

MINUTES OF THE 197<sup>TH</sup> MEETING OF THE  
WATER MANAGEMENT BOARD  
via TELEPHONE CONFERENCE at the  
FLOYD MATTHEW TRAINING CENTER  
523 EAST CAPITAL AVE  
PIERRE, SD

MARCH 3, 2016

**CALL TO ORDER:** Chairman Jim Hutmacher called the meeting to order at 9:32 a.m.

**APPLICATIONS:** Water Permit Application No. 7537-3, Brett Flihs

The following were present at the Training Center for the meeting:

**Department of Environment and Natural Resources (DENR):** Jami Burrer – Board Secretary; Eric Gronlund, Jeanne Goodman, Adam Mathiowetz, Karen Schlaak, Ron Duvall, Genny McMath and Mark Rath – Water Rights Program; Steve Pirner – Secretary's Office.

**Attorney General's Office:** Ann Mines-Bailey, counsel to the Water Rights Program.

**Legislative Oversight Committee:** Representative Mary Duvall.

The following were present via teleconference for the meeting:

**Board Members:** Chad Comes, Jim Hutmacher, Peggy Dixon, Tim Bjork, Rodney Freeman, and Leo Holzbauer. Ev Hoyt was absent.

**Attorney General's Office:** Matthew Naasz, counsel to the board.

**APPROVE December 9, 2015, MINUTES:** Motion by Freeman to approve the board minutes correcting the spelling of Mr. Fouberg's name, and authorizing Bjork to sign the minutes, seconded by Bjork. Motion carried unanimously by roll vote.

**NEXT MEETING:** May 4-5, 2016. Pierre.

**STATUS AND REVIEW OF WATER RIGHTS LITIGATION:** None.

**ADMINISTER OATH TO DENR STAFF:** The court reporter administered the oath to the DENR Staff who intended to testify during the meeting.

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**LEGISLATIVE UPDATE, Steve Pirner:**

Mr. Pirner stated there is a link on DENR's website for the public to view legislation tracking. DENR only worked one bill this year, the Annual Governor's Water Funding Bill, Senate Bill 68. The bill focused on Big Sioux flooding with over two million dollars of appropriation to pay off the state's commitment for the Sioux Falls flood control project. There was an additional

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\$750,000 for the Big Sioux Base and Hydrologic Model. This came out of the flooding in 2011 and 2014 in the Lower Big Sioux. The existing flood modeling and the existing tools that were available for this area were inaccurate. The money will be used to redo the flood modeling effort. There is a public input meeting which is tentatively scheduled for March 22, 2016, in North Sioux City, South Dakota. If the Board approves a motion for a request for proposals (RFP), DENR will look for a qualified engineering and hydrologic firm. There is also \$250,000 in the funding for another Big Sioux flood control study; this is a Watertown issue. The Corps of Engineers contacted the City of Watertown and stated flood control projects in Watertown need to be re-analyzed. The City of Watertown asked DENR to help pay the non-federal cost share of the program.

Mr. Pirner stated there is a \$5 million appropriation in the bill for the consolidated program. This is the program the Board of Water and Natural Resources uses to help provide financial assistance to smaller water and waste water projects across the state. There is \$2.4 million for the Solid Waste Management Program, to help fund regional landfills and recycling projects. The total amount appropriated by the bill is around \$8.2 million, along with other fees and federal funds.

Mr. Pirner stated the bill passed the Senate with a 35-0 vote. In the House the bill passed the joint appropriations committee, but on the house floor there were six "no" votes. However, the bill received the two-thirds majority of the votes that it needed to pass and be delivered to the governor.

Mr. Pirner stated House Bill (HB) 1214 is an act to regulate conflicts of interest for authority, board, and commission members. When the bill was first introduced by Representative Mickelson the Water Management Board was not included in the bill. However, it was amended to include the board.

Mr. Pirner stated the Governor recommended DENR's budget as a status quo budget, with no increase in FTE, personal services, and no increase in operating expenses. The budget is still pending in front of the Legislature.

Mr. Pirner stated HB 1082 is an act to codify the list of navigable streams requiring gates. Representative Mary Duvall is the sponsor and author of the bill and is present today.

Ms. Duvall stated last fall the Water Management Board was presented with an issue regarding Firesteel Creek and its navigability. After listening to the meeting and looking in the code book to read the list of navigable streams that required gates, it was noticed that what was in the code book was not accurate. In the code book it stated an appointed board had an authority to make changes to statute through the rules process, however, the code book did not reflect those changes. HB 1082 was submitted to correct that issue. The bill fixed the code book to reflect the list of streams that required gates by incorporating the list existing in rule since 1994. The provision to petition the Water Management Board to make a determination was removed. Any changes to the list will need to be made legislatively and not through the administrative rules process.

Ms. Duvall stated Firesteel Creek is still in a state of limbo, because HB 1082 does not go into effect until July 1, 2016. As of that date the board will no longer have authority over the Firesteel Creek issues. It is her understanding DENR will notify the petitioner, the landowners, and others who provided testimony during the December 2015 hearing, to explain what HB 1082 is and what it does. Since it is still a pending action, the Firesteel Creek petition will be placed on the July 2016 agenda for final action, and dismissal is recommended since the board will no longer have jurisdiction.

Mr. Pirner stated the rule adopted on the Firesteel Creek issue went to the interim Rules Review Committee, and the committee remanded the rules back to the board.

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#### **RAPID VALLEY WATER MASTER, Mark Rath:**

Mr. Rath stated there is a state law that requires the annual appointment of the Rapid Valley Water Master to be subject to the board's approval. The Water Master's duties include the allocation of water flows from Rapid Creek, both natural flows of Rapid Creek and purchase water releases from Pactola and Deerfield Reservoirs. The Water Master also acts as an agent to the board and the chief engineer if there are minor disputes with people taking water out of order or things of that nature. Each February, DENR contacts the Rapid Valley Conservancy District regarding this appointment for the upcoming irrigation season. This year the district requested that Kevin Ham be appointed as the Water Master. Mr. Ham has been the Water Master since 2005. The recommendation is for the board to approve the appointment of Kevin Ham for the 2016 season.

Motion to appoint Kevin Ham as the Rapid Valley Water Master by Freeman, seconded by Comes. Motion carried unanimously by roll vote.

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#### **VIOLATIONS FOR FAILURE TO REPORT IRRIGATION QUESTIONNAIRE, Genny McMath:**

Ms. McMath stated on October 23, 2015, 3,834 irrigation questionnaires were mailed by first class mail to irrigators for reporting water use in 2015. The permit holders were given until December 1, 2015 to return the forms. The cover letter included the following examples of how questionnaires could be completed and returned: Online, Mail, or Fax. On January 15, 2016, 222 notices (involving 419 permits) were mailed to those irrigators who had not returned their irrigation questionnaires. Additional questionnaire forms were included with the mailing. All of the notices were sent by "certified mail." The January 15th notice advised permit holders that the Board may take one or more of the following actions pursuant to SDCL 46-1-12 and SDCL 46-1-14:

- The permit(s) could be suspended for:
  1. A period of up to one year (first violation); or
  2. A period of up to three years (second violation - includes one previous suspension);

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- The permit(s) could be canceled for a third violation (includes at least two previous suspensions);
- The permit(s) could be amended to include the mandatory irrigation questionnaire qualification;
- Postpone any action or take no action.

Ms. McMath stated the Water Rights Program is recommending the Board take the following action for those permits with irrigation questionnaires not received by March 3, 2016:

- Suspend the permits/rights (listed on attachment) as follows:
  1. First Violation - one year suspension - effective April 4, 2016;

If the irrigator sends in the questionnaire prior to April 4<sup>th</sup> no suspension will occur. Following the March 3<sup>rd</sup> hearing, all permit holders are sent a notice informing them of the Board action with the opportunity to submit the questionnaire by April 4<sup>th</sup> to avoid suspension. All follow-up notices will be sent by certified mail.

- Amend the permits/rights (listed on attachment) to include the following qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

Motion by Freeman, seconded by Bjork, to suspend water rights listed under Violation 1 (Permit Nos. 1921-1, 1922-1, 1801A-1, 495-2, 2175-2, 1350-3, 6042-3, 7286-3, 7543-3, 1342-2, 7196-3, 1349-2, and 7124-3) for one year, effective 30 days from today's date. Under Violation A (Permit Nos. 962B-1, 4292-3, 386-2, and 2457-3) be amended to include the qualification. Motion carried unanimously by roll vote.

Irrigation Questionnaires for Water Permit Nos. 1921-1, 1922-1, 1801A-1, 7286-3, 7543-3, 7196-3, and 7124-3 were received prior to the April 4<sup>th</sup> deadline and were not suspended.

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**WATER PERMIT APPLICATION NO 7537-3, Brett Flihs:**

Mr. Gronlund stated what was previously provided to board in this matter.

Water Permit Application No. 7537-3 proposed to appropriate 6.6 cubic feet of water per second from three well fields, each comprised of 12 to 14 wells, completed into the Lake Silt aquifer for irrigation of 480 acres in Brown County. The application was deferred in 2013 in order to allow for a pump test to be completed so that an evaluation on the availability of unappropriated water and potential impact to existing users could be conducted.

Mr. Gronlund stated in November 2015, the Chief Engineer recommended denial of Application No. 7537-3 because based on the information available there is not a reasonable probability that there is unappropriated water available. The applicant was made aware of this

recommendation and did not file opposition to the recommendation. Since this matter formally came before the Water Management Board and was deferred it must be brought back before the Board for final action. Therefore notice was sent to the applicant scheduling Application No. 7537-3 before the Board today with a denial recommendation.

Mr. Gronlund stated Mr. Flihs will get 75 percent of the application filing fees returned to him and he did not seem surprised by the recommendation for denial.

Motion to deny Water Permit Application No. 7537-3 by Freeman, seconded by Holzbauer. Motion carried unanimously by roll vote.

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**CANCELLATION CONSIDERATIONS, Eric Gronlund:**

Mr. Gronlund stated what was previously provided to the board in this matter.

Mr. Gronlund stated there are 16 cancellations scheduled for today. There were no letters received from permit holders in regards to the hearing; there is also no one present at the meeting today. The recommendation is for cancellation of the 16 permits/rights listed.

Motion to approve the cancellation requests as recommended by DENR staff, shown on the table below by Freeman, seconded by Dixon. Motion carried unanimously by roll vote.

PE 1161-2	Glen Hostutler, Hostutler Inc.	Abandonment or Forfeiture
PE 2400-2	Warren Karlen w/Karlen Family Partnership	Abandonment or Forfeiture
PE 2592-2	George & Joseph Clinton, Clinton Ranch Ltd Partnership, Donley Hewett	Abandonment or Forfeiture
PE 2628-2	Brandon Powles	Non-Construction
RT 60-3	Arthur Geyer	Abandonment or Forfeiture
RT 1398-3	Marv Schlomer w/ M&M Farms Inc	Abandonment or Forfeiture
RT1937-3	Joe Zimprich	Abandonment or Forfeiture
RT 2866-3	John & Jolene Hermoe	Abandonment or Forfeiture
RT 3243-3	Richard Boomsma	Abandonment or Forfeiture
RT 3689-3	Marv Schlomer w/ M&M Farms Inc	Abandonment or Forfeiture
RT 4034B-3	Chip Carlson w/ Henry Carlson Company	Abandonment or Forfeiture
RT 4361A-3	Darrell Muller	Abandonment or Forfeiture
PE 6107-3	Harlow C Lomheim	Non-Construction
PE 6686-3	Tom Schaffer w/ Sarah Sue LLC	Non-Construction
PE 6859-3	Marv Schlomer w/ M&M Farms Inc	Non-Construction
PE 7063-3	Anthony Ekren, Kurtis Domnick and Bradley Fehr w/ Riverview LLP	Non-Construction

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**ADJOURN:** Chairman Hutmacher declared the meeting adjourned.

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A court reporter was present for the meeting, and a transcript of the proceedings from March 3, 2016, may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501-0903, telephone number (605) 224-7611.

The meeting was also digitally recorded and a copy of the recording is available on the department's website at <http://denr.sd.gov/boards/schedule.aspx>.

Approved this 5<sup>th</sup> day of May.



Vice Chairman, Water Management Board



Secretary, Water Management Board