

Dakota Counsel

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NEW HOPE FOR CLEAN AIR

The outgoing Bush administration conceded defeat on two of its attacks on clean air in December.

The Environmental Protection Agency pulled in its horns on new rules that would lock in high levels of pollution at older coal plants and make it easier to build new plants near protected areas.

Bush’s EPA had been trying to gut New Source Review provisions of the Clean Air Act since 2001.

Its NSR plan was to give a pass to older plants “grandfathered” at high emissions rates when they expanded capacity.

A federal court in 2006 struck down the original Bush plan to let older plants keep existing pollution rates when they expanded, unless they spent at least 20% of a plant’s value in making upgrades.

The District of Columbia Court of Appeals said the rule was “contrary to the plain language of the Clean Air Act.”

The Milton R. Young plant near Center was one of the plants at issue. It became subject to EPA enforcement action in 2002 after it added superheaters that increased nitrous oxides emissions in 1994 without applying for an NSR permit.

The EPA said it was unable to complete rule changes to achieve what John Walke of the Natural Resources Defense Council called “the most high profile prize sought by the utility industry,” according to the Associated Press.

Also down the tubes went the Bush administration’s plans to make North Dakota’s Prevention of Significant Deterioration rules the law of the land.

Eight of the 10 EPA regions opposed the Bush effort to weaken the method of measuring pollution levels near national parks and other protected areas. (See Terrence Kardong’s comments on page 7.)

As recently as November 23, Bush’s EPA had announced plans to implement the new PSD rule.

The rule was modeled on the one North Dakota’s Health Department came up with in 2002 in order to make the numerous PSD sulfur dioxide violations it originally discovered in 1998 disappear without any reductions in pollution.



**North Dakota
air pollution**

STRONGER OIL BONDING NEEDED

Citing a 2006 saltwater spill in McKenzie County, DRC told U.S. Bureau of Land Management officials in Dickinson November 13 the public needs stronger oil and gas bonding protection—particularly against Zenergy.

“Why should a company that has potential liability of almost \$8 million carry a bond totaling \$250,000 to cover its reclamation costs?” asked Donald Nelson, Keene.

Zenergy is responsible for the saltwater pipeline leak that spilled nearly one-million gallons of saltwater into Charbonneau Creek west of Alexander, North Dakota in 2006.

The spill is still being cleaned up at Zenergy’s expense under an enforcement action by the state Department of Health. State officials in October said Zenergy’s costs have already exceeded \$2 million.

Local landowner Linda Monson, Alexander, filed a federal suit in October for damages from the spill. Her cows still refuse to drink from Charbonneau Creek.

Saltwater from the spill was about 10 times as salty as sea water.

The 2006 spill was preceded by a smaller spill in 2005, which went unreported but was discovered later by state officials.

Monson’s suit alleges that Zenergy knowingly used faulty equipment, which contributed to the spill.

Zenergy’s \$250,000 bond represents the total “blanket bond” for an unlimited number of wells in North Dakota under state and federal law.

See **BONDING** p 4

The Dakota Counsel is published six times a year by Dakota Resource Council, a nonprofit, grassroots activist organization. The mission of Dakota Resource Council is to form enduring, democratic local groups that empower people to influence decision-making processes that affect their lives. DRC is committed to preserving sustainable agriculture and natural resources.

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SAVE COOL— RENEGOTIATE NAFTA

By DRC Board Chair Roger Brenna &
At-Large Board member Linda Weiss



It's been six years since Congress passed country-of-origin (COOL) labeling, yet at the vast majority of supermarkets, all consumers know is that their meat comes from Canada, Mexico or the United States.



In other words, we have no new information.

It's another example of "free" trade trumping fair labor practices, safe food, consumer knowledge and even national sovereignty.

The trade connection emerged in early November when *Inside U.S. Trade* reported that the Canadian pork and beef industries are pushing their government to challenge our labeling law under the rules of either the World Trade Organization or the North American Free Trade Agreement (NAFTA).

If President-elect Obama needs a reason to renegotiate NAFTA, this is a good one.

NAFTA has provided a big assist to the monopolistic meatpacking industry in keeping consumers in the dark while emptying the pocketbooks of both livestock producers and meat industry workers.

Opening the borders to animals from Mexico and Canada insulated meatpackers against short supply and allows them largely to avoid actually bidding for cattle in an open market. The result for North Dakota cow-calf operators has been stagnating prices during the 15-year life span of NAFTA.

Meatpackers have also profited from the offshoring of jobs under "free" trade, even if not in the literal sense. Instead of taking the slaughter plants out of the country, they bring the workers here. Charges were filed in late October against a small meatpacker in Postville, Iowa, for employing more than 300 illegal workers and violating child labor laws.

The meatpacking industry, which used to provide middle-class and often unionized jobs, has now fallen into the sweatshop category.

Given increasing food-borne illnesses in this country, consumers rightly want to know where their food comes from.

Congress responded to this sentiment by passing COOL as part of farm legislation in 2002 and again in 2008.

U.S. Secretary of Agriculture Ed Schafer has said he would uphold the law, but that doing so was difficult given industry practices. Interim rules now allow a "mixed origin" label when a meatpacker slaughters animals from more than one country on a given day.

That's not good enough.

See COOL p 4

ANNUAL MEETING REVIEW

DRC celebrated its 31st annual meeting in Bismarck October 25 by re-electing Chair Roger Brenna, passing new resolutions on several issues and hearing several success stories on local foods and energy.

Brenna, a farmer-rancher from Keene, is the third McKenzie County Energies and Taxation Association member in the last decade to serve as DRC Chair. The others were Donald Nelson and Linda Rauser.

Retired educator and non-profit director Marie Hoff, Bismarck, was elected Vice-Chair.

Newcomers to the Board included Travis Schulz, Bismarck, a medical librarian and Leo Walker, a farmer from Maddock.

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COOL from p 2

Still, wimpy USDA enforcement is not enough to mollify the Canadian beef and pork industries. They want to use international trade agreements to nullify the very laws Congress has passed for the benefit of our nation's residents.

So Mr. Obama, let's get COOL enforced.

And while we're at it, let's get to the heart of the problem and renegotiate NAFTA and all the other trade agreements that are keeping us in the dark as to what we're eating—not to mention wrecking our agricultural economy and lowering living standards for working people.

(This essay appeared in the Fargo Forum November 22. The Canadian government filed a complaint against COOL with the World Trade Organization December 2, and Mexico followed suit December 18.)

Others remaining on the Board were Dean Remboldt, Jamestown; Ted Reinert, Minot; Terrence Kardong, Richardton; Verle Reinicke, Bismarck; and Dean Hulse, Fargo.

Former DRC Treasurer R. J. Stohler, Fargo, was elected to a full one-year at-large seat after serving out the remaining term of Matt Shimanek, Grand Forks, who resigned after moving out of state.

Badlands Area Resource Council Chair Linda Weiss, Belfield, who had served on the Board previously, returned to an at-large seat.

Leaving the Board after completing their terms were Bob White, Emerado; Kim Simmons, Grand Forks; and Dianne Aull, Bismarck.

Twelve of DRC's 23-member Board are selected by DRC's six active affiliates.

DRC members approved the resolutions that:

- ◆ Encouraged legislative initiatives for the purpose of developing a regional food system;
- ◆ Opposed to new national animal identification systems;
- ◆ Called for prompt and full implementation of country-of-origin labeling;

- ◆ Supported legislation to direct money from the Resources Trust Fund to energy efficiency projects;

- ◆ Encouraged reform of state extra-territorial zoning law to give all affected governments a say in zoning; and

- ◆ Called for an exhaustive inventory of state aquifers and clarification of surface owner rights in water appropriation matters.

(For a complete text of the resolutions, contact any DRC office.)

Panelist Jim Kusler, Beulah outlined the marketing challenges for local beef producers posed by the lack of infrastructure. Linda Grotberg, Wimbledon, talked about how her family moved from industrial to organic farming and is now producing biodiesel from their own fields to power their farm fleet.

Rick Thompson, Sharon, told the story of how he and other community leaders made the transition from trying to attract a wind developer to building a base of investors that won the state's first community wind production utility contract.

Keynote speaker Terry VanDerPol told how sustainable farming for local markets can work.

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NEW CHALLENGES FOR COAL

A recent federal appeals panel decision lent new importance to carbon dioxide in the permitting of new coal-fired power plants.

Together with cost considerations and mounting plant-by-plant opposition around the nation, it seems likely to slow down new permitting.

Utah Plant Blocked

The Environmental Protection Agency panel on November 13 blocked the permit granted to Deseret Power by EPA Region VIII on the basis that it contained no controls on carbon dioxide emissions.

The EPA regional office now must explain why it failed to include such controls.

Deseret Power hopes to build the plant at the site of an existing coal-fired power plant on the Uintah and Ouray Indian Reservation in Utah.

Sierra Club led the challenge to the permit.

“It’s going to stop everything while EPA mulls over what to do next,” said Sierra Club attorney David Bookbinder.

The appeals panel decision is one of a flood of remarkable rulings issued since the Supreme Court’s 2007 opinion (*Massachusetts v. EPA*) that the EPA has authority to regulated carbon dioxide under the Clean Air Act.

EPA Administrator Stephen Johnston tried to put his finger in the dike with a December 18 memorandum ordering the agency not to consider carbon dioxide emissions under the federal Prevention of Significant Deterioration program.

Next month a new administration takes office, however, which seems likely to take the 2007 ruling more seriously.

Pessimistic Utilities Report

An August study commissioned by the American Public Power Association noted that about 60 proposed new coal-fired power plants have been scrapped or delayed in the last two years.

The author, J. Edward Cichanowicz, cited environmental litigation as one reason, but also increasing costs of coal-fired generation and lack of access to capital.

Cichanowicz noted that a new coal-fired power plant will cost about \$1,600 per kilowatt in today’s dollars, not counting carbon dioxide controls.

Among the delayed plants considered in the Cichanowicz study is the proposed coal conversion facility near South Heart.

He cited opposition from the National Park Service, but also uncertainty in power markets.

Promoters withdrew an air quality permit application for a coal-fired power plant near South Heart in 2007.

They have since been talking about a coal gasification plant, but have yet to submit an air quality permit application for such a facility.

His report concluded that operators not already established in coal-fired generation—such as Great Northern Power Development—are at a particular disadvantage because they “may not appreciate the regulatory delays and capital cost barriers associated with coal-fired generation.”

Meanwhile, the Public Service Commission’s Reclamation Division sent GNPDP’s initial mining permit application back in November, citing about 60 separate deficiencies.

GNPDP estimated it might take up to a year to complete the application, according to the *Dickinson Press*.



BONDING from p 1

If Zenergy were to close its doors, state taxpayers could be on the hook for the rest of the Charbonneau spill—plus the reclamation costs for Zenergy’s 49 existing wells (as of November 1), three of which are for saltwater disposal.

The cost of reclaiming these wells would be over \$7 million, according to Jim Kuipers’ report, *Filling the Gaps*, commissioned by the Western Organization of Resource Councils.

The federal Mineral Leasing Act, which governs BLM’s oversight of federal mineral extraction, says bonds must be adequate to “ensure the complete and timely reclamation of the lease tract, and the restoration of any lands or surface waters adversely affected by lease operations after abandonment or cessation of oil and gas operations on the lease.”

Nelson said BLM should exercise its right to increase Zenergy’s bond “in light of the negligent behavior that the company has displayed in the last few years.”

BLM officials promised a response to DRC’s request for increased bonding by the end of the year, but none was received by December 19.

OIL SPOTS AND GAS FLARES

Keystone Again

North Dakota landowners may have TransCanada at their door again for pipeline easements.

An alternate North Dakota route turned up unexpectedly on the company's Presidential Permit application for the proposed Keystone XL pipeline on December 4—just three days after the Associated Press reported the pipeline would “not cross any part of North Dakota.”

The North Dakota route would cross the state border west of Williston and cross large sections of McKenzie, Dunn, Morton, Emmons and McIntosh Counties before entering South Dakota. (See map.)



The route would go through a large area of the state heavily impacted by oil and gas extraction and cross some federal land.

Yet no North Dakota newspapers appeared to carry public notices, and a DRC inquiry with the U.S. Forest Service indicated the agency was unaware of the application.

Seven groups, including DRC and the McKenzie County Energies and Taxation Association, joined in protesting the brief 30-day comment period on the Presidential Permit application.

The U.S. Department of State quickly agreed to issue a new notice for public comment of at least 45 days beginning in January.

DRC contested the initial TransCanada Keystone pipeline, which is now under construction in eastern North Dakota.

Both pipelines would carry highly-polluting tar sands oil from Alberta to refineries outside North Dakota.

Construction lagged behind schedule this year on the already permitted Keystone pipeline due in part to heavy rainfall that filled the ditches with water.

Some adjacent landowners have reported company efforts to drain water onto their land, despite not having an easement to do so.

Wastewater De-Icer Again

The state Health Department said last month it would allow salty oilfield wastewater to be used as a road de-icer, despite fact that the state oil and gas rules prohibit it.

The state suspended the de-icing practice last year.

Since then it has conducted studies that showed some oil wastewater would be safe for commercial use, while some would not.

The state has issued guidelines that would require testing of wastewater prior to using it on roadways.

The guidelines apparently wouldn't fly on U.S. Forest Service land.

Larry Melvin, Bismarck, USFS mineral manager, told the Associated Press that any oil wastewater spilled on Forest Service land would have to be cleaned up.

“Spills are not tolerated by the Forest Service,” he said.

Then there's North Dakota's administrative code, 43-02-03-53.

It says, “All saltwater liquids or brines produced with oil and natural gas shall be processed, stored, and disposed of without pollution of freshwater supplies. At no time shall saltwater liquids or brines be allowed to flow over or pool on the surface of the land or infiltrate the soil.”

The Health Department guidelines don't mention this law.

Grants for Violators

Some lawbreakers get prison time. Others get grants.

The Ray and Tioga Water Supply Association (RTWSA) began using more water than its state permit allowed in 2005.

That's a class A misdemeanor.

However, the state Water Commission's response was to give them a temporary permit in 2007 to draw additional water, then recommend a new permit for yet more water in 2008 (over DRC's objections).

RTWSA has been selling water to oil companies for hydraulic fracturing, which evidently accounts for much of its increased volume. Its source of water is wells.

Now its system can't keep up with demand.

The solution? A \$4.2 million grant from the Water Commission, which according to the Minot Daily News will pay 70% of an expansion project to double RTWSA's capacity, with borrowed money providing the balance.

Other than paying for the water it buys, there appear to be no costs to the oil industry.

Permanently Temporary

Some things change on paper but stay the same on the ground (or under the ground).

DRC challenged 21 McKenzie County water permit applications from Zenergy, Inc. in 2005, fearing diminished

LIVESTOCK ROUNDUP

Dollars for Animal Factories

Industrial animal confinement operations get the lion's share of federal grants from the federal Environmental Quality Incentives Program (EQIP), according to a report released this month by the Campaign for Family Farms and the Environment.

The report says that industrial hog facilities receive 37% of all EQIP contracts, although they represent less than 10.7% of hog operations nationally.

Figures for industrial dairies are 54% and 3.9% respectively.

One of the reasons is the 2002 farm bill, which raised overall EQIP funding by over \$1 billion per year.

The bill also raised the five-year EQIP payment caps from \$50,000 per operation to \$450,000, and required 60% of funding to go to livestock operations.

The 2002 bill also restricted public access to specific information about what the funds are actually used for.

These changes effectively turned a program meant to promote conservation practices into a cash cow for highly-polluting animal factories and facilitated huge growth in industrial operations.

The study found that industrial hog operations in Minnesota, Missouri and

Iowa have grown by 122% to 155% since 1996, and industrial dairies by 300% to 900%.

The report calls for an end to EQIP funding for the construction or expansion of industrial operations, capping total EQIP funding to \$150,000 per operation, and striking prohibitions on public release of EQIP data.

New Exemptions

The U.S. Environmental Protection Agency gave animal factories another boost December 12 by exempting them from reporting hazardous air pollution such as ammonia and hydrogen sulfide.

The rule, proposed a year ago, exempts animal factories from reporting requirements in force for 28 years.

"Exempting such major pollution sources is a further attempt by EPA to ignore the CAFO plague faced by communities throughout the nation," wrote Charlie Tebbutt of the Dairy Education Alliance in comments on the rule.

Tebbutt noted that many adverse human health effects associated with air pollution, including respiratory diseases (asthma, hypersensitivity pneumonitis, industrial bronchitis), cardiovascular events (sudden death associated with particulate air pollution), and

neuropsychiatric conditions (due to odor as well as delayed effects of toxic inhalations) as well as increased headaches, sore throats, excessive coughing, diarrhea, burning eyes, and reduced quality of life for nearby residents.

"CAFO air pollution tends to be especially problematic from a public health perspective because neighboring communities are exposed on a near constant basis," wrote Tebbutt.

Cow and Pig Tax?

Livestock producers "should oppose any attempt to tax livestock as a means of regulating greenhouse gases," according to R-CALF USA Vice President Randy Stevenson, in response to recent Farm Bureau news releases.

But R-CALF also roundly criticized Farm Bureau for its "outlandish" press efforts that "misinform the public."

"This so-called cow and pig tax has stirred up livestock producers everywhere, which is exactly what U.S. corporate agribusiness and their respective trade associations want to happen, so that our attention is diverted away from the true issues immediately facing us," said R-CALF CEO Bill Bullard.

Among those issues, said Bullard, are country-of-origin labeling and "the anticompetitive effects from packer-owned livestock and other captive supply practices."

Bullard noted that EPA is not currently proposing a taxation on livestock, just seeking comments on alternative ways for regulating greenhouse gases.

He said R-CALF agreed with EPA's in-house conclusion that a livestock tax would be "relatively ineffective at reducing greenhouse gas concentrations," and would submit comments to that effect.

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OIL SPOTS from p 5

water supplies for area residents.

The state Water Commission approved 20 in 2007. (The other one was denied because a landowner had a surface use agreement that specifically forbade water drilling.)

In most cases, oil companies already had temporary permits to drill for water.

One consolation was that all the new, non-temporary permits required

the oil companies to go into deeper aquifers, rather than the shallow water source generally used by local surface residents.

Over a year later, many of the new permits have not been drilled, and at least eight of the temporary permits that were superseded are not only still in use but have been extended.

And the consolation is just words on paper.

A WIN FOR THE MOUSE

by Terrence Kardong

Wednesday, December 10, 2008 was a good day for the environment in North Dakota and the nation. On that day, the Bush Administration announced that it was dropping its efforts to lessen pollution controls for power plants.

Since Dakota Resource Council has been struggling for eight years against this effort, we consider this a win.

Normally, when you go against the federal government, you lose. They wear you down. In this case, we wore them down. As the ancient Latin saying goes, *Illegitimus non carborundum est*. (Don't let the bastards wear you down!)

The basic dynamics of this contest were as follows. The Clean Air Act of 1971 protects the air standards in wilderness areas and some national parks, which are designated "Class One Airsheds" under the Clean Air Act.

This means that the air in these areas should be more pristine and there is less room for new pollution. Theodore Roosevelt National Park in the west central part of the state and Lostwood Wildlife Refuge in north central North Dakota are both designated Class One airsheds.

We also have six power plants about 100 miles east of the park. In 1999 it was discovered that the Class One areas in the state were maxed out on sulfur dioxide pollution from the power plants, which meant that no more power plants could be built in North Dakota. The Environmental Protection Agency (Region VIII, Denver) is the watchdog on these matters.

Since the start of the governorship of John Hoeven, our state government has been looking for a way around



these rules. According to them, we need more power plants because "that's where the good jobs are."

Alarminglly, the State Health Department has led the fight to weaken the EPA rules and therefore allow more pollution.

A couple of years ago, EPA gave in and said that it would let North Dakota run its own tests for pollution using unscientific methods. In the opinion of DRC, this amounts to hiring the fox to guard the chicken coop. In response, DRC did something we generally avoid at all costs: we sued EPA. In fact, we sued them twice. Needless to say, DRC did not win those cases. This left us with nowhere to turn.

In response to the EPA's acceptance of North Dakota's methods, people began to make plans to build various kinds of power plants west of South Heart, which is about 25 miles from the park. With the door open, the energy speculators crowded in. Then, to crown it all, EPA announced that it would look into the possibility of allowing all the states to use the North Dakota method!

But on December 10, against all probability, the Bush gang finally gave up! Why? Well, they said time is running out and they have not been able to execute the various legal steps it would take to carry out their plans.

Unfortunately, DRC cannot rest long on its laurels because North Dakota is still operating under the flawed methods. We do not know what will happen with our nation's new administration. We can hope and pray things

will now improve, but we don't know. What we do know is this: **THE BUSH GANG FINALLY GAVE UP AND WE DID NOT.**

(Terrence Kardong, Richardton, is chair of DRC's Clean Electricity Task Force.)



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NO VOTE ON GRAND FORKS LANDFILL

Grand Forks County Commissioners missed their last opportunity December 16 to give affected residents a voice in local proceedings on the proposed landfill in Rye Township.

Commission Chair "Spud" Murphy cast the deciding vote in a 3-2 decision not to hold a county vote on the state landfill permit.

State law requires the Health Department to notify counties when it is planning to approve a landfill permit, and gives county commissions the decision whether or not to call a special election to accept or reject the landfill.

The landfill would be owned and operated by the city of Grand Forks.

Commissioners Diane Knauf and Cindy Pic voted to schedule a county vote, but Gary Malm and John Schmisek joined Murphy in opposing it.

The \$20,000 cost of a special election was evidently a factor in the decision.

The decision means the only public hearings on the landfill will be conducted by the state Health Department.

Grand Forks County Citizens Coalition members gave testimony at a December 17 Health Department hearing.

GFC3 also convinced the state to schedule a second hearing February 2 so that it would have more time to evaluate the lengthy landfill application and supporting documents.

Part of GFC3's objection to the landfill is environmental. The group would like to see an ambitious program of waste reduction.

"At this time in history, with all of the other options available, we don't need a landfill," GFC3 member Richard Gross told the *Grand Forks Herald*. "We have an opportunity here, and building a landfill is going backwards."

Then there are the due process and equal protection issues GFC3 has raised in a federal lawsuit.

The city made landfills a permitted use throughout nearly its entire extraterritorial authority, thereby avoiding the need for a local special use permit and public hearing.

Residents directly affected by the landfill all live outside city limits and cannot vote for or against the city officials who are forcing the landfill on them.

If you wish to receive the Legislative weekly update, please notify the Dickinson office soon!

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