

MINUTES OF THE 196TH MEETING OF THE
WATER MANAGEMENT BOARD
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITAL AVE
PIERRE, SD

December 9, 2015

CALL TO ORDER: Chairman Hutmacher called the meeting to order at 8:35 a.m. A quorum was present.

The following were present at the meeting:

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

Department of Environment and Natural Resources (DENR): Jami Burrer – Water Management Board Secretary; Mark Rath, Ron Duvall, Jeanne Goodman, Eric Gronlund, Ken Buhler, Karen Schlaak, and Mike DeFea – Water Rights Program; Patrick Snyder and Kelli Buscher – Surface Water Quality Program.

Attorney General's Office: Ann Mines-Bailey and Matt Naasz.

Legislators Present: Representative Mary Duvall and Representative Joshua M Klumb.

APPROVE October 14, 2015, MINUTES: Motion to approve the October 14, 2015, minutes by Hoyt, seconded by Bjork. Motion carried.

NEXT MEETING: March 2-3, 2016, in Pierre.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: Mr. Naasz stated in August 2015 two cases involving denial of the applications for appropriations from the Tulare: East James Aquifer and the Tulare: Western Spink Aquifer were appealed to the Sixth Circuit Court. Judge Barnett dismissed the cases on a motion to dismiss filed by DENR. As of December 8, 2015, there has been no notice of appeal filed with the Sixth Circuit Court or the Clerk of the South Dakota Supreme Court. If no notice is filed, Judge Barnett's decision to dismiss the appeals is final.

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

PRESENTATION ON INVASIVE SPECIES IN SOUTH DAKOTA BY THE DEPARTMENT OF GAME, FISH, AND PARKS (GF&P):

Tony Leif, director of the Wildlife Division for South Dakota GF&P, and Mike Smith, the lead biologist on aquatic invasive species (AIS), were present.

Mr. Leif stated one particular type of aquatic invasive species, zebra mussel's, are present in South Dakota waters. The primary implications of zebra mussel's infestations extend beyond the primary responsibilities of GF&P. The primary implications are within agriculture, industry, municipalities, and any other entity that place pipes or other structures into water bodies. The regulatory authority over the different human induced spread of these mussels extends beyond the regulatory authority of the GF&P commission. Zebra mussels have been found in Lewis and Clark Lake in southeastern South Dakota, and it has been confirmed that a population has been established in that lake.

Mike Smith stated AIS is a species that is not native to South Dakota and is mostly aquatic. It also has to have one of two things, negatively impacting the eco system or negatively impact the human use of that resource.

Mr. Smith gave a Power Point presentation with a list of AIS species. Each female zebra mussel can spawn multiple times a year with up one million larvae per spawn. Zebra mussels can survive a wide range of water temperatures. They have to be in water over 140 degrees for ten seconds in order to kill them. They can survive in water up to 90 degrees and can reproduce from 50 degrees to around 85 degrees. Zebra mussels can avoid chemical treatment because they can close their shell when encountering a chemical. They can also survive up to 30 days in damp environments. If there is a live well on a boat with just a little bit of water in it, they can survive up to 30 days. The mussels are not always easy to find in a body of water.

Mr. Smith stated in November 2014, a GF&P staff member found a single adult zebra mussel on a boat ramp. After a search, conducted over a couple of days, it was considered to be an isolated incident. It was not until the June 2015 sample where larva was detected. A snorkel survey was then conducted in the lake, and it was discovered there is a wide spread infestation in Lewis and Clark Lake and below Gavins Point Dam.

Mr. Smith stated that each month samples are taken to make sure the mussels have not spread. The plan for 2016 is to sample the 30 highest priority waters in the state and waters with large marinas. Those samples are then sent to Montana for analysis. The Montana Fish, Wildlife and Parks have a lab that does this testing for numerous states. For prevention, there are many different resources used by GF&P to spread the word to communities. There are also signs at all of the boat ramps in South Dakota, warning users of the potential risks. In 2016, GF&P is planning a watercraft inspection and decontamination program. There will be five teams of two interns each, who will be going around the state to different water bodies each day. The goal is to increase the compliance of regulations.

Mr. Smith stated DENR can help by cooperating and participating in the AIS Task Force. There was a letter that went out to all of the irrigators in the state, which DENR staff helped mail. *Information sharing for permit holders is also helpful.*

Mr. Smith answered questions from board members.

Mr. Smith stated there is more research on zebra mussels because they are the most common. There is also some research for bio bullets, small formed plastic that float in the water. The mussels filter them in and deliver the chemicals, although this method is still in the early stages and is more focused on Asian carpe.

Mr. Smith stated the impact on a fishery is difficult to determine. There are many different variables in a water body. The mussels filter the water resulting in increased clarity of the water, but that also allows vegetation to grow more rapidly, causing overgrowth. There is also an effect to the fish population; however the effect is still unknown. GF&P does know that if zebra mussels take over a water body, they will impact infrastructure.

Mr. Smith stated mussels were found in the Great Lakes in the mid 1980's. They noticed an increase of water clarity of 500 percent in less than 10 feet of water. When the water clears up that quickly, the vegetation will grow faster. However, it can change the dynamic in that eco system.

Mr. Smith stated zebra mussels can have multiple spawns in a year. Females release up to one million larva per spawn. For intakes pipes, to prevent mussels from entering it would need a filter that is 63 microns. The filter would keep them out of the pipe, however the filter will likely clog up with sediment.

Mr. Smith stated zebra mussels have no known predators in the United States. In Eastern Europe, there are a few fish species that will eat them.

Mr. Smith stated they spread by contamination through humans moving them on boats from lake to lake. They can also spread by moving downstream.

Mr. Smith stated there is a list of infested bodies of water on the GF&P website and the fishing handbook.

Mr. Smith stated zebra mussels can keep their shells closed for a couple of days, as long as the water is oxygenated. Adults can be in boats for up to a week with just small amounts of water. You can kill them with 140 degree water for at least 10 seconds. You can also let the boat dry, however, that depends on the humidity level and the time of the year. Chemicals do work; bleach will kill them within a couple of hours. However, using bleach on a boat can cause corrosion. Vinegar kills mussels within four hours if they are completely submerged.

PUBLIC HEARING ON AMENDMENT TO ADMINISTRATIVE RULES OF SOUTH DAKOTA CHAPTER 74:51:01 – Surface Water Quality Standards:

The purpose of the hearing is to consider the adoption and amendment of Administrative Rules of South Dakota (ARSD) 74:51:01:50, 74:51:01:51, and 74:51:01 Appendix B.

Mr. Snyder stated the proposed changes include deleting the fecal coliform criteria from ARSD 74:51:01:50 and 74:51:01:51. When the Water Management Board adopted the *Escherichia coli* recreation criteria on March 11, 2009, it was the understanding that the fecal coliform criteria would be removed after sufficient time to allow changes to Surface Water Discharge Permits issued by the Department.

Mr. Snyder stated the nonylphenol criteria was recommended by the United States Fish and Wildlife Service and by the United States Environmental Protection Agency (USEPA) during the triennial review held in December of 2014. The Department recommended not adopting the criteria until further discussion with the USEPA had occurred. Based on those discussions, the Department is now recommending these criteria be adopted.

2.0 Chapter 74:51:01 – Surface Water Quality Standards

2.1 § :50. Criteria for immersion recreation waters.

The Department is recommending the deletion of fecal coliform as this bacterial parameter is no longer needed.

2.2 § :51. Criteria for limited contact recreation waters.

The Department is recommending the deletion of fecal coliform as this bacterial parameter is no longer needed.

2.3 Appendix B Toxic Pollutant Criteria

Nonylphenol – This change reflects the latest U.S. EPA criteria for aquatic life.

Proposed changes to Surface Water Quality Standards;

74:51:01:50. Criteria for immersion recreation waters. The criteria of parameters for immersion recreation waters and their allowable variations that are not included under § 74:51:01:55 and Appendix B, unless set under § 74:51:01:24, are as found in the following table and only apply May 1 - September 30:

Parameter	Criteria	Unit of Measure	Special Conditions
Dissolved oxygen as measured anywhere in the water column of a non-stratified water body, or in the epilimnion and metalimnion of a stratified water body	≥ 5.0	mg/L	daily minimum
Fecal coliform	≤ 200	/100 mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period, and they may not exceed this value in more than 20 percent of the samples examined in this same 30-day period
	≤ 400		in any one sample
<i>Escherichia coli</i>	≤ 126	/100 mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period
	< 235		in any one sample

74:51:01:51. Criteria for limited contact recreation waters. The criteria of parameters for limited contact recreation waters and their allowable variations that are not included under § 74:51:01:55 and Appendix B, unless set under § 74:51:01:24, are as found in the following table and only apply May 1 - September 30:

Parameter	Criteria	Unit of Measure	Special Conditions
Dissolved oxygen as measured anywhere in the water column of a non-stratified water body, or in the epilimnion and metalimnion of a stratified water body	≥ 5.0	mg/L	daily minimum
Fecal coliform	$\leq 1,000$	/100 mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period, and they may not exceed this value in more than 20 percent of the samples examined in this same 30-day period
	$\leq 2,000$		in any one sample
<i>Escherichia coli</i>	≤ 630	/100mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period
	≤ 1178		in any one sample

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS ⁽¹⁾					
FOR TOXIC POLLUTANTS - ARSD 74:51:01					
Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Uses 2-3-4-5-6-9	
				Acute (CMC)	Chronic (CCC)
Acenaphthene	83329	670	990		
Acenaphthylene (PAH) ⁽⁶⁾	208968				
Acrolein	107028	6	9	3	3
Acrylonitrile ⁽⁴⁾	107131	0.051	0.25		
Aldrin ⁽⁴⁾	309002	0.000049	0.000050	3.0	
Anthracene (PAH) ⁽⁵⁾	120127	8,300	40,000		
Antimony	7440360	5.6	640		
Arsenic ⁽⁴⁾	7440382	0.018 ⁽⁴⁾⁽¹¹⁾	0.14 ⁽⁴⁾⁽¹¹⁾	340	150
Asbestos ⁽⁴⁾	1332214	7,000,000 fibers/L			
alpha-BHC ⁽⁴⁾	319846	0.0026	0.0049		
beta-BHC ⁽⁴⁾	319857	0.0091	0.017		
gamma-BHC (Lindane) ⁽⁴⁾	58899	0.98	1.8	0.95	
Benzene ⁽⁴⁾	71432	2.2	51		
Benzidine ⁽⁴⁾	92875	0.000086	0.00020		
Benzo(a)Anthracene ⁽⁴⁾	56553	0.0038	0.018		
Benzo(a)Pyrene ⁽⁴⁾	50328	0.0038	0.018		

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		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Uses 2-3-4-5-6-9	
				Acute (CMC)	Chronic (CCC)
Benzo(b)Fluoroanthene ⁽⁴⁾	205992	0.0038	0.018		
Benzo(k)Flouoroanthene ⁽⁴⁾	207089	0.0038	0.018		
Beryllium ⁽⁴⁾	7440417	4			
Bis(2-Chloroethyl)Ether ⁽⁴⁾	111444	0.030	0.53		
Bis(2-Chloroisopropyl)Ether ⁽⁴⁾	108601	1,400	65,000		
Bis(2-Ethylhexyl)Phthalate ⁽⁴⁾	117817	1.2	2.2		
Bromoform ⁽⁵⁾	75252	4.3	140		
Butylbenzyl Phthalate	85687	1,500	1,900		
Cadmium	7440439			2.0 ⁽⁷⁾	0.25 ⁽⁷⁾
Carbon Tetrachloride ⁽⁴⁾	56235	0.23	1.6		
Chlordane ⁽⁴⁾	57749	0.00080	0.00081	2.4	0.0043
Chlorine	7782505			19	11
Chlorobenzene	108907	130	1,600		
Chlorodibromomethane ⁽⁴⁾	124481	0.40	13		
Chloroform ⁽⁴⁾	67663	5.7	470		
2-Chloronaphthalene	91587	1,000	1,600		

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		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
2-Chlorophenol	95578	81	150		
Chromium(III)	16065831			570 ⁽⁷⁾	74 ⁽⁷⁾
Chromium(VI)	18540299			16	11
Chrysene ⁽⁴⁾	218019	0.0038	0.018		
Copper	7440508	1,300		13 ⁽⁷⁾	9.0 ⁽⁷⁾
Cyanide (weak acid dissociable)	57125	140	140	22	5.2
4,4'-DDD ⁽⁴⁾	72548	0.00031	0.00031		
4,4'-DDE ⁽⁴⁾	72559	0.00022	0.00022		
4,4'-DDT ⁽⁴⁾	50293	0.00022	0.00022	1.1	0.001
Dibenzo(a,h)Anthracene ⁽⁴⁾	53703	0.0038	0.018		
1,2-Dichlorobenzene	95501	420	1,300		
1,3-Dichlorobenzene	541731	320	960		
1,4-Dichlorobenzene	106467	63	190		
3,3'-Dichlorobenzidine ⁽⁴⁾	91941	0.021	0.028		
Dichlorobromomethane ⁽⁵⁾	75274	0.55	17		
1,2-Dichloroethane ⁽⁴⁾	107062	0.38	37		

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		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
1,1-Dichloroethylene ⁽⁴⁾	75354	330	7,100		
2,4-Dichlorophenol	120832	77	290		
1,2-Dichloropropane ⁽⁴⁾	78875	0.50	15		
1,3-Dichloropropene	542756	0.34	21		
Dieldrin ⁽⁴⁾	60571	0.000052	0.000054	0.24	0.056
Diethyl Phthalate	84662	17,000	44,000		
2,4-Dimethylphenol	105679	380	850		
Dimethyl Phthalate	131113	270,000	1,100,000		
Di-n-Butyl-Phthalate	84742	2,000	4,500		
2-Methyl-4,6-Dinitrophenol	534521	13	280		
2,4-Dinitrophenol	51285	69	5,300		
Dioxin (2,3,7,8-TCDD) ⁽⁴⁾	1746016	5.0E-9	5.1E-9		
2,4-Dinitrotoluene ⁽⁴⁾	121142	0.11	3.4		
1,2-Diphenylhydrazine ⁽⁴⁾	122667	0.036	0.20		
alpha-Endosulfan	959988	62	89	0.22	0.056
beta-Endosulfan	33213659	62	89	0.22	0.056

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		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Endosulfan Sulfate	1031078	62	89		
Endrin	72208	0.059	0.060	0.086	0.036
Endrin Aldehyde	7421934	0.29	0.30		
Ethylbenzene	100414	530	2,100		
Fluoranthene	206440	130	140		
Fluorene ⁽⁵⁾	86737	1,100	5,300		
Heptachlor ⁽⁴⁾	76448	0.000079	0.000079	0.52	0.0038
Heptachlor epoxide ⁽⁴⁾	1024573	0.000039	0.000039	0.52	0.0038
Hexachlorobenzene ⁽⁴⁾	118741	0.00028	0.00029		
Hexachlorobutadiene ⁽⁴⁾	87683	0.44	18		
Hexachlorocyclopentadiene	77474	40	1,100		
Hexachloroethane ⁽⁴⁾	67721	1.4	3.3		
Ideno(1,2,3-cd)Pyrene	193395	0.0038	0.018		
Isophorone ⁽⁴⁾	78591	35	960		
Lead	7439921			65 ⁽⁷⁾	2.5 ⁽⁷⁾
Mercury	7439976	0.050	0.051	1.4	0.77 ⁽⁸⁾

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		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Uses 2-3-4-5-6-9	
				Acute (CMC)	Chronic (CCC)
Methyl Bromide	74839	47	1,500		
Methyl Chloride ⁽⁵⁾	74873				
Methylene Chloride ⁽⁴⁾	75092	4.6	590		
Methylmercury	22967926		0.3 mg/kg		
N-Nitrosodimethylamine ⁽⁴⁾	62759	0.00069	3.0		
N-Nitrosodi-n-Propylamine ⁽⁴⁾	621647	0.0050	0.51		
N-Nitrosodiphenylamine ⁽⁴⁾	86306	3.3	6.0		
Nickel	7440020	610	4,600	470 ⁽⁷⁾	52 ⁽⁷⁾
Nitrobenzene	98953	17	690		
<u>Nonylphenol</u>	<u>84852153</u>			<u>28</u>	<u>6.6</u>
Polychlorinated Biphenyls, PCBs ⁽⁴⁾⁽⁹⁾		0.000064	0.000064		0.014
Pentachlorophenol	87865	0.27	3.0	19 ⁽⁶⁾	15 ⁽⁶⁾
Phenanthrene ⁽⁵⁾	85018				
Phenol	108952	10,000	860,000		
Pyrene ⁽⁵⁾	12900	830	4,000		

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		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Uses 2-3-4-5-6-9	
				Acute (CMC) ⁽¹⁰⁾	Chronic (CCC) ⁽⁸⁾
Selenium	7782492	170	4,200		5.0 ⁽⁸⁾
Silver	7440224			3.2 ⁽⁷⁾	
1,2,4-Trichlorobenzene	120821	35	70		
1,1,2,2-Tetrachloroethane ⁽⁴⁾	79345	0.17	4.0		
Tetrachloroethylene ⁽⁵⁾	127184	0.69	3.3		
Thallium	7440280	0.24	0.47		
Toluene	108883	1,300	15,000		
Toxaphene ⁽⁴⁾	8001352	0.00028	0.00028	0.73	0.0002
1,2-Trans-Dichloroethylene	156605	140	10,000		
1,1,1-Trichloroethane	71556				
1,1,2-Trichloroethane ⁽⁴⁾	79005	0.59	16		
Trichloroethylene ⁽⁴⁾	79016	2.5	30		
2,4,6-Trichlorophenol ⁽⁴⁾	88062	1.4	2.4		
Vinyl Chloride ⁽⁴⁾	75014	0.025	2.4		
Zinc	7440666	7,400	26,000	120 ⁽⁷⁾	120 ⁽⁷⁾

Motion to adopt the amendments proposed by Freeman, seconded by Bjork. Motion carried by unanimous vote.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION ON DECLARATORY RULING REQUEST ON NAVIGABILITY OF FIRESTEEL CREEK IN DAVISON COUNTY:

Mr. Naasz stated the board was sent proposed rulings on parties' submissions and proposed findings of fact and conclusions of law. The board's motion would be to authorize Mr. Hutmacher to sign the rulings and findings of fact and conclusions of law.

Motion to adopt the rulings on the proposed findings of fact, conclusions of law, and final decision as prepared by board council by Hoyt, seconded by Freeman. Bjork, Comes, Holzbauer, Hoyt, Dixon, and Freeman voted in favor of the motion. Hutmacher abstained. Motion carried unanimously.

Motion to adopt the findings of fact, conclusions of law, and declaratory ruling as prepared by board council by Freeman, seconded by Bjork. Bjork, Comes, Holzbauer, Hoyt, Dixon, and Freeman voted in favor of the motion. Hutmacher abstained. Motion carried unanimously.

REQUEST PERMISSION TO ADVERTISE AMENDMENT TO ADMINISTRATIVE RULES OF SOUTH DAKOTA CHAPTER 74:04:12, DRINKING WATER STANDARDS:

Mr. Mayer stated there are a couple of rule changes to keep up with the Environmental Protection Agency (EPA) and the Federal Safe Drinking Water Act. EPA revised the total coliform rule, and it becomes effective in April 2016. This will impact all of the water systems regulated by DENR in South Dakota. The total coliform rule has an acute impact, therefore it is important to keep it current. The revised rule improves the existing total coliform rule and will require sampling every month for all large water systems.

Mr. Mayer stated the revised rule will require a seasonal system to go through a startup procedure before operating. If the operator depressurizes the system over the winter months, when it is re-pressurized, they will have to ensure it was flushed out and have received the results of the sample indicating it is safe for use.

Motion to approve to advertise amendment to Administrative Rule of South Dakota Chapter 74:04:12 by Freeman, seconded by Comes. Motion carried unanimously.

PUBLIC HEARING ON AMENDMENT TO ADMINISTRATIVE RULES OF SOUTH DAKOTA CHAPTER 74:02:10, Fences Crossing Navigable Streams:

The purpose of the hearing is to consider the adoption and amendment of ARSD 74:02:10:07.

Mr. Naasz stated comments from the public have been received and went over who comments have been received from.

Mr. Naasz stated what was previously provided to the board in this matter and who submitted additional written comments after the Board packet was mailed.

Ron Duvall stated state law provides that any fence crossing on a navigable stream in SDCL 43:17:38, has to have a gate to allow passing by the public. State law also states that anyone may file a petition to either add or delete a stream from the statutory list of streams that require gates and fence crossing. There was a petition filed by Gary Bussmus requesting that Firesteel Creek in Davison County be deleted from that list of streams. The portion of Firesteel Creek being discussed begins at the Aurora/Davison County line and continues through Davison County and Lake Mitchell until the creek enters the James River.

Mr. Duvall stated in 1990 legislation enacted a statute requiring stream fence crossing and in 1992 the list of streams in which gates are required in fence crossings was enacted. The rule under consideration today had the first removal occur in November 1992, with additional removals in October 1993, and the last removal in October 1994. It has been 21 years since the list has changed.

Mr. Duvall stated a petition dated July 14, 2015, was filed by Gary Bussmus questioning the navigability of Firesteel Creek. This petition also seeks deletion of Firesteel Creek from the list of streams requiring gates. Upon receipt of the petition DENR was required by law to begin the steps necessary to have a rule-making proceeding. In the proposed rule, section 74:02:10:07, Firesteel Creek is being added to the list of streams where gates are not required in fences across the stream:

(9) The portion of the Belle Fourche River from its intersection with Meade County Highway 12 on the west side of section 19, township 5 north, range 10 east to its confluence with the Cheyenne River, section 33/34, township 6 north, range 15 east of the Black Hills Meridian [SDCL 43-17-38(18)].; and

(10) Firesteel Creek located in Davison County [SDCL 43-17-38(10)].

Mr. Duvall stated subsection 10 would be added and it removes Firesteel Creek entirely from the list of streams in which gates are required.

Mr. Duvall stated the parameters on which the board should base their decision on are found in SDCL 43:17:39:

(2) Delete a stream or portion of a stream from the streams listed pursuant to § 43:17:38 and this section:

(a) If available information shows that the public's use is not significant; or

(b) If the rights of the public to the use of the stream would not be adversely impaired without a gate or opening in any fence across the stream.

Mr. Duvall stated the scope of what the board's decision can be is laid out in the published public notice:

The Water Management Board may adopt the rule to remove Firesteel Creek from the list of streams where gates are required, remove a portion of Firesteel Creek, or not adopt the rule.

Mr. Duvall stated DENR is neutral in the situation. Mr. Bussmus filed a petition and DENR is required by law to bring this matter to the board. Typically, when a rule is brought to this board, it is by DENR to either implement a statute or perhaps clarify some point of law. In this case, today's rules' proceeding is based on the Bussmus petition. Also, SDCL 43:17:39 provides the possibility that someone submitting written comments or oral testimony may file a petition within 10 days of today's hearing to request the legislature to take final action on this matter. If that happens, any action taken by the board today will be nullified and DENR could end up having a position contrary to the board's decision. Finally, to the extent possible, DENR's actions should not lend themselves to either being perceived as pro-landowner or pro-recreationist.

Mr. Duvall stated for informational purposes, on the table behind the board are five maps showing Firesteel Creek in Davison County, in a dry year 2012 and a wet year in 2010. Two maps show the western portion and the other two maps show the eastern portion. These maps will not answer whether there is significant use or users being adversely impaired but it will give the board an idea of where there is water in a dry year and wet year. The fifth map has the roads labeled.

Mr. Duvall stated the rule pertains only to fencing across Firesteel Creek not fencing off Firesteel Creek. The possibility does exist of DENR being involved in a cost share program with local partners to improve riparian areas along creek but that is outside the board's authority today. If the board adopts this rule, public access to Firesteel Creek will not be denied. The water is the property of the people of the state and adoption of this proposed rule will not change that. The public has the right to be on the water and the board found that Firesteel Creek is navigable at their October 14, 2015, meeting. There is a public highway 50 feet out from water's edge. However, adoption of the rule could hinder the public's ability to get access to the creek and navigate up and down the creek. This issue speaks to one of the two issues the board needs to use in determining whether to adopt the rule, which is will the public's use be adversely impaired.

The proposed amendment is shown below.

**CHAPTER 74:02:10
FENCES CROSSING NAVIGABLE STREAMS**

Section

- 74:02:10:01 Definitions.
- 74:02:10:02 Landowner requirements.
- 74:02:10:03 Gate specifications.
- 74:02:10:04 Declaratory ruling on navigability.
- 74:02:10:05 Timely consideration by board.
- 74:02:10:06 Petitioner to publish notice.
- 74:02:10:07 Deletion of stream portions from streams listed in SDCL 43-17-38.

74:02:10:07. Deletion of stream portions from streams listed in SDCL 43-17-38. The following portions of streams are deleted from the list of streams where gates or openings are required in fences across streams pursuant to SDCL 43-17-38:

(1) The portion of the Belle Fourche River from the Wyoming state line to the Belle Fourche Irrigation District Diversion Dam in Butte County [SDCL 43-17-38(18)];

(2) The portion of the Belle Fourche River from its intersection with Highway 79 in Butte County to its intersection with Meade County Highway 12 on the west side of section 19, township 5 north, range 10 east of the Black Hills meridian [SDCL 43-17-38(18)];

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(3) The portion of the Cheyenne River from the Wyoming state line to the mouth of Hat Creek in Fall River County in the southeast quarter of section 13, township 9 south, range 4 east of the Black Hills meridian [SDCL 43-17-38(14)];

(4) The Little Minnesota River from Highway 10 to Lake Traverse in Roberts County [SDCL 43-17-38(19)];

(5) The North Fork of Whetstone River in Roberts and Grant Counties from Highway 15 near Wilmot to the Minnesota state boundary [SDCL 43-17-38(5)];

(6) The portion of the Cheyenne River from the Angostura Dam to the Fall River-Custer County line [SDCL 43-17-38(14)];

(7) The portion of the Cheyenne River from Highway 44 to the mouth of the Belle Fourche River [SDCL 43-17-38(14)];

(8) The Little Missouri River in Harding County from the Montana state boundary to the North Dakota state boundary [SDCL 43-17-38(17)]; and

(9) The portion of the Belle Fourche River from its intersection with Meade County Highway 12 on the west side of section 19, township 5 north, range 10 east to its confluence with the Cheyenne River, section 33/34, township 6 north, range 15 east of the Black Hills Meridian [SDCL 43-17-38(18)]; and

(10) Firesteel Creek located in Davison County [SDCL 43-17-38(10)].

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Source: 19 SDR 73, effective November 19, 1992; 20 SDR 53, effective October 20, 1993; 21 SDR 68, effective October 13, 1994.

General Authority: SDCL 43-17-39.

Law Implemented: SDCL 43-17-38, 43-17-39.

Mr. Comes asked if gates are currently required.

Mr. Duvall stated gates are required. It is difficult to accommodate everyone trying to use the creek with a single gate. In the past, the board has stated the gate can be on the shore within the high bank boundary. While this works for someone going down the shoreline, it does not work for someone in a kayak.

Mr. Hoyt asked if gates are only required on Firesteel Creek in Davison County.

Mr. Duvall stated that is correct. Firesteel Creek starts in northern Jerauld County and comes down through Aurora County. However, the segment in question is only in Davison County.

Mr. Comes asked if there is a procedure as of right now if gates are not installed.

Mr. Duvall stated Mike DeFea prepared a report of complaints received, which was included in the board packet. When DENR receives a complaint the department goes out, inspects the fences, and lets the land owner know about the statute.

Mr. Freeman asked whether in the past the board or the legislature determined that Firesteel Creek in Davison County was navigable and met the definition.

Mr. Duvall stated it was determined by the legislature.

Leslie Murphy with South Dakota Game, Fish and Parks (GF&P).

Ms. Murphy stated the board confirmed that a portion of Firesteel Creek in Davison County is navigable. This makes that portion of Firesteel Creek open to the public and, gates would be required in that portion. If gates were to be removed from that portion of the creek, GF&P would see that as impairment to public recreation. There are programs offered to the land owners to help keep the cattle out of the creek by fencing off the creek and eliminating the requirement for the gates.

Proponent testimony:

Stanley Neilson

Mr. Neilson stated the land he owns has been in his family for many years. They were unaware of the law requiring gates. Mr. Neilson asked that only a portion downstream of Loomis Road be put on the list where gates are required. There have not been any kayakers on his land that he knows of. There are also no cattle on his land but fencing is needed to keep cattle out of his hay ground.

Mr. Freeman asked if his fence has ever been tampered with or cut.

Mr. Neilson stated it has not been. There have been people on the property but not in the creek.

Harvey Fouberg

Mr. Fouberg stated if GF&P is approved to fence the creek off, there will be too much upkeep between the creek and the fence line. The ice comes up past the creek bed and will ruin the fence, causing it to need replacing year after year.

Mr. Fouberg stated three quarters of a mile west of Loomis Oil Road, the creek is full of rocks and is very narrow. A kayaker has never been seen on his property, and he is there two times per day to check his cattle.

Mr. Fouberg stated his uncle owned the property prior to him. He had issues on two different occasions with the gates being left open by recreational users.

Mr. Freeman asked if there is a lot of public use on the creek seen when checking cattle.

Mr. Fouberg stated he can see people standing on the bridge, fishing. Occasionally they will cross the fence and fish on the creek banks.

Mr. Hoyt asked where on the map Mr. Fouberg's property is located.

Mr. Fouberg pointed out on the map where his land is located.

Amy Puepke

Ms. Puepke stated her land is next to Mr. Fouberg and there have been several issues with gates being left open by recreational users. This leads to cattle getting out on to the road and getting hit by vehicles, which is a liability issue and a loss in income for the landowner.

Mr. Freeman asked if she observes any public use.

Ms. Puepke stated the public use is only seen closer to Lake Mitchell, any further up the creek is mainly snowmobilers. The litter that comes with recreational users is frustrating and causes damage to livestock, which in return causes the landowner a loss in income.

Answering questions from Mr. Hoyt, Ms. Puepke stated a couple of years ago there were two claims. A pop can getting on the calf's hooves happens about once every other year. The cattle were out as a result of a recreational user leaving the gate open. The gates are marked.

Gary Bussmus

Mr. Bussmus stated GF&P is talking about fencing off the creek as a solution. However, the landowners are going to lose land if this happens. When the creek floods, the ice takes a lot of fence out leaving it up to the land owners to maintain the fence over the years. A solution maybe to leave the creek as navigable from Loomis Road east to Lake Mitchell. It takes an entire day to sort cattle if they get out of your pasture and into the neighbor's pasture, which also costs the landowner time and money.

Mr. Hutmacher asked if Firesteel Creek is the only water source for the cattle.

Mr. Bussmus stated it is the only source, unless everyone puts in and uses wells as a water source.

Mr. Hoyt asked how frequently they have to sort cattle.

Mr. Bussmus stated in past years it was very often, to the point where you could not leave on the weekends because you did not know if you would have to go sort cattle.

Opponent testimony:

Mark Puetz

Mr. Puetz stated he is a landowner on the east side of Mitchell on Firesteel Creek. Recreational users enjoy the stream of Firesteel Creek in the Lake Mitchell area. It is unfortunate any time a neighbor or community member causes harm to anyone or anything. The way the proposed amendment is currently written, it would infringe on recreational uses on all of Firesteel Creek. On the east side of the lake, the creek is different. Recreationists enjoy using the creek for numerous activities.

Mr. Comes asked if recreationists would be okay with the stream being navigable from Loomis Oil Road east.

Mr. Puetz stated he cannot speak for all recreationists, but a majority would be okay with that.

Roger Foote

Mr. Foote stated he is a board member with the South Dakota Canoe and Kayak Association and currently lives in Watertown, South Dakota. The South Dakota Canoe and Kayak Association is a volunteer based organization established in 1981. The mission is promoting paddling education, conservation, and safety through the rivers, lakes, and streams of South Dakota.

Mr. Foote stated kayaking is becoming more popular. Floating water gates that cross the stream perpendicular can be installed. This way there are no gates to open as kayakers pass through the water. The association has been receiving grant money from the American Canoe Association and the LL Bean partnerships. There have been a couple of these gates already installed on Skunk Creek and negotiations are currently taking place with landowners on the Big Sioux River by Watertown. If the design does not work for a landowner's circumstance, the Association works with them to come up with an alternative.

Mr. Hoyt asked if he knows the specific gate requirements put into place by the board and if the gate proposed consistent with current regulations?

Mr. Foote stated yes, the association has worked with GF&P to make sure the gates are in compliance.

Motion to amend the proposed rule to a portion of Firesteel Creek west of Loomis Road in Davison County to remove the gate requirement by Freeman, seconded by Holzbauer. Comes, Holzbauer, Freeman, and Hutmacher voted in favor of the motion. Bjork, Hoyt, and Dixon voted against the motion. Motion carried.

Mr. Bjork stated a lot of times when compromises are made in these types of situations, the recreationists lose. A number of years ago when the statutes were passed the landowners may have lost. It is a situation where it is understood that kayaking is enjoyable, but only so far.

Mr. Freeman stated the majority of the testimony is that the creek has its primary use up to Loomis Road, once past that the creek has dry spots and low spots. Most of the use west of Loomis Road is mainly for fishing. The statute states if available information shows that the public use is not significant, and the public use west of Loomis Road is not significant.

Mr. Bjork stated Firesteel Creek, even beyond Loomis Road, is still navigable. Amending the rule will make the navigability more difficult because there will not be gates.

Mr. Hoyt stated he does not feel he can support the motion. If the requirement for gates is removed west of Loomis Road it will be difficult to use, even in a high water condition.

Mr. Bjork stated in order to make this decision there should be more information and evidence presented to the board.

Ms. Dixon stated she agrees with Mr. Hoyt. Complaints with the landowners are more about misuse of the gates by the public. It seems the gates are not the issue; it is the users of the gates.

Mr. Holzbauer stated gates not being closed, is an unenforceable law. There will not be someone at every crossing making sure that the recreational users close the gates. The use of the creek west of Loomis Road is more landowner based, rather than the recreationist. Two miles from Mitchell Lake is a long distance for a lot of people to kayak. If there is no gate, there would be nothing to leave open.

Mr. Comes stated limiting to Loomis Road is reasonable. As Mr. Freeman stated, if the available information shows the public's use is not significant, then west of Loomis Road should not require gates.

Mr. Hutmacher stated if the gate requirement is taken out, the fear is the users of the creek may cut the wires.

Motion to adopt the amended rule to administrative rules of South Dakota Chapter 74:04:12 by Freeman, seconded by Holzbauer. Comes, Holzbauer, Freeman, and Hutmacher voted in favor of the motion. Bjork, Hoyt, and Dixon voted against the motion. Motion carried.

Mr. Naasz stated there is an appeal process for those who submitted written comments for today's hearing, if they chose to do so. The appeal would need to be filed within 10 days of today's hearing date.

Amendment adopted by the board is shown below.

CHAPTER 74:02:10

FENCES CROSSING NAVIGABLE STREAMS

Section

- 74:02:10:01 Definitions.
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(10) The portion of Firesteel Creek from the Aurora-Davison County line to 405th Avenue in Davison County [SDCL 43-17-38(10)].

Source: 19 SDR 73, effective November 19, 1992; 20 SDR 53, effective October 20, 1993; 21 SDR 68, effective October 13, 1994.

General Authority: SDCL 43-17-39.

Law Implemented: SDCL 43-17-38, 43-17-39.

CONSIDER WITHDRAWAL OF WATER PERMIT APPLICATION NO. 7386-3 BRIAN GATZKE:

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

Mr. Gronlund stated this application has been before the board in the past. The application was filed in July 2012, and requested to appropriate 3.06 cfs from two wells to irrigate 204 acres, approximately two miles northeast of Brookings, South Dakota. At the time of DENR's review, information had not been provided to clearly identify the

aquifer. The chief engineer recommended deferral on the application. In March 2013 the application was deferred by the board until an aquifer pump test could be conducted. In that period of time, Mr. Gatzke has searched for water in that area. In September 2015, Mr. Gatzke stated he was not able to find a sufficient water source and requested that his application be withdrawn.

Mr. Gronlund stated DENR is recommending the board accept the withdrawal of the application and that it does not prevent Mr. Gatzke from applying in the future.

Motion to approve the request for withdrawal by Freeman, seconded by Bjork. Motion carried unanimously.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND FINAL DECISION ON WATER PERMIT APPLICATION NO. 2730-2, UNITED ORDER OF SOUTH DAKOTA:

Mr. Naasz stated the proposed rules on the parties' submissions were prepared.

Mr. Hutmacher stated he will abstain from voting on this matter, as he was absent for that portion of the meeting.

Motion to adopt the proposed rulings on the parties' submissions and authorize the current board chairman to execute the rulings by Freeman, seconded by Hoyt. Bjork, Comes, Hoyt, Dixon, and Freeman voted in favor of the motion. Holzbauer voted against the motion. Hutmacher abstained. Motion carried unanimously.

Motion to adopt Findings of Fact, Conclusions of Law, and Final Decision and authorize the current board chairman to execute the findings by Freeman, seconded by Comes. Bjork, Comes, Hoyt, Dixon, and Freeman voted in favor of the motion. Holzbauer voted against the motion. Hutmacher abstained. Motion carried unanimously.

WATER PERMIT APPLICATION NO. 8152-3, LAKE ANDES:

Mr. Holzbauer recused himself from this matter.

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

Ms. Mines-Bailey stated the parties have reached an agreement that would end the need for a hearing, if the board also agrees. The parties agree that there is unappropriated water available to fulfill this application; there is no unlawful impairment to any existing right; and the proposed use of this application is both beneficial and in the public interest. The Yankton Sioux Tribe had filed a petition to intervene. The Tribe is concerned that the well site was on the Lake Andes lake bed. However, further examination of the map and discussion shows it is not on the lake bed. For that reason the Yankton Sioux Tribe will be withdrawing their objection.

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Ms. Mines-Bailey read the agreement and stipulations to the board that have been agreed upon by all parties.

Ms. Mines-Bailey stated it is being proposed that a copy of the board minutes be included in the permit file and that no separate findings of fact be drafted or submitted.

Ms. Realbird, counsel for the Yankton Sioux Tribe, stated the tribe does agree with the language proposed by Ms. Mines-Bailey.

Pam Hein, counsel for Lake Andes, stated they also agree with the language proposed by Ms. Mines-Bailey.

Mr. Naasz stated it is important to note, the board has in the past entered conclusions of law that are similar to the language in the stipulation.

All parties agreed that Findings of Facts would be waived.

Motion to accept the stipulation of the parties and grant Water Permit Application No. 8152-3 including that the stipulation and statement be included in minutes and the minutes be placed in the permit file by Freeman, seconded by Bjork. Motion carried unanimously.

STIPULATIONS:

The Winters Doctrine provides that the priority date for the determination of whether tribes have surface water rights is the creation of the reservation. *Winters v. United States* 207 US 564 (1908).

There is a split of authority as to whether the Winters Doctrine applies to ground water. In *re General Adjudication of All Rights to Use Water of Gila River System*, 989 P2d 739 (Ariz. 1999); In *re general Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P2d 76 (Wyo. 1988). The Supreme Court of Arizona has held that the Winters Doctrine does apply to ground water while the Supreme Court of Wyoming has declined to so hold.

The United States Supreme Court has had more than one opportunity to hear the issue and apply the Winters Doctrine to ground water rights of Indian tribes but has failed to do so. *U.S. v. Cappaert*, 426 US 128 (1976) (affirming the Ninth Circuit but declining to fully endorse the statement of the Ninth Circuit applying the Winters Doctrine to ground water); *Wyoming v. U.S.*, 492 US 406 (1989).

The Supreme Court of South Dakota has not addressed the issue of whether the Winters Doctrine applies to ground water.

Until a court of competent jurisdiction or settlement agreement determines that the Yankton Sioux Tribe has Winters Doctrine rights that apply to ground water and until such time as those rights are quantified, the Chief Engineer and the Water Management Board are unable to determine the extent to which the Yankton Sioux Tribe has rights to the Dakota aquifer that would be superior rights to this permit.

If a court of competent jurisdiction or settlement agreement determines that the Winter Doctrine applies to groundwater claims of the Yankton Sioux Tribe and if those rights are quantified, the Yankton Sioux Tribe's priority date for its rights most likely would date back to the treaty establishing the Yankton Sioux Tribe's reservation. This Board does not purport to adjudicate the question of whether the Yankton Sioux Reservation's diminished status would affect the quantification of the Winters rights. Such a right, if any, would be senior in priority to the present application.

WATER PERMIT APPLICATION NO. 8165-3, TODD SWENSON:

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

Appearances:

Ray Rylance, appearing on behalf of Orth Brothers and Jon Jones, who petitioners.

Ivan Kupfmann, appearing on his own behalf.

Tim Bottom, appearing on behalf of Todd Swenson.

Ann Mines-Bailey on behalf of the chief engineer and the Water Rights Program.

Ms. Mines-Bailey stated it is DENR's understanding is that Mr. Swenson and the interveners have reached an agreement and have entered into a stipulation that will be a part of the record. All parties do request that the board grant the permit.

Mr. Bottom and Mr. Rylance stated they agree with Ms. Mines-Bailey.

Mr. Rylance stated Mr. Bottom and himself have put together a stipulation on behalf of their clients. The stipulation would be an addition to the recommendations of the Chief Engineer, in the letter dated July 24, 2015. The stipulation will read:

"All production wells for Water Permit No. 8165-3, shall be located a minimum of one-eighth of a mile in any direction from the top of the bank next to Sand Creek."

Ms. Mines-Bailey stated the opposition to the application was based on fears that pumping the aquifer at these well sites would diminish the flow in Sand Creek. Drawdown calculations were taken regarding the proposed well site and it was

determined that the drawdown would not be significant more than 600 feet from the well site. The stipulation is for one-eighth of a mile, which would require the wells to be set back 660 feet from the banks of Sand Creek. This should prevent any potential well interference with the flow of Sand Creek or the water present in Sand Creek.

Mr. Hutmacher asked if Mr. Kupfmann and Mr. Bottom agree to the stipulation stated by Mr. Rylance.

Both parties agree to the stipulation.

All parties also waive Findings of Facts and Conclusions of Law.

Motion to approve Water Permit Application No. 8165-3, subject to the qualifications of the chief engineer and the stipulated qualification that was just placed into the record by Freeman, seconded by Holzbauer. Motion carried unanimously.

QUALIFICATIONS:

1. The wells approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
2. The wells authorized by Permit No. 8165-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.
4. All production wells for Water Permit No. 8165-3, shall be located a minimum of one-eighth of a mile in any direction from the top of the bank next to Sand Creek.

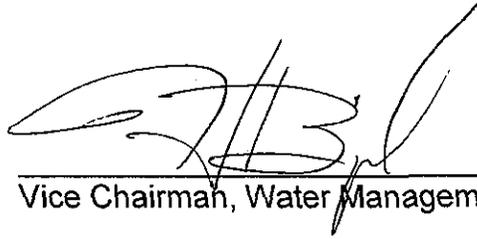
ADJOURN: Chairman Hutmacher declared the meeting adjourned.

A court reporter was present for the meeting and a transcript of the proceedings from December 9, 2015, 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>.

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Approved this 3rd day of March, 2016.

A handwritten signature in black ink, appearing to be 'J. B. [unclear]', written over a horizontal line.

Vice Chairman, Water Management Board