

The audio recording for this meeting is available on the South Dakota Boards and Commissions Portal at <http://boardsandcommissions.sd.gov/Meetings.aspx?BoardID=67>

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

June 18, 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: Charles McGuigan, Steve Blair, and Holly Farris, Attorney General's Office; Stacy Titus and Carla Cushman, city of Rapid City; Ross and Fern Johnson, Rapid City; Jim Wendte, Waste Management Program, Mike Lees, Minerals and Mining Program.

APPROVAL OF MINUTES FROM MAY 21, 2020: Chairman Hagg pointed out that the following deletion shown by overstrike is needed in the last sentence on page 15 and continuing to page 16:

He asked if the ~~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.

Motion by Morris, seconded by Blumhardt, to approve the minutes, as amended, from the May 21, 2020, Board of Minerals and Environment meeting. A roll call vote was taken, and the motion carried unanimously.

Mr. Morris asked that the minutes for today's meeting reflect that the court reporter's transcript is the official record of the hearing regarding the petition to reverse or modify Rapid City Municipal Solid Waste Facility Permit Number 20-01, which was held on May 21, 2020.

CONSIDER HEARING CHAIRMAN'S DECISION REGARDING PETITION TO REVERSE OR MODIFY RAPID CITY MUNICIPAL SOLID WASTE FACILITY PERMIT NUMBER 20-01 AND PETITION FOR EQUITABLE RELIEF: Chairman Hagg stated that following the hearing, Hearing Chairman Morris submitted an Order of Dismissal to all of the parties and the board members.

Chairman Hagg asked the parties to identify themselves if they were present. Fern and Ross Johnson, petitioners, Carla Cushman and Stacey Titus, city of Rapid City, and Steve Blair, Attorney General's Office were present on the conference call.

Hearing Chairman Morris thanked the parties in this matter.

Hearing Chairman Morris moved to approve his Order of Dismissal dated June 15, 2020, seconded by Englund.

Ms. Johnson stated that she filed her objections to Hearing Chairman Morris' Final Decision and Dismissal of Order for review and consideration by the other board members.

Ms. Cushman stated that the city had nothing to add.

Mr. Blair stated that the Department of Environment and Natural Resources disagrees with the objections filed by the Johnsons, and the Department has no objections to the proposed decision of Hearing Chairman Morris.

Chairman Hagg requested board discussion regarding the motion.

Mr. Karpen asked if the draft permit published in the newspapers was the same, word for word, as the final permit, or were there changes in it?

Hearing Chairman Morris stated that Johnson Exhibit A was a copy of the notice and draft permit. He said his understanding is that once the final permit was issued, there were some changes made between the publication of the initial draft and the issuance of the final permit.

Mr. Karpen said if the publications were different, the clock should be reset because there is no other recourse for the anyone that would object to the permit. Mr. Karpen referred to the draft minutes from the May 21, 2020, board hearing on this matter. On the top of page 10, the minutes state, "The regulation does not require that post-permit actions be discussed in any notice to the public." Mr. Karpen stated that it would be fair to everyone involved that the final permit be available to the public before board approval is granted.

On the top of page 8, the minutes state, "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." Mr. Karpen said he believes that gives the board some latitude, so he will be voting "no" on the motion. He recommended in the future, if this is the process the board is going to use, that all cases be contested because the public does not know what the final permit is actually going to say in the end.

Hearing Chairman Morris stated that the board is only given the jurisdiction to act on the authority by the legislature, and if the board is given rule-making authority, the authority the board is given through that process. The requirement of the statute pertaining to the permit is clear. Once the notice is published there are 30 days in which to file a petition for a contested hearing, and that was not done by the Johnsons. So, without the filing for a contested hearing, this board cannot act with jurisdiction. He noted that Mr. Karpen is right; under what appears to be the present law, if anyone wants to be actively involved in or being notified of any changes to the permit, they must file for a contested case hearing.

Mr. Scheetz stated that when considering the facts, it is difficult for him not to agree with the motion. However, one of the questions he had is whether there is any other recourse for the Johnsons to bring this issue to the front so that there is a fair opportunity for the landfill, or anyone else, to rectify not only the issues, but also some of the vagueness regarding a draft permit versus a final permit.

Hearing Chairman Morris said he believes the Johnsons have alternative avenues available to them. He suggested the Johnsons, or anyone placed in this situation, seek competent legal advice on the issues and to address the options that are available to them. He noted that ultimately there has to be some finality to a permitting process because the applicant for the permit has to abide by the permit and has to have knowledge of what is required of them and the conditions.

Mr. Scheetz said he believes rules should to be modified to make the process clear.

Mr. Karpen stated that once changes are made to the draft permit, the process should start over. He suggested that in the future all permit applications become contested cases.

Chairman Hagg stated that the law is what it is, and he does not believe the board is in a position to change the statutes.

A roll call vote was taken on the motion to adopt Hearing Chairman Morris' Order of Dismissal, and the motion carried with Blumhardt, Englund, Greenfield, Landguth, Peterson, Scheetz, Morris, and Hagg voting aye, and Karpen voting no.

Chairman Hagg asked Mr. Blair to prepare the board's Final Decision and Order of Dismissal and submit it to Chairman Hagg to sign.

PUBLIC COMMENT PERIOD: Ms. Johnson offered comments regarding 34A-6-1.13, Notice and opportunity for hearing--Issuance of permit--Contested cases--Grounds for denial and 34A-6-1.14, Promulgation of rules specifying procedure for permit issuance, amendment, suspension, revocation, and reinstatement--Recommendation of secretary--Notice and hearing.

NEXT MEETING: The next meeting is scheduled for July 16, 2020.

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


Secretary

7/08/20
Date


Witness

7/8/20
Date