

MINUTES OF THE 246th MEETING
OF THE WATER MANAGEMENT BOARD
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA
OCTOBER 4, 2023

CALL TO ORDER: Vice Chairman Jim Hutmacher called the meeting to order at 9:30 a.m. Central Time. The roll was called, and a quorum was present.

The meeting was streaming live on SD.net, a service of South Dakota Public Broadcasting.

The following attended the meeting:

Board Members: Jim Hutmacher, Rodney Freeman, Tim Bjork, Leo Holzbauer and Chad Comes participated remotely. Bill Larson and Peggy Dixon were absent.

Department of Agriculture and Natural Resources (DANR): Eric Gronlund, Chief Engineer, Ron Duvall, Adam Mathiowetz, Mark Rath, and Rachel Rodriguez, Water Rights Program.

Attorney General's Office: David McVey, Assistant Attorney General, Board counsel; Charles McGuigan, Deputy Attorney General, Water Rights Program counsel.

Legislative Oversight Committee: Representative Mike Weisgram.

Court Reporter: Carla Bachand, Capital Reporting Services, Pierre, SD.

Others: Bob Mercer, Keloland News, Ann Mines Bailey, Unified Judicial System, John Taylor, counsel for Sonstegard Food Company.

ADOPT FINAL AGENDA: Motion by Freeman, seconded by Bjork, to adopt the final agenda. The motion carried unanimously.

CONFLICT DISCLOSURES AND REQUESTS FOR STATE BOARD WAIVERS: None.

ADOPT JULY 12 AND AUGUST 2, 2023, BOARD MEETING MINUTES: Motion by Bjork, seconded by Freeman, to approve the minutes of the July 12 and August 2, 2023, Water Management Board meetings. The motion carried unanimously.

DECEMBER MEETING DATES AND LOCATION: The next meeting is scheduled for December 6 and 7, 2023, in the Matthew Training Center in Pierre.

Vice Chairman Hutmacher noted that he will not be able to attend the December meeting.

PUBLIC COMMENT PERIOD IN ACCORDANCE WITH SDCL 1-25-1: Ann Mines Bailey who was formerly employed as Assistant Attorney General and counsel for the Water Rights

Program, stated that she enjoyed practicing before the Water Management Board. She said water is one of the state's most precious resources and she is grateful that the board members are willing to serve on the Water Management Board. Ms. Mines Bailey said through the years she has appreciated the perspectives and thoughtfulness the board has given when crafting qualifications and conditions and granting permits and denying permits, and she has always appreciated the respect and the patience the board has had with those who have appeared before them. She said it was a pleasure working with the board.

Vice Chairman Hutmacher thanked Ms. Mines Bailey and he wished her good luck in future endeavors. The other board members thanked Ms. Mines Bailey for her time and service.

UPDATE ON DANR ACTIVITIES: Eric Gronlund, Chief Engineer, Water Rights Program, reported that South Dakota is hosting the Association of Western State Engineers October 8-11, 2023, in Custer State Park. That organization is made up of 19 western states that all follow similar prior appropriations water law. The meeting is generally attended by the current and retired chief engineers or state engineers from the various states. There are currently 33 people representing 16 of the western states registered for the meeting.

Mr. Gronlund noted that it was not necessary to issue shut-off orders this irrigation season. Based on flows, streams maintained fairly well. Mr. Gronlund and Mark Rath monitored the USGS gaging stations. The two gaging stations they watched most were the Battle Creek below Hermosa and the Big Sioux River in the Castlewood area. Both of those have bypass qualifications, and it started getting close but shut-off notices were not necessary.

Water permit applications this fall have now started to taper off as the producers are focusing more on the harvest.

Staff are doing lake level surveys, dam inspections, and other field work.

Soon the annual irrigation questionnaire will be mailed to approximately 4,000 irrigation water permit/right holders.

Mr. Gronlund noted that the Water Rights Program is in the process of filling three positions.

In response to a question from Mr. Comes regarding aquifers that are at or near capacity, Mr. Gronlund stated that the observation well readings for this year show that, overall, the aquifers are down a little, but with the moisture received this year, and hopefully next spring, they should rebound.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: Mr. McVey reported that there was nothing to report regarding litigation.

ADMINISTER OATH TO DANR STAFF: The court reporter administered the oath to DANR staff who were present and intended to testify during the meeting.

CANCELLATION CONSIDERATIONS: Prior to the meeting, the board members received a

table listing the proposed cancellations, the notices of cancellation, and the chief engineer's recommendations.

A water right/permit can be cancelled for non-construction, abandonment, or forfeiture due to non-use of water.

Mr. Duvall presented the water rights/permits scheduled for cancellation. The owners were notified of the hearing and the reasons for cancellation. The Water Rights Program received no comments or letters in response to the notices of cancellation.

Division I is all of the area north of the Cheyenne River and Pennington County, Division II is all of the area south of the Cheyenne River including Pennington County, and Division III includes all of the east river area.

The chief engineer recommended cancellation of the following water rights/permits for the reasons listed.

Number	Original Owner	Present Owner(s) and Other Persons Notified	Reason
DIVISION II WATER PERMIT			
PE 2074-2	Prairie Gardens Inc.	same	Abandonment/Forfeiture
DIVISION III WATER PERMITS AND WATER RIGHTS			
RT 762-3	O.L. Bussmus Farms Inc	E Tjomsland	Abandonment/Forfeiture
RT 1263-3	Eugene Flynn	Bridget Flynn	Abandonment/Forfeiture
RT 1391-3	Gosch Brothers	Willis M Sackreiter	Abandonment/Forfeiture
RT 2187-3	Dale, Kenneth, and Dean Gosch	Eddie, Ronald, and Allen Beren	Abandonment/Forfeiture
RT 2681A-3	Karen Herrold	George Herrold	Abandonment/Forfeiture
RT 2892-3	Watertown MHP, LLC	Larry Schmeling	Abandonment/Forfeiture
RT 3154-3	Kenneth B Mouw	Winifred Nabb	Abandonment/Forfeiture
RT 3240-3	Steve & Lori Sapp	Oscar Sapp	Abandonment/Forfeiture
PE 6663-3	Clark County Hwy Dept	Same	Abandonment/Forfeiture
PE 6850-3	Larry Wagner	Same	Abandonment/Forfeiture
RT 7005-3	Dairy Wise	Randall Enterprise LLC	Abandonment/Forfeiture
PE 8358-3	Sonstegard Food Company	Same	Non-construction

Motion by Freeman, seconded by Holzbauer, to cancel the 13 water rights/permits for the reasons listed. A roll call vote was taken, and the motion carried unanimously.

FUTURE USE REVIEWS: A table listing the future use permits up for a seven-year review was included in the packet the board members received prior to the meeting. Certain entities such as water distribution systems, municipalities and rural water systems can reserve water for future needs.

State law requires future use permits to be reviewed by the Water Management Board every seven years, and it requires the permit holder to demonstrate a reasonable need for the future use permit.

Mr. Duvall stated that the Water Rights Program contacted each of the entities inquiring whether the entity wanted to retain the future use permit. The letters from the entities requesting that they be allowed to retain their future use permits, the Chief Engineer's recommendations, and the Affidavits of Publication showing that the hearing was public noticed were included in the board packet. No letters in opposition were received in response to the public notices.

The chief engineer recommended that the board allow the following Future Use Permits to remain in effect for an additional seven years, as listed below.

No.	Name	Amount Remaining in Reserve	Source
4673-3	City of Elk Point	378 AF	Missouri River
5875-3	City of Volga	572 AF	Big Sioux Brookings aquifer
2560-2, 2560A-2, 2560B-2	Fall River Water Users District	358 AF	Madison aquifer

Motion by Holzbauer, seconded by Bjork, that the future use permits shown in the table remain in effect for the amounts listed. A roll call vote was taken, and the motion carried unanimously.

CONSIDER FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION IN THE MATTER OF WATER PERMIT APPLICATION NO. 8744-2, DAKOTA BAY: David McVey reported that the Water Rights Program filed proposed Findings of Fact and Conclusions of Law.

On September 11, 2023, John Hines, counsel for the McCook Lake Recreation Area Association, filed objections and alternative Findings of Fact and Conclusions of Law.

Mr. McVey stated that, in compliance with SDCL 1-26-25, the final Findings of Fact, Conclusions of Law and Final Decision, which were prepared by Mr. McVey, address the objections with specificity.

The final Findings of Fact, Conclusions of Law, and Final Decision reject the assertions made by McCook Lake Recreation Area Association and approve Water Permit Application No. 8744-2 with the following qualifications:

1. The well approved under Water Permit No. 8744-3 is located near domestic wells and other wells which may obtain water from the same aquifer. Water withdrawals shall be controlled so there is not a reduction of needed water supplies in adequate domestic wells

- or in adequate wells having prior water rights.
2. The permit holder shall report to the Chief Engineer annually the amount of water withdrawn from the Missouri: Elk Point aquifer.
 3. Water Permit No. 8744-3 authorizes a total diversion of up to 28.6 acre-feet of water the first year when use begins and then up to 7.99 acre-feet annually from the Missouri: Elk Point aquifer.

Motion by Bjork, seconded by Freeman, to adopt the final Findings of Fact, Conclusions of Law, and Final Decision in the matter of Water Permit Application No. 8744-2, Dakota Bay. A roll call vote was taken, and the motion carried with Bjork, Freeman Holzbauer, and Hutmacher voting aye. Comes abstained.

CONSIDER FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION IN THE MATTER OF MCCOOK LAKE RECREATION AREA ASSOCIATION'S PETITION FOR DECLARATORY RULING: David McVey reported that the Water Rights Program filed proposed Findings of Fact and Conclusions of Law.

On September 11, 2023, John Hines, counsel for the McCook Lake Recreation Area Association, filed objections to the Findings of Fact and Conclusions of Law.

In compliance with SDCL 1-26-25, the final Findings of Fact, Conclusions of Law, and Final Decision, which were prepared by Mr. McVey, address the objections with specificity.

The final Findings of Fact, Conclusions of Law, and Final Decision rejects the assertions made by McCook Lake Recreation Area Association regarding Findings of Fact paragraph 1, notes but not adopts the assertions regarding paragraphs 19 and 25; notes but not adopts the assertions regarding Conclusions of Law paragraphs 2 and 3; and the final Findings of Fact, Conclusions of Law, and Final Decision denies the requested relief and declares that Mr. Chicoine's/Dakota Bay's canal is not an appropriation of McCook Lake water and does not require a standard or traditional permit from the board.

Motion by Freeman, seconded by Holzbauer, to adopt the final Findings of Fact, Conclusions of Law, and Final Decision in the matter of McCook Lake Recreation Area Association's petition for declaratory ruling regarding appropriative permits and shoreline alterations. A roll call vote was taken, and the motion carried with Bjork, Freeman, Holzbauer, and Hutmacher voting aye. Comes abstained.

NEW WATER PERMIT APPLICATIONS: The pertinent qualifications attached to approved water permit applications throughout the hearings are listed below:

Well Interference Qualification

The well(s) approved under this permit will be located near domestic wells and other wells which may obtain water from the same aquifer. Water withdrawals shall be controlled so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.

Well Construction Rule Qualification

The wells authorized by Permit No. _____ 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.

Irrigation Water Use Questionnaire Qualification

This permit is approved subject to the irrigation water use questionnaire being submitted each year.

Low Flow Qualification

Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.

CONSIDER WATER PERMIT APPLICATION NOS. 8221B-3 AND 8278A-3, SONSTEGARD FOOD COMPANY: Eric Gronlund reported that Sonstegard Food Company filed applications to extend the length of time allowed for construction of works and the placement of water to beneficial use for Water Permit No. 8221B-3 and Water Permit No. 8278A-3.

SDCL 46-5-26 allows for a permit to be amended by extending the time for completion of construction or for application to beneficial use for a reasonable time, but only on account of delays due to physical or engineering difficulties which could not have been reasonable anticipated, due to operation of law beyond the power of the application to avoid, or due to other exigent circumstances identified by the Water Management Board.

Mr. Gronlund noted that the packet the board received prior to the meeting included a letter from John Taylor, the applicant's counsel, transmitting the two applications as well as explaining the reasons that construction of works was not able to be completed on time, the Chief Engineer's recommendation, and the staff report.

The two applications were reviewed, and the reports were authored by Gaibrielle Lewis who was an intern with the Water Rights Program during the summer.

Water Permit Application No. 8221A-3 appropriated 222.2 acre-feet of water at a maximum diversion rate of 1.11 cfs (500 gpm) from the Vermillion West Fork Aquifer from up to eight wells completed into the aquifer north of Parker, South Dakota in Turner County. The water is for use in an avian production facility.

The date to complete construction of works is September 23, 2024.

Water Permit Application No. 8278-3 also appropriated 222.2 acre-feet of water at a maximum diversion rate of 1.11 cfs from up to two wells in the Montrose Management Unit of the Vermillion East Fork Aquifer two miles northeast of Parker, South Dakota in Turner County. The water is for use in an avian production facility.

The date to complete construction of works was July 12, 2023. Mr. Gronlund asked the board to take note that the extension request was filed on July 5, 2023.

Mr. Gronlund stated that this production facility only needed 222.2 acre-feet of water so there is a qualification that the combined withdrawal from these sources could not exceed 222.2 acre-feet of water.

Sonstegard also has Water Permit No. 8358-3 from a different source for this facility, but they requested cancellation. The board approved cancellation of this water permit earlier in the meeting.

Sonstegard requested a five-year extension of time from the date of the letter requesting the extension, which was June 30, 2023. The Water Rights Program received the application on July 5, 2023. The reasons for the time extension request include litigation surrounding Turner County Planning and Zoning, a federal lawsuit involving the State of California regarding selling products from animals confined in a certain manner that was litigated through the 9th Circuit Court of Appeals and the U.S. Supreme Court, the Covid-19 pandemic, and the bird flu outbreak.

Mr. Gronlund stated that in the case of Water Permit No. 8221B-3, since that permit was approved, there have been no other applications filed for that aquifer.

In the case of Water Permit No. 8278A-3, since that permit was approved, one permit has been issued from the Montrose Management Unit of the aquifer, but it is located 33 miles north of this location. Therefore, the Water Rights Program does not see unlawful impairment of existing rights being an issue.

The applications were public noticed as set forth in state law, and no petition or comments were received.

The Chief Engineer recommended approval of both applications if the Water Management Board finds that the criteria in SDCL 46-5-26 have been met. The qualifications will remain the same, except for the qualification referencing Permit No. 8358-3 which has been cancelled.

John Taylor, counsel for Sonstegard Food Company, stated that he was available for questions from the board. He requested board approval of the time extension requests.

There were no questions from the board. Vice Chairman Hutmacher requested board action.

Motion by Freeman, seconded by Bjork, to approve the Application Nos. 8221B-3 and 8278A-3, subject to the qualifications set forth by the Chief Engineer. A roll call vote was taken, and the motion carried unanimously.

CONSIDER FUTURE USE WATER PERMIT APPLICATION NO. 8778-3, WEB WATER DEVELOPMENT ASSOCIATION, INC.: Mark Rath reported that Future Use Water Permit Application No. 8778-3 proposes to appropriate and reserve for future use 10,000 acre-feet of water annually from the Missouri River near Mobridge, South Dakota.

WEB Water Development Association Inc. (WEB) serves users in 14 counties along the northern portion of eastern South Dakota and three counties in North Dakota.

Currently there are 19 future use permits reserving 355,201 acre-feet annually from the Missouri River. There is one future use permit for approximately 1.1 million acre-feet held by the U.S. Bureau of Reclamation for the suspended Oahe Irrigation Project that is not included in this tally. WEB currently holds Future Use Permit Nos. 2671-3, 3429-3 and 8552-3 from the Missouri River. Fifteen thousand acre-feet has been developed under these permits, and there remains 25,000 acre-feet reserved for future use. WEB provided supporting information identifying the need for the reservation as part of this application.

WEB has proposed \$82,000,000 for a Moratorium Improvements project and a proposed water treatment plant expansion project. WEB intends to install a 49.5-inch diameter raw water line and new treated water main line. The upsized main line would have the capacity to transport 53.3 million gallons of water per day, which equates to 60,000 acre-feet annually.

In response to a question from Mr. Bjork, Mr. Gronlund stated that the statute requires that any amount in excess of 10,000 acre-feet requires legislative approval, and since this application requests 10,000 acre-feet it does not require legislative approval.

In response to a question from Mr. Holzbauer regarding North Dakota, Mr. Gronlund stated that the actual future use permit is for WEB Rural Water System. The primary focus is serving people in South Dakota, but they do have connections in North Dakota. There is a specific statute in state law that allows for water to be appropriated and used out-of-state. He noted that there are a number of rural water systems serve connections outside of South Dakota. Likewise, there are some rural water systems out-of-state that serves users in South Dakota.

Mr. Bjork asked if the state has an overall plan for the use of water from the Missouri River. Mr. Gronlund answered that the DANR Division of Financial and Technical Assistance and the Board of Water and Natural Resources maintain a State Water Plan. Water projects must be included in the State Water Plan in order to receive state funding. He stated that from a water allocation aspect, when someone files an application, the Water Rights Program and the Water Management Board look at the four criteria in state law. The Missouri River is a tremendous resource which is not near being fully appropriated.

Motion by Bjork, seconded by Comes, to approve Future Use Water Permit Application No. 8778-3, WEB Water Development Association, Inc. subject to the qualifications set forth by the Chief Engineer. A roll call vote was taken, and the motion carried unanimously.

ADJOURN: Motion by Bjork, seconded by Holzbauer, to adjourn. The motion carried unanimously.

A court reporter was present, and a transcript of the proceedings may be obtained by contacting Carla Bachand, Capital Reporting Services, PO Box 903, Pierre SD 57501, telephone number (605) 222-4235, or email pcbachand@pie.midco.net.

Water Management Board
October 4, 2023, Meeting Minutes

An audio recording of the meeting is available on the South Dakota Boards and Commissions Portal at <https://boardsandcommissions.sd.gov/Meetings.aspx?BoardID=106>.

Approved December 6, 2023.

Water Management Board

DRAFT

WATER MANAGEMENT BOARD MEETING

October 4, 2023

Qualifications:
wi - well interference
wc -wl construction rules
iq - irrigation questionnaire
lf - low flow

Unopposed New Water Permit Applications Issued Based on the Chief Engineer Recommendations

No.	Name	Address	County	Amount	Use	Source	Qualifications
2031-1	City of Belle Fourche	Belle Fourche	BU	2.22 cfs	960 AF	1 well – Madison	wi,wc, 3 special
2032-1	Elk Creek Developers, LLC.	Rapid City	MD	0.167 cfs	30 AF	1 well – Inyan Kara	wi, 2 special
2870-2	Town of Keystone	Keystone	PE	0.078 cfs	18.48 AF	1 well – Crystalline Rock	wi, 2 special
2871-2	Kim & Deb Marcus	Crookston NE	TD	1.78 cfs	135 acres	2 wells – Ogallala	wi, wc, iq
8742-3	Larry Schmidt	Parker	TU	1.78 cfs	160 acres	1 well – Parker Centerville	wi, wc, iq, 1 special
8746-3	Mark D. Nelson	Vermillion	CL	1.78 cfs	115.89 acres	1 well – Lower Vermillion Miss	wi, wc, iq, 1 special
8747-3	Mark D. Nelson	Vermillion	CL	1.78 cfs	108.32 acres	1 well – Lower Vermillion Miss	wi, wc, iq, 1 special
8753-3	Dale G. Williams	Estelline	HM	0.67 cfs	20 acres	1 well – Big Sioux Brookings	wi, wc, iq, 1 special
8755-3	C.H. Rau	Selby	WL	4.45 cfs	246 acres	3 wells – Selby	wi, wc, iq, 1 special
8757-3	Chad Heckathorn	Elk Point	UN	0.56 cfs	42 acres	1 well – Missouri Elk Point	wi, iq
8758-3	Marvin Post	Volga	BG	1.34 cfs	247 acres	2 wells – Big Sioux Brookings/Howard	wi, iq
8759-3	Ernest Namminga	Springfield	BH	1.78 cfs	160 acres	1 well – Choteau West	wi, wc, iq
8760-3	Bottolfson Brothers	Vermillion	CL	2.22 cfs	172 acres	1 well – Lower Vermillion Miss	wi, wc, iq
8761-3	Shad Bratberg	Gayville	YA	1.78 cfs	175 acres	1 well – Missouri Elk Point	wi, wc, iq
8762-3	James D. Gunderson	Mission Hill	YA	1.78 cfs	120 acres	1 well – Lower James Miss	wi, wc, iq, 1 special
8764-3	Jonathon Geraets	Dell Rapids	MY	1.78 cfs	140 acres	1 well – Howard	wi, iq
8765-3	Barry Van Osdel	Mission Hill	YA	1.78 cfs	84 acres	1 well – Lower James Miss	wi, wc, iq, 1 special
8766-3	Kenny Chicoine	Jefferson	UN	1.78 cfs	85 acres	1 well – Missouri Elk Point	wi, iq, 1 special
8767-3	Knife River	Sioux Falls	UN	1,200 AF	Industrial	1 open pit – Big Sioux South	wi, 2 special
8769-3	Gordon Beermann	Elk Point	UN	1.78 cfs	120 acres	1 well – Missouri Elk Point	wi, iq, 1 special
8770-3	Sioux River Dairy, Inc.	Watertown	CD	0.278 cfs	56 AF	4 wells – Big Sioux: North	wi, 4 special
8771-3	County Line Dairy, LLC.	Watertown	HM	1.55 cfs	230 AF	3 wells – Big Sioux: North	wi, wc, 4 special
8772-3	Poinsett Hutterian Brethren	Estelline	HM	1.78 cfs	8.5 acres	1 well – Big Sioux Brookings	wi, wc
8775-3	Derrick Skogsberg	Benbrook TX	UN	1.78 cfs	160 acres	1 well – Lower Vermillion Miss	wi, wc, iq
8776-3	Bon Homme Hutterian Brethren	Tabor	BH	4 .0 cfs	280 acres	Missouri River	iq
8779-3	Josh Schmidt	Sioux Falls	CM	1.78 cfs	120 acres	Missouri River	iq, 2 special
8780-3	Dan or Ann Hacecky	Mission Hill	YA	1.78 cfs	100 acres	1 well – Lower James Miss	wi, wc, iq, 1 special