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Minutes of the  
Board of Minerals and Environment  
Matthew Environmental Education and Training Center  
523 East Capitol Avenue  
Pierre, South Dakota

May 17, 2018  
10:00 a.m. CT

CALL TO ORDER: The meeting was called to order by Chairman Rex Hagg. The roll was called, and Chairman Hagg declared that a quorum was present.

Chairman Hagg announced that this meeting was streaming live on SD.net, a service of South Dakota Public Broadcasting.

BOARD MEMBERS PRESENT: Rex Hagg, Gregg Greenfield, Doyle Karpen, Glenn Blumhardt, Dennis Landguth, Daryl Englund, Bob Morris, and John Scheetz.

BOARD MEMBER ABSENT: Pete Bullene.

OTHERS PRESENT: See attached attendance sheet.

APPROVAL OF MINUTES FROM APRIL 19, 2018 MEETING: Motion by Blumhardt, seconded by Karpen, to approve the minutes from the April 19, 2018, Board of Minerals and Environment meeting. A roll call vote was taken, and the motion carried unanimously.

### MINING ISSUES

Consent Calendar: Prior to the meeting, the board received a table listing the department recommendations for release of surety, transfers of liability and releases of surety, transfers of liability, and release of liability (see attachment).

Motion by Greenfield, seconded by Landguth, to accept the department recommendations for release of surety, transfers of liability and releases of surety, transfers of liability, and release of liability as listed on the consent calendar. A roll call vote was taken, and the motion carried unanimously.

FINANCIAL ASSURANCE INCREASE FOR WHARF RESOURCES (USA), INC.: Eric Holm, Minerals and Mining Program, presented an adjustment to the financial assurance amount for Wharf Resources. This financial assurance, also known as the cyanide spill bond, is required under SDCL 45-6B-20.1 and covers costs to the state for responding to and remediating accidental releases of cyanide and other leaching agents at the Wharf site. This financial assurance is in addition to Wharf Resources' \$37.4 million reclamation bond and \$26.8 million post closure bond.

The department adjusted the financial assurance for inflation and calculated a revised amount of \$669,200, which is an increase of \$19,500 from the 2017 update.

To cover the increase, Wharf has submitted a rider to the surety bond that currently serves as financial assurance. The rider increases the amount of the surety bond to \$669,200.

The department recommends the board accept the rider to Bond No. SU27832, Aspen American Insurance Company, increasing the financial assurance bond to \$669,200.

Motion by Morris, seconded by Englund, to accept the rider to Bond No. SU27832, Aspen American Insurance Company, increasing the financial assurance bond to \$669,200, for Wharf Resources (USA), Inc., Lead, SD, Permits 356, 464, and 476. A roll call vote was taken, and the motion carried unanimously.

TRANSFER OF LARGE SCALE MINE PERMIT 467 FROM PACER CORPORATION TO PACER MINERALS, LLC: Mr. Holm reported that Pacer Minerals, LLC has requested transfer of Large Scale Mine Permit No. 467 from Pacer Corporation. The reason for the transfer is that in November 2017, Pacer notified the Minerals and Mining Program it wanted to convert from a corporation to a limited liability company. The general location of the operation is six miles northwest of Custer, SD.

Under SDCL 45-6B-47, any mine permit can be transferred from one operator to another, with the successor operator assuming all reclamation liability.

On March 29, 2018, the department received an amendment to Bank of America Irrevocable Letter of Credit No. 68127108, which changed the name on the Irrevocable Letter of Credit from Pacer Corporation to Pacer Minerals LLC. The department received the \$100 transfer fee and transfer application on April 9, 2018. The application was deemed complete on April 30, 2018.

The department's recommendation to transfer the permit was prepared on April 30, 2018. The notice was published in the Custer County Chronicle on May 9 and 16, 2018. The department had not yet received the Affidavit of Publication; however, staff verified that the notice was published on those two dates. No public comments regarding the transfer were received.

Under SDCL 45-6B-47, the board cannot deny a mine permit transfer unless the operation is not or cannot be brought into compliance with all applicable federal, state, or local laws or the successor operator is in violation of state mining laws or mine permit conditions for any mining operation in the state. The current mine permit and Pacer Minerals, LLC are in compliance with all federal, state, and local laws and regulations. With the application, Pacer Minerals, LLC submitted a Certification of Applicant form and disclosed no violations. The company is working on the name change for other state permits as well as the US Forest Service operating plan.

The department recommended that the board transfer Large Scale Mine Permit 467 from Pacer Corporation to Pacer Minerals, LLC, and transfer Irrevocable Letter of Credit No. 68127108 to Pacer Minerals, LLC and accept Amendment No. 1 changing the name on Irrevocable Letter of Credit No. 68127108 to Pacer Minerals, LLC.

Responding to questions from the board, Mr. Holm stated that \$348,000 is the original amount of the reclamation bond. The US Forest Service also holds a bond for this site. The two bonds for

this site total approximately \$1,000,000. The bonds cover reclamation of about 16 acres of surface disturbance with close to five acres currently being reclaimed. Pacer Corporation registered to conduct business in South Dakota in 1970. Pacer Minerals, LLC registered on January 11, 2017. Mr. Holm stated that the officers of both companies are the same and that the company is up to date on all of its required annual reports.

Motion by Morris, seconded by Blumhardt, to transfer Large Scale Mine Permit 467 from Pacer Corporation to Pacer Minerals, LLC, and transfer Irrevocable Letter of Credit No. 68127108 to Pacer Minerals, LLC and accept Amendment No. 1 changing the name on Irrevocable Letter of Credit No. 68127108 to Pacer Minerals, LLC. A roll call vote was taken, and the motion carried unanimously.

UPDATE ON NOTICE OF VIOLATION FOR EXPLORATION NOTICE OF INTENT, EXNI-419, VMC, LLC: Roberta Hudson, Minerals and Mining Program, provided a PowerPoint presentation updating the board on the Notice of Violation for EXNI-419.

Exploration Notice of Intent EXNI-419 was issued to VMC, LLC on December 5, 2012. No exploration activity occurred under the permit from 2012 through 2016. Drilling and trenching activities were performed during the spring and fall of 2017.

When VMC, LLC applied for the Exploration Notice of Intent, the operator defined a vertical depth limit of 100 feet. When the department issued the restriction letter to the company, two conditions were included at the request of Game, Fish, and Parks. The conditions were that VMC was to provide the locations of historic mine workings and to not work within 100 feet of a historic mine shaft in the area of the exploration for the protection of potential bat habitat.

During an on-site inspection on September 21, 2017, the department's inspector was informed that the company planned to drill to a depth of 800 feet. The contract geologist was informed of the 100-foot limitation. The senior geologist contacted Ms. Hudson to confirm the depth limits. That individual then contacted Don Valentine, who contacted Mike Cepak at DENR on September 22, 2017, to confirm that they would not be able to drill deeper holes. During an inspection of the drilling area on September 27, 2017, department inspectors were informed that an 800-foot drill hole had just been completed.

The department confirmed that Game, Fish, and Parks had not been provided any information regarding the historic mine workings, and also nine holes were determined to exceed the 100-foot depth limit.

Ms. Hudson concluded that the department determined there had been a miscommunication between the driller and the operator, and that there was no environmental damage from the drilling activities as the holes were plugged immediately.

The Notice of Violation was issued on December 5, 2017, with VMC, LLC signing a Settlement Agreement and paying an \$11,000 fine in March 2018. As part of the Settlement Agreement, VMC, LLC is required to complete reclamation by June 1, 2018. An inspection of the site is scheduled for the last week of May. If reclamation has been completed, EXNI-419 will be

considered to have been brought back into compliance with state laws, and VMC, LLC may continue exploration activities.

Ms. Hudson answered questions from the board.

ORAL MINING REPORTS: The annual large-scale gold mine oral reports were presented to the board by LAC Minerals (Richmond Hill Mine), Homestake, Wharf Resources, VMC, LLC (Deadwood Standard Project), and by DENR for the Gilt Edge Superfund Site. The mine operators reported on water treatment, production, and reclamation activities during 2017 and discussed plans for 2018. The annual oral mining presentations are required by statute.

LAC Minerals – Mark Tieszen

During 2017, LAC continued water treatment, discharging 18.2 million gallons. LAC plans to continue water treatment in 2018.

Homestake Mining Company – Mark Tieszen

In 2017, Homestake continued water treatment at its Blacktail Plant in Central City and made upgrades to its Yates Plant near Pluma. In January 2018, the Board of Minerals and Environment approved the release of reclamation liability for 41.77 acres at Homestake.

Mr. Tieszen answered questions from the board regarding water treatment and reclamation.

Wharf Resources – Matt Zietlow

During 2017, Wharf produced 95,372 ounces of gold and 63,535 ounces of silver. Wharf continued mining in the Green Mountain Pit and completed mining in the Harmony (Golden Reward) Pit. In 2018, Wharf plans to continue mining the Green Mountain Pit and backfilling and reclaiming pits at Golden Reward at the base of Terry Peak.

Mr. Zeitlow answered questions from the board regarding current mining activities and reclamation.

VMC, LLC – Don Valentine (via telephone conference call)

VMC, LLC (Deadwood Standard Project) reported there was no mining activity on its proposed operation on the rim of Spearfish Canyon and none planned for 2018.

Gilt Edge Superfund Site – Mike Cepak

In 2017, DENR staff reported 34.6 million gallons of acid water was treated at the site. Remediation work at Gilt Edge included the construction of a new 23 million-gallon capacity sludge impoundment, road building, laying of approximately six miles of pipeline, and the dewatering, sludge removal, and partial backfilling of the Sunday Pit. DENR also completed its foreclosure of Brohm Mining Corporation (Gilt Edge Mine) property and acquired 644 acres of land in a Sheriff sale.

Mr. Cepak answered questions from the board about water treatment, reclamation, the foreclosure procedure, mineral rights, surface rights, and possible future mining at the site.

DENR OIL AND GAS UPDATE: Brian Walsh, DENR Groundwater Quality Program, reported that Mike Lees is now the Minerals and Mining Program administrator. Former administrator Bob Townsend retired in April.

Mr. Walsh stated that due to recent staffing changes, the Underground Injection Control (UIC) Class II Well responsibilities are being transferred from the Groundwater Quality Program to the Minerals and Mining Program. Mr. Walsh will be completing the UIC activities he is responsible for, and once those few projects are complete, staff from the Minerals and Program will take over those duties in the future.

Mr. Walsh reported that a contested case hearing in the matter of the application of Peter K. Roosevelt for a permit to inject production water into an existing well is anticipated to be scheduled for the board's October 18, 2018, meeting. Following the department's Notice of Recommendation for a permit to inject, several people intervened with concerns about impacts to groundwater quality. The intervenors include the Eckard Water Company, the Quinto Ranch, LLC, the Fall River County Commission, and Susan Henderson.

Responding to questions from the board, Mr. Walsh stated that all of the injection wells associated with oil and gas are Class II injection wells. The Safe Drinking Water Act regulates the underground injection of fluids through wells through several classes. For example, Class II wells are specific to oil and gas activities. A Class III well is specific to mining activities for insitu mines. These programs can be delegated to states for primary enforcement authority, and DENR has been delegated the Class II Underground Injection Control Program.

CERCLA 108(b) FINANCIAL ASSURANCE RULES BRIEFING: Mr. Holm provided a PowerPoint presentation discussing the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), also known as Superfund. Section 108(b) of CERCLA directs EPA to develop financial assurance rules for certain facilities. In 2009, U.S. District Court ordered EPA to identify classes of industries for which it would develop financial assurance rules. Hard rock mining industry was the first one selected.

Environmental groups were not happy with EPA's progress, so they went back to the District Court, and the District Court issued a Writ of Mandamus in which they required EPA to issue proposed rules. The court did allow EPA to retain discretion to decline to promulgate a rule.

EPA began work on developing the proposed rules. Since the rules could potentially preempt existing state programs, EPA was required to do a federalism consultation. EPA consulted with the DENR Minerals and Mining Program other states, the Interstate Mining Compact Commission, and the Western Governors Association. EPA indicated their intent was not to preempt existing state regulatory programs, CERCLA liabilities were separate from state reclamation requirements, and the rules would create financial incentives for improved mining practices.

During the process, EPA invited states to submit pre-publication comments. DENR commented that South Dakota's post closure and cyanide spill bonding programs would be preempted and duplicated and that EPA had a faulty assumption that state programs do not address hazardous releases. For post closure and spill bonds, DENR does address long-term water treatment and hazardous releases such as cyanide spills. The department also pointed out risk reduction practices already in place. There are several operating water treatment plants constructed by mining companies, and the bonding practices have been changed over the years to cover long-term water treatment and treating hazardous materials.

DENR was asked to provide information to the Small Business Advocacy Review Panel, which was assembled pursuant to requirements of the Small Business Regulatory Enforcement Fairness Act to assess impacts to small business. DENR generated charts and information on what is covered with the bonds. Before the proposed rules were published, the department also presented its concerns to the Office of Information and Regulatory Affairs, which is part of the White House Office of Management and Budget. They do regulatory analysis of any proposed or final rules.

Mr. Holm provided a chart showing the growth of South Dakota financial assurance amounts for mining operations from 2005 to 2018. In 2005, the department was holding \$44.2 million in bonds, and in 2018, the department is holding \$162.5 million in bonds.

EPA issued proposed rules on December 1, 2016, with an original comment deadline of March 13, 2017. The rules were 125 pages long with an additional 2,000 support documents consisting over 69,000 pages. South Dakota, as well as other states, requested additional time to review all of the information, so EPA extended the deadline to July 11, 2017.

Mr. Holm provided slides discussing the new rules.

South Dakota's response to the proposed rules was that EPA should adopt a "no rule" option. The rules duplicate and pre-empt South Dakota's existing financial assurance programs. South Dakota has also taken steps to significantly reduce CERCLA risks. The department pointed out faulty assumptions used in EPA's one size fits all formula and corrected errors in South Dakota's Financial Responsibility Summary produced by EPA.

Mr. Holm stated that prior to the final rules being issued, the department was able to meet with EPA officials and President Trump's transition team and the Office of Information and Regulatory Affairs to discuss South Dakota's comments regarding the proposed rules.

EPA made its final decision on December 1, 2017, and determined that financial assurance rules for the mining industry are not necessary. EPA felt that the rules, as proposed, would duplicate and preempt the state financial assurance programs. EPA found that certain risks have been reduced from existing robust state and federal financial assurance programs. EPA also noted the protective practices of modern mining operations; steps are taken to reduce releases, treating water, etc. EPA also noted that concerns from financial markets and the mining industry, not only the availability but the affordability of additional financial assurance instruments.

EPA's final decision was published in the Federal Register in February 2018. Parties are allowed to file challenges to EPA's decision in US Circuit Court 90 days after publication of EPA's decision in the Federal Register. The deadline is May 22, 2018. Mr. Holm stated that on May 16, 2018, Earthjustice filed an appeal on behalf of the environmental groups that filed the original lawsuits.

Mr. Holm said that going forward, it is important that DENR recommends and the Board accepts realistic financial assurance amounts that will pay the costs for reclamation, cleanups, and long-term water treatment so future CERCLA listings are avoided.

Mr. Holm answered questions from the board regarding CERCLA.

DRAFT VOLKSWAGEN BENEFICIARY PLAN: Barb Regynski, DENR Air Quality Program, provided a brief overview of the Volkswagen Settlement and the resulting South Dakota Mitigation Trust.

In 2016, EPA and California filed a lawsuit against Volkswagen for installing a system that allowed nitrogen oxide pollution, also referred to as NOx, to exceed levels allowed by the Clean Air Act.

Volkswagen agreed to a settlement consisting of three major parts:

- Volkswagen must buy back or repair non-compliant vehicles.
- Volkswagen must invest in zero emission vehicle infrastructure and awareness. An example of this would be electric cars.
- Volkswagen must fund an Environmental Mitigation Trust to be used to offset the excess pollution emitted by the non-compliant vehicles.

Under the Trust, South Dakota was allocated approximately \$8 million dollars to use for NOx reduction projects. The agreement requires South Dakota to develop and submit a Mitigation Plan to the Trustee at least 30 days before any funds may be dispersed.

One of the requirements is to explain the process by which the state will seek and consider public input on the plan. The proposed public input process is as follows:

- DENR develops a website to provide information and to request public input. This was completed in September 2017.
- DENR drafts the plan. This was completed in early May 2018.
- DENR requests public input on the draft plan. Public comments are being accepted through June 15, 2018.
- DENR holds public input meetings in Rapid City and Sioux Falls. The meetings are scheduled for early June 2018.
- DENR considers the comments received and makes needed revisions to the plan.
- DENR publishes notice of another comment period and a hearing on the revised plan in front of the board.
- The board considers new comments received and finalizes and approves the plan.
- The approved plan will be submitted to the trustee.

Ms. Regynski noted that this information, the draft plan, and the comments received are available on the following website: <http://denr.sd.gov/des/aq/aaVW.aspx>.

Ms. Regynski requested that the board set a hearing date of August 16, 2018, to finalize and approve the plan.

Motion by Morris, seconded by Greenfield, to hold the public hearing on August 16, 2018, at 10:15 a.m. Central Time in Matthew Training Center in Pierre, SD, to finalize and approve the Volkswagen Beneficiary Mitigation Plan. A roll call vote was taken, and the motion carried unanimously.

DISCUSSION ON HB 1172, AN ACT TO REVISE CERTAIN PROVISIONS REGARDING MEETINGS OF CERTAIN PUBLIC BODIES: The 2018 Legislature passed HB 1172, which amends SDCL 1-25-1 by adding the following paragraph:

The chair of the public body shall reserve at every official meeting by the public body a period for public comment, limited at the chair's discretion, but not so limited as to provide for no public comment.

Mr. McGuigan requested guidance from the board as to where on the meeting agenda to place the public comment period.

Chairman Hagg suggested holding the public comment at the end of the meeting, because getting the board's official business done is the first priority.

Doyle Karpen suggested holding the public comment period for 10 minutes prior to calling the meeting to order.

Gregg Greenfield suggested that holding the public comment period at the beginning of the meeting may potentially preempt the issues on the meeting agenda. Mr. Greenfield said he would prefer to hold the comment period at the end of the meeting.

Bob Morris asked if the Legislature is aware that the Board of Minerals and Environment is a quasi-judicial board.

Mr. McGuigan stated that the Board of Minerals and Environment has traditionally allowed for public comments prior to officially opening a contested case hearing, so he does not see that as being an issue. The main thing the board and the commenters will need to be cautious of is ex parte communication regarding current contested cases or potential contested cases. This is something the board chair will need to be aware of, and the chair will need to ensure that evidentiary-type information is not being presented through this open public comment period. The board needs to be careful to preserve its record for all contested cases.

Dennis Landguth stated that he would prefer to hold the public comment period for 10 minutes at the end of each meeting.



John Scheetz stated that he likes the idea of being flexible and not set a specific time for public comment.

Mr. McGuigan said he would not advise that the board hold the public comment period at the beginning of one meeting, then at the end of the next meeting. The board should hold the public comment period at same time each meeting.

Chairman Hagg said the board would take this matter under advisement, and he will make a decision regarding where to place the public comment period on the agenda by the July meeting.

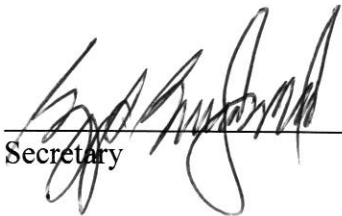
Mr. Karpen reiterated that he would like to have the public comment period for 10 minutes prior to calling the meeting to order.

Mr. Morris noted that the statute states that a public comment period shall be reserved at every official meeting. He said an official meeting only convenes upon the taps of the gavel.

NEXT MEETING: The next meeting is scheduled for July 19, 2018. Depending on agenda items for July, the meeting may be held via telephone conference call.

Chairman Hagg noted that he is unable to attend the July meeting.

ADJOURN: Motion by Greenfield, seconded by Morris, that the meeting be adjourned. Motion carried unanimously.

  
Secretary \_\_\_\_\_ Date 5/16/18

  
Witness \_\_\_\_\_ Date



***South Dakota Board of Minerals & Environment  
Consent Calendar***

***May 17, 2018***

<u>License Holder</u>	<u>License No.</u>	<u>Site No.</u>	<u>Surety Amount</u>	<u>Surety No.</u>	<u>Surety Company or Bank</u>	<u>DENR Recommendation</u>
<b><u>Release of Surety:</u></b>						
Victor Martinmaas Orient, SD	05-362		\$1,000	500556	American Bank & Trust, Miller	Release \$1,000.
<b><u>Transfer of Liability and Release of Surety:</u></b>						
Duane Emmett Brookings, SD	02-741		\$1,000 \$3,000 \$2,500 \$1,000	56302 9536 9682 9822	First National Bank, Pierre Richland State Bank, Bruce Richland State Bank, Bruce Richland State Bank, Bruce	Transfer liability. Release \$7,500.
		<b>741001</b>	SW1/4 Section 8; T111N-R47W, Brookings County			
Transfer to:						
Sterzinger Crushing Inc. Taunton, MN	15-997		\$4,500 \$7,000	13984 14044	First Security Bank, Hendricks, MN	
<b><u>Transfer of Liability:</u></b>						
James T. Goetz Estate Yankton, SD	83-187		\$20,000	2116504726	First National Bank, Yankton	Transfer liability.
		<b>187001</b>	SE1/4 & SE1/4 SW1/4 Section 36; T98N-R63W, Douglas County			
Transfer to:						
Grosz Sand & Gravel LLC Delmont, SD	18-1032		\$20,000	RC-0029	Sun Surety Insurance Company	

***South Dakota Board of Minerals & Environment  
Consent Calendar***

***May 17, 2018***

<u>License Holder</u>	<u>License No.</u>	<u>Site No.</u>	<u>Surety Amount</u>	<u>Surety No.</u>	<u>Surety Company or Bank</u>	<u>DENR Recommendation</u>
<b><u>Release of Liability:</u></b>						
Leola Township South Shore, SD	86-330		EXEMPT	NA	NA	Release liability.
		<b>330001</b>	SE1/4 NW1/4 Section 1; T119N-R51W, Codington County			

## *South Dakota Board of Minerals & Environment*

*May 17, 2018*

<u>Permit Holder</u>	<u>Permit No.</u>	<u>Surety Amount</u>	<u>Surety No.</u>	<u>Surety Company or Bank</u>	<u>DENR Recommendation</u>
<b><u>Acceptance of Financial Assurance Increase for Wharf Resources (USA), Inc.:</u></b>					
Wharf Resources (USA), Inc. Lead, SD	356, 464, & 476	\$649,700	SU27832	Aspen American Insurance Company	Accept rider to Bond No. SU27832, Aspen American Insurance Company, increasing bond by \$19,500 to the new amount of \$669,200.
<b><u>Transfer of Large Scale Mine Permit 467:</u></b>					
Pacer Corporation Custer, SD	467	\$348,000	ILOC No. 68127108	Bank of America	Transfer Permit 467. Transfer Irrevocable Letter of Credit No. 68127108 to Pacer Minerals LLC and accept Amendment No. 1 changing the name on Irrevocable Letter of Credit No. 68127108 to Pacer Minerals LLC.
<p>Transfer to:</p> <p>Pacer Minerals LLC Custer, SD</p>		<b>Legal:</b>	SW1/4 & S1/2 NW1/4 Section 28; T2S-R4E; Custer County		