](#)) regarding an Army Corps of Engineers proposed water use rule.

In response to a question from Representative Martinson, Ms. Verleger said she would send the Legislative Council staff information regarding the amount of money North Dakota has expended on the *Wilkinson v. Board of University and School Lands* case (Civil No. 53-2012-CV-00038), including the current appeal, from where the money is coming, and whether the Attorney General's office will ask for more money from the Legislative Assembly next session. She said the Attorney General's office represents the state engineer in the case.

In response to a question from Chairman Schmidt, Ms. Verleger said current projects in North Dakota generally are not being delayed by the change to the water use rule because the projects already have access easements, projects involving the United States Bureau of Reclamation are exempt from the rule, and for other reasons. She said projects involving water used for fracking would be impacted after energy companies' agreements with the Army Corps of Engineers expire and have to be renegotiated. She said the agreements have terms up to 5 years, and each agreement is eligible for only one 5-year extension. She said representatives of the Army Corps of Engineers will be coming to North Dakota in March 2020, but no official action on the new rule is anticipated before then.

In response to a question from Representative Porter, Ms. Verleger said the state engineer, the Board of University and School Lands, and Statoil are appealing the court's decision in the *Wilkinson* case for different reasons. She said the notices of appeal have been filed.

DEPARTMENT OF EMERGENCY SERVICES

Chairman Schmidt called on Mr. Cody Schulz, Director, Division of Homeland Security, Department of Emergency Services, for a presentation ([Appendix R](#)) regarding the cooperative effort between the department and the State Water Commission.

In response to a question from Chairman Schmidt, Mr. Schulz said the federal government establishes the process the department uses to determine a project's cost-benefit ratio. He said there may be ways for the department and State Water Commission to avoid duplication or reduce work when determining cost-benefit ratios.

NORTH DAKOTA RISK ASSESSMENT MAP SERVICE

Chairman Schmidt called on Mr. Aaron Carranza, Director, Regulatory Division, State Water Commission, for a presentation (Appendices [S](#) and [I](#)) regarding the North Dakota Risk Assessment MapService. Mr. Carranza said the North Dakota Risk Assessment MapService evolved from the Water Topics Overview Committee's 2017-18 statewide flood risk management study.

AUDIT OF CASS COUNTY JOINT WATER RESOURCE BOARD

Representative Martinson said the committee members received an email alleging the Cass County Joint Water Resource District improperly inflated payments for certain properties, including those in Oxbow, acquired for the FM Area Diversion Project.

It was moved by Representative Martinson, seconded by Senator Luick, and carried on a roll call vote that Chairman Schmidt ask the Legislative Audit and Fiscal Review Committee to request an audit of the Cass County Joint Water Resource District with regard to appraisals and acquisitions of properties for the FM Area Diversion Project. Representatives Schmidt, Damschen, Guggisberg, Howe, Martinson, Nelson, Porter, and Sanford and Senators Kreun, Lee, Luick, Robinson, Schaible, and Sorvaag voted "aye." No negative votes were cast.

No further business appearing, Chairman Schmidt adjourned the meeting at 3:45 p.m.

Claire Ness
Counsel

ATTACH:20