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MINUTES OF THE 224th MEETING OF THE
WATER MANAGEMENT BOARD
REMOTE MEETING VIA AUDIO/VISUAL CONFERENCE

MAY 6, 2020

CALL TO ORDER: Chairman Hutmacher called the meeting to order at 8:35 a.m. Central Time. The roll was called, and a quorum was present.

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

The following were present:

Water Management Board Members: Jim Hutmacher, Leo Holzbauer, Tim Bjork, Peggy Dixon, Rodney Freeman, and Chad Comes. Newly appointed board member Bill Larson was present but did not participate in the meeting.

Department of Environment and Natural Resources (DENR): DENR Secretary Hunter Roberts, Eric Gronlund, Ron Duvall, Mark Rath, Water Rights Program.

Attorney General's Office: Ann Mines Bailey, Water Rights Program counsel, and David McVey, board counsel.

Legislative Oversight Committee: Representative Mary Duvall.

Others: Bruce Ellison, attorney for the petitioners and Dusty Ginsbach, attorney for the town of Buffalo, in the matter of Water Permit Application No. 1992-1, Town of Buffalo; John Taylor, attorney for the applicant in the matter of Water Permit Application No. 8409-3, Schley Farms & Schley Real Estate LLP.

ADOPT FINAL AGENDA: Chairman Hutmacher noted that he would like to add "Formal thank-you to Everett Hoyt" to the agenda:

Motion by Freeman, seconded by Bjork, to add this agenda item after "Conflicts Disclosures and Requests for State Board Waivers." A roll call vote was taken, and the motion carried unanimously.

Motion by Bjork, seconded by Dixon, to adopt the amended agenda. A roll call vote was taken, and the motion carried unanimously.

CONFLICT DISCLOSURES AND REQUEST FOR STATE BOARD WAIVERS: None

FORMAL THANK YOU TO EVERETT HOYT: Motion by Freeman, seconded by Bjork, to thank Everett Hoyt for his service on the Water Management Board and to the State of South Dakota. A roll call vote was taken, and the motion carried unanimously.

FEBRUARY 26, 2020, BOARD MINUTES: Motion by Freeman, seconded by Bjork, to approve the minutes from the February 26, 2020, Water Management Board meeting. A roll call vote was taken, and the motion carried with Bjork, Comes, Freeman, Holzbauer, and Hutmacher voting aye. Dixon abstained.

SET JULY 8-9, 2020 MEETING AND LOCATION: The board discussed the July meeting dates later in the meeting.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: There are no cases pending involving the Water Management Board.

UPDATE ON DENR ACTIVITIES

Legislative Session – DENR Secretary Hunter Roberts provided an overview of the following bills tracked by DENR throughout the 2020 Legislative Session.

- HB 1025, An Act to revise certain provisions regarding plugging and performance bonds for oil and gas wells. The bill was signed by the Governor.
- HB 1026, An Act to revise certain provisions relating to use of security for cleanup and remediation of environmental problems. The bill was signed by the Governor.
- SB 17, An Act to make an appropriation for the plugging and surface reclamation of natural gas wells and to declare an emergency. The bill was signed by the Governor.
- HB 1033, An Act to provide for the prevention of aquatic invasive species contamination in public waters and to declare an emergency. The bill was signed by the Governor.
- HB 1035, An Act to make an appropriation from the water and environment fund and its revolving fund subfunds for various water and environmental purposes, to revise the water resources projects list, and to declare an emergency. The bill was signed by the Governor.
- HB 1093, An Act to establish a pipeline liability fund, to authorize a special fee for extraordinary expenses, and to make a continuous appropriation therefor. The bill was tabled.
- HB 1118, An Act to revise the boundaries of certain water development districts and to revise certain provisions regarding the election of the board of directors and the levying of taxes in the affected districts. The bill was tabled.
- SB 151, An Act to define critical infrastructure and revise certain crimes for the trespass or damage to critical infrastructure. The bill was signed by the Governor.
- SB 157, An Act to revise certain provisions regarding the county zoning and appeals process. The bill was signed by the Governor.
- HB 1166, An Act to revise provisions regarding the appointment of inactive watershed district boards and the reactivation of watershed districts and to declare an emergency. The bill was signed by the Governor.

Secretary Roberts reported that the Matthew Training Center and the restrooms in the Foss Building are currently being remodeled.

Secretary Roberts also discussed the Governor's Back to Normal Plan. Due to the Covid-19 situation, approximately 90 percent of DENR's staff has been working remotely from home. This past week, some staff were called back to work. Before more staff is brought back into the building, the department will be working on a plan to social distance staff, obtaining additional cleaning materials, hand sanitizer, etc., and possibly installing plexiglass screens. Secretary Roberts stated that because of the construction taking place in four of the eight restrooms in the building, staff will be brought back into the building slower than some of the other state buildings.

Flooding – Mark Rath reported that last year the state experienced an extremely wet year. Out of 125 years of record, it was the wettest year for the state.

Rivers – Mr. Rath stated that staff was concerned about the Missouri River mainstem system. A year ago, there were issues with extremely high flows going through South Dakota. There was downstream flooding in Iowa, Nebraska, Kansas and Missouri. Staff was concerned that going into winter that 2020 would be a repeat of 2019. Fortunately, the state did not receive the amount of precipitation it did in 2019.

This year an above-normal runoff year is expected for the Missouri River, but the projections for each month have continually been downgraded. The Corps of Engineers recently released the May annual runoff amounts. The average annual runoff over the 70+ years they have operated is 25,200,000 acre-feet. The Corps of Engineers' May projection is 32,100,000 acre-feet. The April projection was 35,500,000 acre-feet. Mr. Rath noted that the system storage is currently running above average. The total storage in all six of the mainstem reservoirs from Montana through North and South Dakota was well below the 2019 and 2011 levels, so that level is in a range that is manageable.

The James River has essentially been in flood stage since March 2019, and it continues to be in flood stage. Although the levels are dropping off, there is still one area near Ashton, which is north of Huron, that is a low area where the river can easily go out of the banks. Throughout the rest of the James River in South Dakota it is in moderate flood stage to minor flood stage.

The Big Sioux River experienced two major floods in 2019; one in March and one in September. Currently, the river is mostly in normal condition except for a couple areas that are slightly above normal.

Lakes – Mr. Rath reported that there are ongoing lake issues that are residual problems from last year. The Game, Fish and Parks regional staff have been helpful with some of these issues.

Mr. Rath noted that the following lakes are having high water issues:

- Red Lake in Brule County
- Sand Lake and Salt Lake in Campbell County
- Lake Andes in Charles Mix County
- Blue Dog Lake, Minnewasta Lake, Rush Lake, Waubay Lake, Bitter Lake, and Lynn Lake in Day County

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- Dry Lake, Indian Springs, and Reid Lake in Clark County
- Goose Lake and Grass Lake in Codington County
- Lake Alice in Deuel County
- Three Buck Lake in Hamlin County
- Lake Thompson in Kingsbury County
- Hazelton Lake in Marshall County
- Drywood Lakes in Roberts County
- Blue Blanket Lake in Walworth County

Mr. Rath noted that there are various high water issues on these lakes.

Chairman Hutmacher asked if the cattails in the spillway at Lake Thompson have been removed. Mr. Rath answered that the department has not heard of any maintenance with the cattails. Kingsbury County did contact the department in December, and the department's understanding from the county is that it was too far into winter, and the county was unable to get out there. Mr. Rath stated that he recently received a call from a local property owner expressing concern about the box culvert just downstream from outlet that was plugged by debris, so Mr. Rath put the individual in contact with the Miner County highway superintendent, since the road and box culvert are in Miner County.

Mr. Rath reported that the department installed a lake gage on Lake Thompson to take real-time measurements. The gage is installed on the bridge on the Oldham Road, which goes across the southern third of the lake. Funding for the gage was provided by East Dakota Water Development District, and the gage was installed and will be operated by staff from DENR's Watershed Protection Program. A satellite link is being used through NOAA's GOES System, which updates the information every 15 minutes.

PUBLIC COMMENT PERIOD IN ACCORDANCE WITH SDCL 1-25-1: There were no public comments.

CONSIDER FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION IN THE MATTER OF WATER PERMIT APPLICATION NO. 2572A-2, SHERIDAN LAKE HIGHLANDS, INC.: David McVey, Assistant Attorney General, stated that proposed Findings of Fact and Conclusions of Law were submitted by Water Rights Program. The applicant submitted objections to the proposed Findings of Fact and Conclusions of Law, and offered alternative Findings of Fact for Number 1 and Number 15.

Mr. McVey stated that Water Rights proposed Findings of Fact Numbers 2 through 14 and 16 through 22 were accepted as written, and Findings of Fact Number 1 and 15 are modified pursuant to Applicant's alternative proposed Findings of Fact.

Mr. McVey stated that in the Final Decision, "Water Permit Application No. 8284-3" was changed to "Water Permit Application 2572A-2." He also recommended that in paragraph 2 of the Final Decision "ARSD" be added before "Chapter 74:02:04" and before "Section 74:02:04:28."

Mr. McVey then discussed the qualifications listed in the Final Decision.

Motion by Freeman, seconded by Bjork, to adopt the Findings of Fact, Conclusions of Law and Final Decision with the changes proposed by Mr. McVey in the matter of Water Permit Application No. 2572A-2, Sheridan Lake Highlands, Inc. A roll call vote was taken, and the motion carried with Bjork, Comes, Freeman, Holzbauer, and Hutmacher voting aye. Dixon abstained.

CONSIDER TIMELINESS OF QUESTIONNAIRE FOR WATER RIGHT NO. 2954-3, LANE TEKRONY, AND POSSIBLE RESCISSION OF SUSPENSION: Ron Duvall reported that the packet the board received prior to the meeting included information regarding this matter.

At the February 2020 meeting, the board considered violations of the irrigation questionnaire qualification on permits. The board suspended Water Right No. 2954-3 for the 2020 irrigation season, effective March 26, 2020, for failure to submit the 2019 irrigation questionnaire. Notice of the suspension to Lane Tekrony stated that if the 2019 irrigation questionnaire was submitted by March 26, 2020, the suspension would not take effect.

Subsequently, Mr. Tekrony submitted the 2019 irrigation question. The envelope containing the questionnaire was post-marked March 30, 2020, and the department received the irrigation questionnaire on April 1, 2020. On April 21, 2020, the department sent a letter to Mr. Tekrony stating that due to the disruptions caused by the Covid-19 pandemic, the department would request that the Water Management Board consider submittal of the 2019 irrigation questionnaire as timely. The letter also requested that Mr. Tekrony reply with detailed reasons for the delay in submitting the questionnaire. To date, the department has not received a response from Mr. Tekrony.

Mr. Tekrony was not present for today's board meeting.

The staff recommended that the board consider the irrigation questionnaire to be timely filed and find that the suspension had not taken effect.

Motion by Comes, seconded by Dixon, to find the irrigation questionnaire submission timely.

Mr. Freeman expressed concern that Mr. Tekrony did not bother to provide an explanation as to the reasons the irrigation questionnaire was submitted late.

In response to a question from Mr. Bjork, Mr. Duvall stated Mr. Tekrony has met the deadline for submitting the irrigation questionnaire only one time since 2003. Every other year the questionnaire was submitted in February, March, or April. Mr. Duvall stated that Mr. Tekrony has been irrigating every year.

Chairman Hutmacher stated that he believes Mr. Tekrony has had all the chances he deserves.

Mr. Bjork said that if the board does accept the 2019 irrigation questionnaire as timely, the department should send Mr. Tekrony a stern warning that in the future the board will not accept irrigation questionnaires Mr. Tekrony submits after the deadline, and the irrigation permit will be suspended.

A roll call vote was taken, and the motion carried with Bjork, Comes, Freeman, Holzbauer, and Dixon voting aye. Chairman Hutmacher voted no.

CONSIDER ADOPTION AND ANY BOARD AMENDMENT OF HEARING OFFICER'S ORDERS ON MOTIONS FOR DENR'S MOTION FOR CONTINUANCE OF WATER PERMIT APPLICATION NO. 2805-2, RC & J, LLC, DENR'S MOTION FOR CONTINUANCE OF WATER PERMIT APPLICATION NO. 8409-3, SCHLEY FARMS & SCHLEY REAL ESTATE, LLP, AND DENR'S MOTION FOR CONTINUANCE OF WATER PERMIT APPLICATION NO. 1992-1, TOWN OF BUFFALO: Hearing Officer Freeman's Orders continued these hearings until June 10-11, 2020.

Chairman Hutmacher stated that the board will most likely not be able to meet in person in early June due to the Covid-19 pandemic. He said he may be in favor of holding the hearings using Microsoft Teams, but is opposed to holding them via telephone conference call.

Hearing Officer Freeman noted that on April 6 he and Mr. McVey set the June 10 and 11 hearing dates. Those dates were set arbitrarily, because at the time it was unknown as to when the board would be able to meet in person.

Chairman Hutmacher stated that for the board to try to set hearing dates now, it would be not much better than an educated guess. He asked if it would be possible to delay the hearings until the July board meeting.

Mr. McVey said based on the unusual circumstances the board is operating under, he does not find a technical problem with delaying the hearings until July. However, there are three separate applications, and he would prefer to avoid a situation where there are several applications scheduled for hearing at the same meeting. Mr. McVey suggested that the board might want to consider scheduling the R&J, LLC and Schley hearings on one day and the town of Buffalo hearing on another day.

Mr. Gronlund stated that at this time he does not know of any other contested cases scheduled for the July meeting. Staff is currently working on the five-year review of the two Tulare Aquifer matters with a goal of scheduling them for the July meeting, but if, by chance, those needed to be pushed to October it wouldn't be a detriment to the permit holders.

Bruce Ellison, attorney for Dakota Rural Action, requested that the board consider setting a hearing date in July, then seeing where we're at with the Covid-19 virus. He said he hasn't heard anything from the town of Buffalo saying they need this water right away. He commented that the town has seven other wells for 200 people. Mr. Ellison said he would appreciate the board considering putting the hearing off until it might be safe to meet.

Chairman Hutmacher suggested setting the hearings for the July board meeting and scheduling the town of Buffalo hearing last so if two days isn't enough, the hearing can continue into a third day. He also stated that the schedule may need to be changed depending on the status of the pandemic.

Mr. Gronlund said that is an option. A three-day board meeting does present some problems for some of the other board members from time to time. With Covid-19 and the social distancing issues, it may be breaking these applications out into separate days would be best. The problem with that it is not knowing how long each hearing will take. Staff has internally discussed possibly having a special meeting to hold one of the hearings.

Mr. Ellison said he appreciates the recommendation of having set dates for each hearing.

Dusty Ginsbach, attorney for the town of Buffalo, said he agrees with Mr. Ellison regarding holding the hearings on separate dates.

John Taylor, attorney for Schley Farms, said he would be open to exploring alternative ways of holding the hearing, such as through Microsoft Teams or Zoom, if it meant the hearing could be held sooner.

Mr. McVey stated that internally there have been several discussions regarding holding contested cases remotely, and there are some legitimate procedural difficulties to doing that, particularly when exhibits cannot be agreed upon in advance. Unless all of the exhibits are essentially stipulated to, it creates some legal blockages in terms of being able to submit evidence. There are other concerns such as swearing of the oath; the person swearing the oath is supposed to be in the same room as the witness.

Chairman Hutmacher stated that he is not comfortable with holding the hearings remotely.

Mr. Comes asked if some of the board members would be allowed to participate remotely, if unable to attend in person.

Ms. Mines Bailey said in the past, by agreement of the parties, if a board member was unable to attend the hearing, they were allowed to read the transcript so they could vote. She said perhaps for Schley Farms, if by agreement of the parties, those members who could be in Pierre would appear in person and those that could not attend would be able to appear telephonically or remotely through video conferencing.

Chairman Hutmacher said he is not opposed to doing that, but he would not be comfortable holding all of the hearings that way.

Mr. McVey suggested that if the board decides to hold the hearings in this manner, the parties who are planning to introduce evidence should be in Pierre, unless everything is stipulated to and provided to the parties in advance.

Mr. Comes suggested that the parties in the Schley Farms matter, where there seems to be an interest in timeliness, consult and request the hearing officer to issue an order, allowing some of the participants to attend in person in Pierre with the option for others to participate remotely if unable to attend in person.

Mr. Bjork he would be comfortable holding the hearing in this manner, if the legal authority to do so exists, but he is less comfortable with a three-day board meeting.

Mr. McVey said he is more comfortable with board members participating remotely than with the parties being remote. The statutes expressly contemplate public meetings being done in a teleconference format. Mr. McVey said he has legal concerns regarding what would almost be considered trial court matters. It would be prudent to have as many board members as possible present in person, particularly the chairman.

Ms. Dixon said she could be in Pierre for three days if need be, and she also does not have a problem meeting remotely; however, she is opposed to taking testimony over the telephone.

Mr. Freeman said is not opposed to holding the hearing with some present in person and some participating remotely.

Mr. McVey suggested that if the board decides to hold a meeting in this manner, witnesses, documents, exhibits, etc. need to be in Pierre.

Mr. Holzbauer said he is concerned about the nonverbal communication by people being present or not being present. He believes having the witnesses attending in person is very important.

Mr. McVey stated that in the interest of social distancing and having the minimum number of people in the meeting room at the same time, it may be prudent to consider specifically scheduling one hearing each day of the three-day meeting.

Mr. Freeman agreed.

Mr. Ellison suggested that since there seems to be so much uncertainty with the meeting in July, it would be prudent to hold a telephone conference call sometime in early June to see if holding the hearings in July would be realistic for holding public hearings. Holding the hearings on separate days makes it a little easier, but by holding a telephone conference call to discuss the situation in June, the board may determine that the hearings should not be held in July.

The board members agreed to holding a conference call in early June, and to tentatively schedule the hearings for R&J, LLC and Schley Farms, LLP on July 8, possibly carrying over to the morning of July 9, and to schedule the town of Buffalo for hearing on July 9, possibly carrying over to July 10. Only parties and witnesses will be allowed in the meeting room during the time their particular hearing is taking place.

The board agreed to schedule the five-year reviews for the Tulare Aquifer matters for the October meeting.

The board will hold a telephone conference call on June 11 to reassess the situation.

Motion by Freeman, seconded by Bjork, to tentatively set the July board meeting for July 8, 9, and 10. A roll call vote was taken, and the motion carried unanimously.

Mr. Gronlund reported that Governor Noem appointed Bill Larson, Burbank, SD, to the Water Management Board. He fills the vacancy left by Mr. Hoyt's resignation.

Secretary Roberts reported that the Governor reappointed Mr. Freeman, Mr. Hutmacher, and Ms. Dixon to another term on the board.

ADJOURN: Motion by Bjork, seconded by Holzbauer, to adjourn. A roll call vote was taken, and the motion carried unanimously with Bjork, Comes, Freeman, Holzbauer, Dixon and Hutmacher voting aye.

Approved the 8th day of July 2020.

Water Management Board

DRAFT

WATER MANAGEMENT BOARD MEETING
May 6, 2020

Qualifications: wi - well interference wcr - well 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
1904B-1	Douglas Ottema	Whitewood	LA	0.167 cfs	IND	3 dugouts/dams	lf, 2 special
1993-1	Circle R Ranch LLLP	Enning	MD	2.0 cfs	106 acres	Cheyenne River	lf, iq, 1 special
8416-3	Jerome Poeschl	Yankton	CL	1.56 cfs	116 acres	2 wells-Niobrara Aquifer	wi, iq
8418-3	DeSmet School District	DeSmet	KG	0.11 cfs	3 acres	1 well-Vermillion:East Fork	wi, wcr, iq, 1 special
8419-3	Jack Wellnitz	Yale	BD	1.33 cfs	188 acres	1 well-Floyd:East James	wi, iq
8420-3	Vogel Farms PTR	Akaska	FA	0.123 cfs	geothermal	1 well-Inyan Kara	wi, 5 special
8421-3	Albert J Selland & Sons Feedlot	Letcher	SA	0.48 cfs	commercial	3 wells-Dakota Aquifer	wi, 6 special
8422-3	New Fashion Pork	Jackson	MR	0.11 cfs	commercial	1 well-Floyd:East James	wi, 4 special
8423-3	City of Platte	Platte	CM	0.33 cfs	municipal	1 well-Dakota Aquifer	wi, wcr, iq, 1 special
8424-3	Dakota Superior Gilts LLC	Pipestone MN	MY	0.11 cfs	commercial	1 well-Sioux Quartzite	wi, 4 special
8425-3	Orland Ridge Dairy LLC	Winfred	LK	0.33 cfs	commercial	2 wells-Vermillion East Fork: Montrose	wi, wcr, 4 special