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Minutes of the
Board of Minerals and Environment
Telephone Conference Call Meeting

May 21, 2020
10:00 a.m. Central Time

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

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

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

BOARD MEMBERS ABSENT: None.

OTHERS: Eric Holm, Roberta Hudson, and Tom Cline, Minerals and Mining Program; Jim Wendte, Waste Management Program; Steve Blair and Holly Farris, Attorney General's Office; Stacy Titus and Carla Cushman, city of Rapid City; Ross and Fern Johnson, Rapid City, Carla Bachand, Capital Reporting Services.

APPROVAL OF MINUTES FROM APRIL 16, 2020: Motion by Blumhardt, seconded by Landguth, to approve the minutes from the April 16, 2020, Board of Minerals and Environment meeting. A roll call vote was taken, and the motion carried unanimously.

UPDATE ON SPYGLASS LITIGATION: Steve Blair, Assistant Attorney General, reported that counsel for the defendants withdrew from the case in early March, and those withdrawals were allowed by the court. Mr. Blair stated that he is not aware of new counsel that has filed a Notice of Appearance. Mr. Blair stated that the Attorney General's Office is now assessing the best route to move forward.

In response to a question from Chairman Hagg, Mr. Blair stated that the parties have not contacted him pro se.

MINING ISSUES:

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

Tom Cline, Minerals and Mining Program, presented the consent calendar.

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

TRANSFER OF SMALL-SCALE MINE PERMIT 479 FROM STUART GOLDSMITH TO TIMMY R. HORN: At the April 16, 2020, board meeting the board continued this matter until the May 21, 2020, meeting.

Roberta Hudson reported that an application was received from Timmy R. Horn for transfer Small-Scale Mine Permit479 from Stuart Goldsmith. The general location of the mining operation is three miles east of Rochford, SD. Under 45-6B-47, any mine permit can be transferred from one operator to another with the successor operator assuming all reclamation liability.

The transfer application and the $100 transfer fee were submitted on February 20, 2020. The application was complete on March 24, 2020. A $2,500 replacement reclamation bond was submitted on May 11, 2020.

The department recommendation to transfer the permit was prepared on March 26, 2020. The recommendation was published in the Rapid City Journal on April 1 and 8, 2020. The Affidavit of Publication was received on April 20, 2020. No petitions to intervene were received following the public notice.

Ms. Hudson stated that 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 Timmy R. Horn are in compliance with all federal, state, and local laws and regulations. Mr. Horn submitted a Certification of Applicant form on February 20, 2020, and disclosed no violations.

The department recommended the board approve the transfer of Permit 479 from Stuart Goldsmith to Timmy R. Horn, release Certificate of Deposit No. 300017857, First Interstate Bank, Gillette, WY, in the amount of $2,500, and accept the replacement Certificate of Deposit No. 220146644, First Interstate Bank, Gillette, WY, in the amount of $2,500.

Mr. Scheetz asked if this is a small placer mine along the creek that flows from Rochford down, and is there intent to actually do any work this summer? Ms. Hudson answered that it is a placer mine along the creek, and some work has already been done at the mine site. Ms. Hudson said she assumes that Mr. Horn plans some activity at the site this summer.

Mr. Scheetz asked if $2,500 is enough to cover the reclamation if the bond was forfeited and the state had to reclaim the site.

Ms. Hudson stated that, in this instance, the mine site is on Forest Service land so the state would transfer the bond to the Forest Service and the Forest Service would be in charge of the reclamation. Ms. Hudson said she is not aware if Mr. Horn has an additional bond with the Forest Service, but the bond that the department holds would probably be sufficient to reclaim this site.

Mr. Scheetz asked the department to check with the Forest Service to make sure the site could be reclaimed if it needed to be.

In response to a question from Chairman Hagg, Ms. Hudson stated that the department has a Memorandum of Understanding with the Forest Service so if bond forfeiture were to happen to a mine permit on Forest Service land, the bond would be forfeited then transferred from the state to the Forest Service to do the reclamation work.

Mr. Karpen agreed that the $2,500 bond may not be sufficient to reclaim the site, and he suggested that maybe the statute should be reviewed before the next legislative session.

Motion by Englund, seconded by Peterson, to approve the transfer of Permit 479 from Stuart Goldsmith to Timmy R. Horn, release Certificate of Deposit No. 300017857, First Interstate Bank, Gillette, WY, in the amount of $2,500, and accept replacement Certificate of Deposit No. 220146644, First Interstate Bank, Gillette, WY, in the amount of $2,500. A roll call vote was taken, and the motion carried unanimously.

ACCEPTANCE OF FINANCIAL ASSURANCE INCREASE FOR WHARF RESOURCES (USA), INC. PERMITS 356, 434, 435, 464, AND 476: Matt Zietlow, Ann Steckelheimer, Hashi, and Paul Sherbine, representatives of Wharf Resources, were available on the phone for board questions.

Eric Holm presented an adjustment of the financial assurance amount for Wharf Resources. The 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 $710,000, which is an increase of $20,700 from the 2019 update.

To cover the increase, Wharf has submitted a rider to the Aspen American surety bond that currently serves as financial assurance which increases the amount to $710,000. Ratings for the company from AM Best, Standard and Poor's, and Moody's are excellent, strong, and upper medium quality, respectively. Mr. Holm stated that the AM Best outlook was downgraded from stable to negative on April 1, 2020, due to three consecutive years of losses. A negative outlook

does not carry the same weight as a negative watch. The Standard and Poor's rating, although still strong, was downgraded by Standard and Poor's from A to A-, and the outlook was changed from negative to stable in March 2020. The board packet included a table that showed the Standard and Poor's rating is still in an acceptable range. Moody's outlook remains negative. Mr. Holm noted that Aspen American still has a very strong balance sheet and a strong capital base.

Mr. Holm also noted that he had provided the board with a press release on Aspen Insurance Holdings Limited's announcement of adverse development cover agreement with Enstar Group Limited.

The department recommended that the board accept the rider to Bond No. SU27832, Aspen American Insurance Company, increasing the financial assurance bond by $20,700 to $710,000.

Responding to a question from Mr. Morris, Mr. Holm stated that the bond is to remediate a slow chronic release of cyanide, which was determined to be more costly to remediate than an accidental spill.

Mr. Scheetz asked if Wharf carries pollution liability insurance over and beyond the bond. Ann Steckelheimer, Couer, said she believes Wharf does not carry pollution liability insurance, but she would need to confirm that.

Mr. Scheetz asked if the cyanide spill bond is primarily for the leach pads where cyanide is used. Mr. Zietlow answered that is correct and the annual bond increase is just the standard three percent increase. Nothing besides the bond amount has changed.

Mr. Scheetz asked if Coeur is complying with all of the requirements in the Worldwide Conference on Cyanide Spills Initiative. Mr. Zietlow stated that Coeur is in compliance, and there is a three-year triennial certification with that under the International Cyanide Management Institute and Wharf Resources has been fully compliant with that, including not just initial one, but the last two triennial recertifications.

Motion by Morris, seconded by Landguth, to accept the rider to Bond No. SU27832, Aspen American Insurance Company, increasing the financial assurance bond by $20,700 to $710,000 for Wharf Resources (USA), Inc. Permits 356, 434, 435, 464, and 476. A roll call vote was taken, and the motion carried unanimously.

ACCEPTANCE OF RIDER TO RECLAMATION BOND FOR WHARF RESOURCES (USA), INC. PERMITS 356, 434, 435, 464, AND 476 AND ACCEPTANCE OF RECLAMATION BOND FOR WHARF RESOURCES (USA), INC. PERMITS 356, 434, 435, 464, AND 476:
Mr. Holm reported that the board previously approved surety bond number K09047803 from Westchester Fire Insurance Company to cover $15,786,000 of Wharf Resources' $37,379,300 reclamation bond.

On April 20, 2020, Wharf submitted a rider to reduce the surety bond by $10,000,000 from $15,786,00 to $5,786,000. Wharf also submitted surety bond number 39S222327 from Liberty Mutual Insurance Company in the amount of $10,000,000 to replace the portion of the reduced Westchester surety. Ratings for Liberty Mutual from AM Best, Standard and Poor's, and Moody's are excellent, strong, and upper medium quality respectively. The outlook for each rating agency is stable.

The department recommended that the board accept rider to Bond No. K09047803, Westchester Fire Insurance Company, decreasing the bond by $10,000,000 to new a bond amount of $5,786,000, and that the board accept Bond No. 39S222327, Liberty Mutual Insurance Company, in the amount of $10,000,000.

Responding to a question from Chairman Hagg, Ms. Steckelheimer stated that Coeur works with a diverse and solid group of mining-focused surety markets, and part of the process is to maintain local sureties in the mining and exploration portfolio with any U.S. operation. Coeur periodically reviews changes in the marketplace and then adjusts any surety bond providers based on the competitive terms and pricing as reflected by the proposed by the surety bond replacement for Wharf Resources.

In response to a question from Mr. Scheetz, Mr. Holm stated that this is a replacement bond; the bond amount is not being reduced.

Paul Sherbine, Coeur, discussed the status of bond ratings since the Covid-19 pandemic began.

Mr. Holm noted that he reviews the bond ratings when reviewing the annual reports for all of the mining companies.

Motion by Scheetz, seconded by Morris, to accept rider to Bond No. K09047803, Westchester Fire Insurance Company, decreasing the bond by $10,000,000 to new a bond amount of $5,786,000, and that the board accept Bond No. 39S222327, Liberty Mutual Insurance Company, in the amount of $10,000,000 for Wharf Resources (USA), Inc. Permits 356, 434, 435, 464, and 476. A roll call vote was taken, and the motion carried unanimously.

ANNUAL UPDATE OF PRELIMINARY LIST OF SPECIAL, EXCEPTIONAL, CRITICAL, OR UNIQUE LANDS: Mr. Holm reported that under ARSD 74:29:10:19, the board is required to annually hold a hearing to consider any petitions received to nominate lands to the Preliminary List.

In accordance with ARSD 74:29:10:17(4), DENR publishes an annual notice to solicit petitions to add areas to the Preliminary List. The notice was published on January 16, 2020, in the Capitol Journal, Sioux Falls Argus Leader, Black Hills Pioneer, and Rapid City Journal. The department received Affidavits of Publication from all four newspapers.

The deadline for submittal of petitions to nominate areas to Preliminary List was May 1, 2020, and no nominating petitions were submitted.

Mr. Holm noted that no board action was needed.

Chairman Hagg turned the gavel over to Mr. Morris.

PETITION TO REVERSE OR MODIFY RAPID CITY MUNICIPAL SOLID WASTE FACILITY PERMIT NUMBER 20-01 AND PETITION FOR EQUITABLE RELIEF: Hearing Chairman Morris opened the hearing.

Hearing Chairman Morris stated that the hearing today is solely on the jurisdictional/timely filing issue concerning the Petitioners' petition.

Hearing Chairman Morris noted that Ross and Fern Johnson, the petitioners, have submitted materials, which have been posted on the DENR website under the Contested Case section, even this case has not been accepted as a contested case as of today. Also included on the DENR website are responses from DENR submitted by Steve Blair and Holly Farris, Attorney General's Office, and the city of Rapid City by Carla Cushman, assistant city attorney, and a reply by the petitioners.

Hearing Chairman Morris requested appearances and advise who will be arguing this issue.

Fern Johnson, one of the petitioners, appeared pro se.

Carla Cushman, assistant city attorney, appeared on behalf of the city of Rapid City landfill.

Steve Blair and Holly Farris, Attorney General's Office, appeared on behalf of the Department of Environment of Natural Resources.

Hearing Chairman Morris allowed 10 minutes each for initial argument by Mr. Blair and Ms. Cushman, 30 minutes for argument by the petitioner, and 5 minutes each for rebuttal by Mr. Blair and Ms. Cushman.

Mr. Blair stated that the hearing was to determine whether the board should assert jurisdiction over the petition that was filed by the Johnsons. DENR did not object to splitting time with the city of Rapid City in the proceeding. Mr. Blair said based on the filings DENR and Rapid City have made overlap, but the department's interests or positions may not necessarily align with the city. The department, in all proceedings, works very hard to keep an impartial middle position between industry, applicants, and potential interested parties or intervenors.

Mr. Blair stated that in the most recent submissions, the Johnsons have accused him of misleading the board in the department's response. Mr. Blair said he takes that as a serious accusation. He said as a lawyer his duty is to be completely candid and forthright to the tribunal, which he feels he has. Mr. Blair stated that he is somewhat offended by the accusations of misleading the board. Mr. Blair asserted to the board that anything contained in the department's response was his legal interpretation of the law, and to the extent it was incorrect, it was

incorrect. Mr. Blair said he doesn't know that any of it was incorrect, but he doesn't consider that to be misleading.

Mr. Blair said this hearing being held not to discuss the merits of the Johnson's petition, and he did not intend to address any of their arguments regarding the merits. The hearing is to determine whether the petition should be accepted. He asked that, if the petition is accepted, the department and the city be given an opportunity to discuss those merits at the appropriate time. Mr. Blair said he would also not discuss the merits of the default motion or the motion for summary judgement. Based on the procedural position, it is not appropriate. Mr. Blair said he had no intention of calling any witnesses because the department appeared to make legal argument on whether the petition should be accepted.

Mr. Blair said this hearing comes after the board asked for briefings on the timeliness/jurisdiction issue. He stated that to the extent that any of the department's responses are viewed as a motion to dismiss, he would accept whatever burden that places on the department, but he believes the burden of persuasion should remain on the Johnsons to establish that their petition was timely and should be accepted.

Regarding the merits of the argument, Mr. Blair stated that applicable law in this area is covered by SDCL 34A-6 and ARSD 74:27. Those are the provisions that regulate solid waste management in the state. The laws set up a notice of recommendation procedure whereby when an application for a solid waste facility is received, the department reviews that application and issues a notice of recommendation. When the notice is issued, that triggers a 30-day comment period. It is within that 30-day comment period that an interested party may request a hearing, and that is how matter would normally end up in front of the board. SDCL 34A-6-1.13 is clear that if a hearing is not requested within the 30 days, the recommendation of the secretary of DENR becomes final and the permit is issued based on that recommendation.

Mr. Blair said DENR began review of Rapid City's landfill renewal in April 2019. The notice of recommendation issued by Secretary Roberts was made on November 22, 2019. That triggered the 30-day comment period, which ran until December 21, 2019. The Johnsons filed their initial comments on December 13, 2019, so it was within the comment period, but their comments did not request a hearing before the Board of Minerals and Environment. The final permit was issued on February 20, 2020. The Johnsons submitted two additional comment letters to DENR regarding the draft permit and some revisions were made, based on their comments. The Johnsons petition that the subject of this hearing was filed with the board of February 28, 2020. DENR's position is that the petition is not timely under the notice of recommendation procedure established in SDCL 34A-6. The Johnsons had adequate notice of the secretary's recommendation. It is clearly engaged in commenting with the department on that notice. There was an opportunity to request a hearing and the Johnsons did not do so. Mr. Blair said the department's position is that the petition is untimely under those statutes, and the board should not accept it as a contested hearing. In the petition and in some of the response materials the Johnsons have cited to numerous federal regulations in an attempt to establish that their petition is timely and appropriate. In the numerous petitions, there are numerous cites to 40 Code of Federal Regulations (CFR) 1-24. Those federal regulations are the procedures used by EPA for

decision making on the permits that EPA would issue on a federal level, including RCRA permits, UIC permits, PSD permits, or NPDES permits. The Johnsons have taken those federal regulations and, to their pleadings, attempted to say those regulations are automatically applicable to the state level solid waste permit that Rapid City received. Mr. Blair said he would submit to the board that those are not summarily applicable to the board. Administrative entities in the state only have the authority to granted by the Legislature or that authority which can be reasonably inferred from statutory authority. Generally, in South Dakota, the regulatory boards have the authority to implement their statutes, the administrative rules they pass, and it's usually within those statutes and rules where you would see an entity adopt a federal regulation, and thereby, have authority to enforce that regulation. For instance, in ARSD 74:27:07.01 there is a definition of composite liner system and definition, says "as defined by 40 CFR 258.40." That is the state regulation that then gives the department and the board authority to interpret and enforce that federal regulation. In the statutory and administrative rules that the board has the authority to enforce 40 CFR 124 is not adopted by reference. That is because those are the rules that EPA uses for their decision making process on a federal level. In the motion for summary judgement, there was some reference made by the Johnsons to 40 CFR 239. Those are the federal regulations that guide how EPA determines whether a state program is adequate and can receive delegation from EPA. Most of the state authority on environmental matters is delegated from the EPA and EPA reviews a program, whether it is solid waste, air quality, concentrated animal feeding operations, etc. and determines whether that program is adequate in their eyes based on the federal regulations they have to follow, then EPA delegates the state the authority to implement that program and regulate that area. EPA delegated to the state of South Dakota the authority to manage and regulate the solid waste program.

Mr. Blair said he would submit that the federal regulations the Johnsons cite to as to why their petition is timely or why the board should review their petition are not applicable in this proceeding. He stated that DENR, in their response, addressed the board's general authority under ARSD 74:09. He asked that the board not exercise that authority at this time, and DENR feels it would create a poor public policy precedence to accept the petition under that general authority to schedule a contested hearing. He also asked the board not to accept the petition and to close the file on this matter.

In response to questions from Hearing Chairman Morris, Mr. Blair confirmed that the city of Rapid City had a pre-existing permit that had been issued sometime in the past. The matter today pertains to a permit renewal process, 74:27:08 are the rules addressing solid waste permit procedures, and 74:27:09 are the rules addressing solid waste permit applications and renewal applications.

Ms. Cushman stated that the landfill provides services to more than 116,000 Rapid City residents and areas around Rapid City, including Ellsworth Air Force Base, portions of Pennington, Meade, and Custer Counties.

Ms. Cushman said she would like to address the Johnson's claims in their pleadings that the city has failed to respond to their substantive complaints that they have made against the landfill. The most recent motion requested default judgement because of the landfill's failure to respond

to their substantive complaints and they allege malicious behavior, that Rapid City has done this because they have no defense to the allegations. Ms. Cushman stated that the city has not responded to the Johnson's substantive complaints because the Johnsons have not yet demonstrated that they have a legal avenue to seek a remedy for these complaints. The reason everyone is here today is to determine whether or not this petition is something that the board is required to, or may choose to consider. She said the landfill is ready to respond to every allegation that has been made against it if and when the time is right.

Ms. Cushman said today the landfill urges the board to deny the Johnson's request for a hearing on their objections to Permit 20-01. State law is clear in this area about what needs to be done to issue a permit, whether it is a renewal permit or a new permit in terms of public notice, public comment, and public review. The Johnsons do not dispute that the conduct of DENR issuing the permit. The permit was issued after notice and the 30-day window, and no initiation of a contested case occurred within the 30-day window, so in accordance with state law, the permit was issued in accordance with the recommendation of the secretary. The mechanism for challenging a potential permit is to initiate a contested case hearing before the board. State law and administrative rules state that no hearing may be held unless that contested case is initiated within the 30-day window. Ms. Cushman said there is no dispute that that did not occur in this case. The Johnsons are asking the board to set aside the 30-day requirement found in SDCL 34A-6-1.14 and provide them with a hearing even though that statute says that a hearing will only be held if initiated within the 30-day window. Ms. Cushman asked the board not to do that.

Ms. Cushman stated that because the Johnsons can't claim that DENR acted in violation of state law, they claim that the permit was issued in violation of federal law, and they invoke a multitude of federal regulations adopted as part of the Resources Conservation and Recovery Act (RCRA) by the federal government, and they allege that the process used to approve Permit 20-01 was incorrect or invalid. Specifically, the Johnsons initially said that they were entitled to a public comment window of 45 days, not 30 days, that they were entitled to a second notice and comment period after the permit was modified by DENR. These modifications were made based on the Johnsons' comments and to accommodate their comments. The Johnsons also claimed entitlement to an appeal procedure that is provided in federal law. These entitlements are found in 40 CFR Part 124, which simply does not apply to solid waste permits issued by the state, it applies to permits that are issued by the EPA.

Ms. Cushman said there are a multitude of rules that the landfill needs to comply with as set forth by RCRA. There is one provision that talks about permitting requirements when states issue solid waste permits found in 40 CFR 239.6. That provision is very general. It requires that the states provide that documents for permit determinations are made available for review and comment by the public, and that the state set up procedures to ensure that public comments are considered. The state rules that have been referenced today about public notice, public comment, initiation of the contested case hearing, are the rules the state of State of South Dakota uses.

In their most recent pleadings, the Johnsons focus on the third provision in 40 CFR 239.6, which says that the state must describe its public participation procedures for issuance of the permit and

post-permit actions, and the Johnsons claim that the notice in the Rapid City Journal did not provide this information. The regulation does not require that post-permit actions be discussed in any notice to the public. Instead, the provision requires the state to provide that information to the EPA as part of the certification process.

In their most recent pleadings, the Johnsons also claim that Permit 20-01 authorizes the city to dispose of hazardous waste, not just solid waste; therefore, the more stringent rules apply. Ms. Cushman said there are certainly more stringent rules in federal law for hazardous waste, as well in state law. There is a whole separate section of the Code, there are separate administrative regulations, there would be a separate permit that the landfill would have to apply for and receive from the board if hazardous waste were authorized. Permit 20-01 only permits the landfill to take solid waste, and solid waste under state law specifically excludes any hazardous waste.

Ms. Cushman stated that the Johnsons, in an attempt to grab more regulations, claim that the city of Rapid City is authorized to accept hazardous waste under Permit 20-01, and that is simply not the case. The Johnsons have alleged that the landfill has circumvented the laws, schemed and tricked the DENR, acted out of the motivation to prevent them from developing their property at all, and that the landfill has been anywhere from willfully ignorant to malicious, to self-serving. The landfill's position is that it is the Johnsons who are trying to impose laws and regulations upon the landfill, which simply do not apply to the permit. The Johnsons are asking the board to provide a new avenue for them to present their myriad of complaints about the landfill to make up for their failure to timely petition for a contested case hearing in 2019.

Ms. Cushman said the landfill feels strongly that it has a right to rely that the procedures laid out in state law will be fairly and equitably applied to it, just like any other resident. Public input and review of DENR and landfill actions is important, and the landfill is not disputing that. This is the place where the public has an applicable role to play in making sure that everything is proceeding appropriately, but in this case, the landfill would encourage to think carefully about opening new legal avenues to contest permits for the public in general and for the Johnsons, in particular, given the burden that it placed on the permitted party, the DENR, and the board.

Ms. Cushman asked the board to dismiss the Johnson's petition as untimely or to otherwise decline to hear the Johnsons substantive complaints about the landfill.

Hearing Chairman Morris asked Ms. Cushman if the Rapid City landfill accepts regulated hazardous waste? Ms. Cushman answered that according to Permit 20-01, the landfill is only allowed to accept solid waste, and that specifically excludes hazardous waste. The Johnsons point to a special waste provision in the regulations and claim that the special wastes that are listed there are hazardous waste, but that is not true. Ms. Cushman said her interpretation on the state regulations is that there are two boxes, one is solid waste and one is hazardous waste, and the city is allowed to take in all waste related to the solid waste box, but does not have authorization for hazardous waste.

Hearing Chairman Morris asked what would happen if an individual came to the solid waste facility and wanted to deposit hazardous waste? Ms. Cushman stated that if the facility wanted to

accept hazardous waste, the city would have to go through the permitting process as laid out in SDCL 34A-11, and the landfill has not done that.

Fern Johnson stated that she would like to respond to Ms. Cushman's assertion that the Johnsons do not contest the process procedure that the DENR went through when they issued Permit 20-01. Ms. Johnson said that is untrue and that is based on the premise of the of the whole petition.

Ms. Johnson said pursuant to the state's codified laws under 34A-6-1.34 and 34A-6-1.35 jurisdiction is proper before the board with regard to the facts upon which the petition is premised. She cited the 2002 South Dakota Supreme Court case Tri County Landfill Association vs. Brule County where the Board of Minerals and Environment adjudicated the validity of the issuance of a solid waste landfill permit. The board denied the landfill permit because the county had not approved the landfill.

Ms. Johnson said the board not only has quasi-judicial authority to act upon on the validity of a permit in questions, but it is required to do so pursuant to 34A-11-4 and 34A-11-12. Should the board deem it necessary after today to proceed by initiating enforcement proceedings on its own based upon the facts presented by the Johnsons petition and the other pleadings that were submitted, the board has jurisdiction and enforcement authority to do so.

Ms. Johnson stated that DENR is the primary state agency authorized by EPA to regulate and enforce the laws of this state, but only if these laws and rules conform to the federal mandates concerning environmental protection, regulation, enforcement, and permitting proceedings. South Dakota is authorized by EPA to regulate non-hazardous and hazardous waste facilities under RCRA. Ms. Johnson cited the specific federal regulations for hazardous and non-hazardous waste that have been adopted by reference in state rules. She said Rapid City's landfill Permit 20-01 clearly falls under both the solid waste and the hazardous waste programs under RCRA because RCRA established a structure for a national system of solid waste control delegated to this state to regulate according, in lieu of EPA. RCRA not only encompasses a comprehensive system inter-relating the federal-state infrastructure to manage hazardous waste from the cradle to the grave, RCRA also established a framework for states to implement effective municipal, solid, and non-hazardous secondary material management programs. Under RCRA, state programs must be at least as stringent as the federal requirements and can adopt more stringent requirements as well, but at no time can this state's laws and rules be implemented or enforced to be less stringent than those enacted under RCRA.

Ms. Johnson said she wants to clarify that this is an appeal or a contesting of the secretary's final permit decision. The secretary did not determine as its final recommendation for permit issuance until February 10, 2020. Ms. Johnson said she not only invokes federal laws under 40 CFR 124, she also calls upon the application of this state's administrative rules must draw from. DENR's attempt to preclude the merits of that petition from being heard by the board is nothing more than a red herring and in doing so, wastes the board's, party's time, and taxpayer funds to hear this matter today on the flawed basis that SDCL 34A-6-1.13 and 34A-6-1.14 are the sole laws that apply here. Ms. Johnson cited several federal and state rules that she believes set forth the permitting requirements this state must implement.

Ms. Johnson said when the DENR secretary responded to the Johnson's comments on January 24, 2020, and later issued its final permit determination on February 10, 2020, this became the effective date upon which the Johnsons were allowed 30 days to appeal or contest the decision. Ms. Johnson stated that she appealed by the submission of the petition on February 28, 2020, which is well within the 30 days required from the date the secretary issued its final permit recommendation. She said the secretary invoked ARSD 74:52:05:20 which it applied this rule to its January 24, 2020, response that stopped short of not only failing to advise the Johnsons of their right to contest the secretary's final permit decision, but also failing to cite any reference to the due process procedure leading to the Johnsons right to appeal as required under ARSD 74:52:05:18. Ms. Johnson said the secretary violated procedural due process by failing to provide notice under this state's rules alone.

Ms. Johnson said also applicable here is that Permit 20-01 allows the city to accept or dispose of hazardous waste such as being a small quantity hazardous waste generator or SQG upon which this state's administrative rules under 74:28 apply.

Ms. Johnson stated that according to the city's application under Section 108 shows the types of waste the landfill requested to be allowed to dispose of, which includes household or conditionally exempt small quantity generator hazardous waste, so they do accept hazardous waste and Permit 20-01 has allowed it. Ms. Johnson cited several state hazardous waste rules, which include RCRA hazardous waste regulations. She said this state does not have the authority to regulate PCBs. That authorization to regulate in this state was rejected in 2012. She said the question as to whether the city is exempt from its SQG status is just one of the questions at issue that the Johnsons challenges in their petition. Ms. Johnson asserted that the city landfill does not meet the conditions to be an exempt hazardous waste generator. Ms. Johnson cited several more federal and state regulations regarding hazardous waste disposal.

Ms. Johnson stated that the DENR secretary invoked the provision set forth in administrative rule 74:52:05:20 when it responded to her comments 63 days after the 30-day published timeframe lapsed. She said the secretary also modified its draft permit based upon her comments and issued a final decision on February 10, 2020, yet the secretary did not deem it necessary to follow through with complying with the notice requirements regarding the Johnson's right to appeal the final permit decision as required under the administrative rules. Ms. Johnson said if the board agrees with the city of Rapid City and the DENR that the SDCL 34A-6-1.13 and 34A-6-1.14 is the sole authority in this case, this would sever the application of its own laws and the federal laws upon which this state's authorization to regulate is drawn from.

Hearing Chairman Morris asked Ms. Johnson she received notice of the permit renewal publication. Ms. Johnson said she received online notice from DENR. Hearing Chairman Morris said he only sees two reference to hazardous waste in the draft permit – Section 3.12 and Section 3.15.

Ms. Johnson said the hazardous waste reference she was talking about are in the final permit, under 1.11, which is the permit restrictions. She noted that she is appealing the final permit, not the draft permit.

Mr. Morris said he does not see in Ms. Johnson's December 13, 2019, letter where she requested a contested hearing. Ms. Johnson said the letter does not request a contested hearing because when she submitted comments instead, she believed that DENR would make the appropriate corrections to the permit after reading her letter. Ms. Johnson said the draft permit was modified rather extensively and when the final permit was issued on February 10, 2020, it was the Johnsons from the beginning to petition according to South Dakota law under 74:52.

Mr. Morris asked if Ms. Johnson would concede that if it is determined that 74:52 does not apply, Ms. Johnson will have failed to timely file a contested case hearing. Ms. Johnson said she would not concede to that because she believes 74:52 applies in this case and it's all covered under RCRA.

Ms. Johnson cited the state administrative rules and federal laws that discuss the right to file an appeal, and she discussed her interpretation of how RCRA and NPDES rules apply in this case.

Hearing Chairman Morris asked Ms. Johnson if she would agree that she filed comments within the 30-day period, but she did not file a petition requesting a contested hearing within the 30-day period. Ms. Johnson said she would agree. Ms. Johnson said nothing less than 45 days is allowed under RCRA, and the solid waste permit falls under RCRA. Hearing Chairman Morris asked Ms. Johnson when the 45 days would have begun. Ms. Johnson said that is just a sideline. The notice is consistent throughout all the permits that DENR issues, whether it's an NPDES permit, a solid waste permit, or any other permits. In this case, the 45-day period should have run from November 22, 2019, and if comments are submitted and if those comments are accepted by DENR and modifications are made, then the appeal process follows with regard to the final permit decision, which would have been February 10, 2020, then 30 days after that because 45 days does not apply to the appellate timeframe from the final permit is issued as an effective date.

Hearing Chairman Morris asked for rebuttal from Mr. Blair and Ms. Cushman.

Mr. Blair stated that the Code of Federal Regulations regarding RCRA is not well-drafted, like many federal regulations, but he maintains the assertion that 40 CFR 124 and 40 CFR 239 do not apply to this procedure. The Johnsons invoked 74:52, which are the administrative regulations for Surface Water Discharge permits, a completely separate permitting process under DENR, which are not applicable to the Solid Waste Management permit that Rapid City has renewed under this proceeding. Ms. Johnson also cited 74:28, which are the Hazardous Waste administrative rules, and do not apply because hazardous waste is not authorized under the permit. Mr. Blair said Ms. Johnson asserted a lack of due process, and the department believes that is not true. EPA has reviewed the state procedures and permitting program, deemed them acceptable, and delegated the program to the state. The procedures give adequate notice and an

opportunity to be heard, and there was no due process violation by DENR in following those statutes and rules.

Mr. Blair asked the board not to accept the petition as a contested case and to close the matter.

Ms. Cushman stated that the Rapid City landfill does not accept any items that are considered to be hazardous waste; the permit does not authorize the landfill to accept hazardous waste. The small quantity hazardous waste language is in 3.07 of the final permit, which states that the operator shall only accept solid waste for disposal. Ms. Cushman stated that according to state law, solid waste specifically excludes hazardous waste. In 3.07 of the final permit it states that the operator may accept special waste as defined in ARSD 74:27:13:17 in accordance with the requirements of that section. That special waste provision does list small quantity generator hazardous waste as well as pesticide containers, petroleum-contaminated soil, asbestos, etc. Those are special wastes are wastes that are deemed to be solid waste, not hazardous waste.

Ms. Cushman stated that the section of the RCRA regulations that apply to state-issued permits for solid waste facilities is found in subpart D, 40 CFR Parts 239 through 259. That does not include the 123 and 124 that Ms. Johnson keeps referring to, but it does impose very general requirements on permitting such as some public participation options and that the comments will be considered and public information available related to the issuance of permits. Ms. Cushman said the language that is repeated by the Johnsons in their pleading and today regarding public notice for every permit needing to include pre- and post-permit procedures for the public simply does not apply in this case. That is information the state needs to provide to the federal government as part of its certification. So, to the extent that the November 22, 2019, publication in the Rapid City Journal did not include notice of post-trial public participation is because it wasn't required, even under that federal regulation.

Ms. Cushman asked the board to find that there is not jurisdiction in this case because the petition was not timely filed.

Hearing Chairman Morris requested board questions.

Mr. Blumhardt asked if the 30-day window is missed, does the board have the authority to set aside state law and call this a contested case?

Mr. Blair stated that the board would be setting aside state law and then exercising its general jurisdiction authority under ARSD 74:09. Mr. Blair said his position is that there is a more specific procedure established for solid waste permitting that should be followed, and if it is not, that is where the matter ends. At that point, the board should not exercise its general jurisdiction authority and schedule a matter for a contested hearing. Mr. Blair said his personal interpretation is that general jurisdiction authority is probably granted to the board to deal with emergent or unique situations that do not fall under any of the more specific notice and hearing provisions in the various programs that DENR administers and that is why that authority is there. In this case, there is a specific procedure that the board should recognize. All parties, the applicant, the department, and the interested parties, should be able to rely on those procedures and should be

entitled to some degree of finality when the statutory and administrative regulations have run their course. Mr. Blair said it would not be wise and it may be inappropriate to exercise jurisdiction in this case.

Ms. Cushman said she agreed with what Mr. Blair said.

Ms. Johnson said she doesn't consider it setting aside statutory law because SDCL 34A-6-1.13 and 34A-6-1.14 do not have a procedure in place. Once an individual submits comments, the modifications to the initial draft are made by the secretary, then after that an effective date is issued. If the board were to hold to that statute, how are they to know what the secretary is going to issue for a final determination. She said if she submitted comments during that 30-day timeframe, and the secretary did not make any changes, then that is the final issuance of the permit. Ms. Johnson asked how someone is able to submit a petition for a contested hearing on a draft permit that they contest if they do not see the final permit until after the 30 day window. She questioned if a person is supposed to submit a petition for a contested case in lieu of comments on a draft permit. If so, the secretary could modify the draft permit within the 30 days before or for a person petitions for a contested case, so there really is not an effective final permit decision until after a final permit decision is issued. She said if a person does not request a contested hearing within that 30 day comment period, they're done. Ms. Johnson said that is violation of due process because administrative law requires a person to be able to appeal a final determination. She stated that it is in judicial law and it is in administrative law.

Mr. Scheetz asked Mr. Blair what other states have for a time period for municipal solid waste landfills. Mr. Blair said for this matter, he relied what is currently in the South Dakota statutes and rules. He said he is not aware of how other states handle the time frame of permitting procedures, comment periods, etc. Mr. Scheetz commented that it would be worth reviewing other state's time frames for permitting.

Mr. Greenfield asked if the Johnsons are arguing that their comments are equivalent to a petition for a contested case hearing, or are they admitting that their comments are not a petition for a contested case hearing? Ms. Johnson stated that just because she did not request a hearing in that comments, the 21 pages of comments contested the draft permit. Ms. Johnson said she believed that DENR would do the right thing and accept those comments and modify the permit. When that was not done within the 30-day timeframe, 63 days later that precluded her from the opportunity of due process to appeal the final permit, which the secretary did modify and issued it as an effective and final decision. Ms. Johnson said she established the fact that she had the right to appeal that decision within 30 days, which she did.

Mr. Greenfield asked if the comments themselves contain a request for a hearing? Mr. Johnson answered they do not.

Chairman Hagg said he was trying to understand the federal versus state authority in this matter. It seems that if the board followed the federal references that Ms. Johnson cited, there are points that are well taken. If the board is going by state statute, then it is clear that the Johnsons did not comply with the state statute in a timely fashion. He asked if the state of South Dakota and

DENR, in passing state statutes, and the board, in adopting administrative rules, have the latitude to change or alter the procedure. Mr. Blair said his understanding is that when EPA reviews a state program for potential delegation, they do look to see whether the state statutes and regulations are equivalent to the federal regulations. He said he does not recall that there is a requirement that the state must adopt identical procedural regulations as to what EPA follows. The Solid Waste Program has been delegated by EPA to the state, and it has remained delegated to the state so DENR operates under that delegation and enforces the statutes that are currently on the books, as passed by the state legislature.

Chairman Hagg stated that he does not know whether the statutes are right or wrong, but those are the statutes passed by the legislature that the board has to work under. He said he is troubled by Ms. Johnson's point that the draft permit is noticed, then there is a comment period, so when is there a final decision. Chairman Hagg said he understands the practicality of Ms. Johnson's argument, but he is not sure that is what is set forth in the statute. If there are comments provided, does that move the timeline. Chairman Hagg said there is some support for that under the federal rule, but if the federal rule doesn't apply and the state statute overrides that, then that latitude is not there, but he questioned whether or not the board has the ability to change that statute to accommodate Ms. Johnson's argument. He asked Mr. Blair, Ms. Cushman, and Ms. Johnson if they would like to comment on that.

Ms. Johnson stated that 40 CFR 123.25, Requirements for Permitting. Part A states that all state programs under this Part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that states are not precluded from omitting or modifying any provisions to impose more stringent requirements. Under subsection 28 it talks about CFR 124.10 and under subsection 31 it talks about 124.17 (a) and (c) with regard to response to comments. Under 124.17 it refers to 124.15, which addresses the final decision and effective date of a permit. Ms. Johnson said this is all under RCRA for all state programs, not just solid waste.

Chairman Hagg asked Ms. Johnson if she would agree that as written in South Dakota statute, it is different and does not accommodate what she is saying is in the federal rule. Ms. Johnson agreed.

Chairman Hagg said that state statute as written does not allow for the time extension at this time and is fixed to the 30 days after publication. Ms. Johnson said that is correct.

Mr. Greenfield said it is his understanding that the state operates with plenary jurisdiction under the EPA and that operating with that type of jurisdiction there is an agreement or a memorandum between DENR and EPA, and if so, has that memorandum been reviewed or is it part of the record. Mr. Blair said his understanding is that when a state makes application to the EPA for delegation of a program, EPA then conducts a review, which is governed by several CFR regulations, and issues a document that memorializes that delegation. Mr. Blair said he has never interpreted that as some sort of contract, agreement, or memorandum of understanding. If the program was not delegated, anyone that needed a solid waste permit would have to go to

EPA to apply for one. Delegation allows those decisions to be made at the state level. Mr. Blair noted that he has not reviewed the delegation document in this case.

Hearing Chairman Morris asked Mr. Blair to provide the delegation document to Ms. Johnson, the city of Rapid City, and him. He also asked that Mr. Blair post it as part of the record on the contested case page of DENR's website.

Hearing Chairman Morris thanked the parties for their submissions. He then closed the hearing, and stated that he will issue a proposed decision to be considered by the full board at the June 18, 2020, meeting.

Mr. Morris turned the gavel back over to Chairman Hagg.

PUBLIC COMMENT PERIOD: There were no public comments.

NEXT MEETING: The next meeting is scheduled for June 18, 2020.

ADJOURN: Motion by Morris, seconded by Landguth, that the meeting be adjourned. A Roll call vote was taken, and the motion carried unanimously.

6/17/20
Secretary Date

6/17/2020
Witness Date

Consent Calendar
South Dakota Board of Minerals & Environment

May 21, 2020

License Holder	License No.	Site No.	Surety Amount	Surety Company or Bank	DENR Recommendation
Transfer of Liability & Release of Surety:					
Daniel J. Heine Vermillion, SD	05-806		$4,000	CorTrust Bank, Vermillion	Transfer liability and release $4,000.
		806001	SE1/4 Section 16; T92N-R52W, Clay County		
Transfer to:					
Pollman Excavation Inc. Wakonda, SD	15-994		$20,000	First Premier Bank, Wakonda	
Wyoming Red Rock, LLC Buffalo, WY	94-532		$1,000	First Interstate Bank of Commerce, Gillette	Transfer liability and release $1,000.
		532001	NE1/4 Section 35; T4S-R4E, Custer County		
Transfer to:					
Carl E. Scott Custer, SD	89-388		$500 $1,000	First National Bank, Pierre First Interstate Bank, Custer	
Release of Liability & Surety:					
Bernstein Trucking Faith, SD	04-787		$500	First National Bank, Pierre	Release liability and $500.
		787001	SW1/4 Section 22; T9N-R12E, Meade County		

Consent Calendar
South Dakota Board of Minerals & Environment

May 21, 2020

License Holder	License No.	Site No.	Surety Amount	Surety Company or Bank	DENR Recommendation
Release of Liability & Surety:					
Dakota Constructors, Inc. Harrisburg, SD	17-1019		$3,500	Granite Re, Inc.	Release liability and $3,500.
		1019001	W1/2 W1/2 Section 9; T19N-R30E, Corson County		
John Heidler Opal, SD	03-771		$500	First National Bank, Pierre	Release liability and $500.
		771001	SW1/4 Section 22; T9N-R12E, Meade County		
Darrell Larson Hamill, SD	95-556		$2,000	Wells Fargo Bank, Winner	Release liability and $2,000.
		556001	S1/2 Section 28, SE1/4 Section 29, E1/2 Section 32 & Section 33; T103N-R74W, Tripp County		
		556003	N1/2 Section 17; T103N-R73W, Lyman County		
Release of Liability:					
TF Luke & Sons Inc. Kimball, SD	83-11		$20,000	Western Surety Company	Release liability.
		11070	N1/2 Section 23; T104N-R69W, Brule County		

May 21, 2020

Permit Holder	Permit No.	Surety Amount	Surety Company or Bank	DENR Recommendation
Transfer of Small Scale Mine Permit 479:				
Stuart Goldsmith Gillette, WY	479	$2,500	First Interstate Bank, Gillette, WY	Transfer Permit 479 from Stuart Goldsmith to Timmy R. Horn and release CD No. 300017857, First Interstate Bank, in the amount of $2,500. Accept CD No. 220146644, First Interstate Bank, in the amount of $2,500.
		E1/2 SE1/4 NW1/4 Section 28; T2N-R4E, Pennington County		
Transfer to:				
Timmy R. Horn Centennial, CO		$2,500	First Interstate Bank, Gillette, WY	
Acceptance of Financial Assurance Increase for Wharf Resources (USA), Inc.:				
Wharf Resources (USA), Inc. Lead, SD	356, 434, 435, 464, & 476	$689,300	Aspen American Insurance Company	Accept rider to Bond No. SU27832, Aspen American Insurance Company, increasing bond by $20,700 to the new amount of $710,000.

May 21, 2020

Permit Holder	Permit No.	Surety Amount	Surety Company or Bank	DENR Recommendation
Acceptance of Rider to Reclamation Bond for Wharf Resources (USA), Inc.:				
Wharf Resources (USA), Inc. Lead, SD	356, 434, 435, 464, & 476	$15,786,000	Westchester Fire Insurance Company	Accept rider to Bond No. K09047803, Westchester Fire Insurance Company, decreasing bond by $10,000,000 to new bond amount of $5,786,000.
Acceptance of Reclamation Bond for Wharf Resources (USA), Inc.:				
Wharf Resources (USA), Inc. Lead, SD	356, 434, 435, 464, & 476	$10,000,000	Liberty Mutual Insurance Company	Accept Bond No. 39S222327, Liberty Mutual Insurance Company, in the amount of $10,000,000.