



SouthDakota

Legislative Research Council

Regional Watershed Advisory Task Force Minutes

**First Meeting
2014 Interim
July 24, 2014**

**Room 413
State Capitol
Pierre, South Dakota**

The first meeting of the interim Regional Watershed Advisory Task Force was called to order by Representative Brian Gosch, Chair, at 9:00 a.m. (CDT), on Thursday, July 24, 2014, in Room 413 in the State Capitol in Pierre, South Dakota.

A quorum was determined with the following members present: Representatives Brian Gosch (Chair), Dennis Feickert, Leslie Heinemann, and Spencer Hawley; Senators Jason Frerichs, Tom Jones, Mike Vehle (Vice Chair), and Jim White; and Dennis Duncan, Mike Jaspers, Paul Symens, and Mike Traxinger. Members excused were: George Vandell and Kim Vanneman. Staff members present included David Ortbahn, Acting Chief Research Analyst, Roxanne Hammond, Legislative Attorney, and Kris Schneider, Senior Legislative Secretary.

All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council (LRC). This meeting was recorded by South Dakota Public Broadcasting. The committee documents and archived recording are available at the LRC website at <http://legis.sd.gov> under "Interim – Agendas, Minutes and Committee Documents." For the purpose of continuity, these minutes are not necessarily in chronological order.

Minutes

MR. DENNIS DUNCAN MOVED, SECONDED BY MR. PAUL SYMENS, TO APPROVE THE MINUTES OF DECEMBER 2, 2013. The motion prevailed unanimously on a voice vote.

Subcommittee Reports

Mediation and Dispute Resolution Subcommittee

Mr. Duncan, Chair, Senator Jim White, and Mr. Mike Traxinger reported on their subcommittee conference call relating to mediation and dispute resolution. They discussed whether mediation should be placed under the Department of Agriculture (DOA) or the Department of Environment and Natural Resources (DENR). Many of the drainage matters are agriculturally related; however there is a need for technical information and assistance for the mediator. It was also suggested that the Office of Hearing Examiners may be able to provide mediation and hire experts. It is important that the mediator have a background on drainage issues.

The subcommittee discussed if there should be the ability to enjoin the drainage construction. If the task force decides they would like to have this capability, statutes would have to be changed. Mr. Duncan stated that if a permit system is established, that could be a trigger for

action to be started. Legislation may have to be written to give the mediator the right to enjoin the project.

Third party intervention was also discussed. If it is allowed, it may bog down the process. If the issue goes to litigation, other parties would have the right to intervene, including townships and counties.

The issue of mediation documents being private or publically available was discussed. There is some benefit in allowing others access to the records of prior mediation cases, but also problems with confidentiality of some of the information considered during the mediation.

It was suggested that a filing fee for a drainage permit could be used to help cover mediation costs. It may be helpful to hear from the Department of Agriculture on their mediation process.

Public Testimony on Mediation and Dispute Resolution

Representative Jim Peterson, District 4, Revillo, represents four counties where extensive tiling has been done. Two of the counties have permitting processes and it does work. They are required to obtain permission to cross roads and from downstream landowners. He would like to see the permitting process under the Department of Agriculture.

Mr. Matt Olson, Centerville, Legal Counsel, Vermillion Basin Water Development District, and Turner County States Attorney, stated the entire watershed needs to follow the same principles. Enforcement of a stay would be an issue as he has seen neighbors use it as a delay tactic. There is potential for abuse and the task force needs to consider how to protect both parties. Turner County does not have a drainage ordinance and tiling is booming. The counties have to deal with drainage into road ditches and they should be allowed to intervene if necessary. Mr. Olson feels that the tiling should be recorded and without a permitting process, it will not happen.

Mr. Jeff Albrecht, Doland, Spink County Commissioner, testifying on behalf of himself, stated that there needs to be a permit system. It will decrease the number of disputes. He asked the task force to consider what to do with silent "out-of-state" landowners downstream.

Chair Gosch asked the subcommittee to obtain more information on the cost of the mediation program in the Department of Agriculture and compare it to the Office of Hearing Examiners.

Standardized Disclosure of New Drainage Projects, Tracking of Drainage and Infrastructure Activity Subcommittee

Senator Mike Vehle, Chair, Representative Leslie Heinemann, Senator Tom Jones, and Mr. George Vandel met and discussed the standardized disclosure and tracking issues. Draft legislation was distributed for discussion purposes (**Documents 1, 2, and 3**).

Document 1 – *An Act to provide for a uniform county drainage permit application form.* Senator Vehle noted on page 1, line 6, states "may adopt". It is not mandatory. The draft bill sets forth the requirements of the permit and does allow delegation of authority.

Document 2 – *An Act to provide for the establishment of a statewide drainage tracking system.* For discussion purposes, this draft bill sets forth DENR as the agency responsible for a statewide drainage tracking system. DENR would maintain the records for the public, this is not a permit. It provides for a process to submit the information to DENR if there is no county involved.

Document 3 – *An Act to establish a technical assistance program for counties in matters relating to drainage regulation.* This draft bill provides technical assistance to counties from DENR.

Issues discussed regarding the draft bills included the need for a fiscal note on the permitting process; how the tracking of drain tile could be similar to other underground utilities; a detailed map versus general map filed as part of the permit process in Document 1, page 2, line 17 (3); a provision for filing an amendment to the permit process; review of the language used in Document 1 on page 3, line 2, (11) regarding "approval" by other entities; clarify "technical assistance" in Document 3; the necessity of a wetland determination in Document 1, page 3, line 4 (12); moving forward with councils instead of counties; mandating the legislation instead of making it optional; and the value of the tracking system and whether all of the information should be private or public.

Public Testimony on Standardized Disclosure of New Drainage Projects, Tracking of Drainage and Infrastructure Activity

Mr. Jay Gilbertson, Brookings, Manager, East Dakota Water Management District, spoke in support of the proposed changes thus far. He would like to know what it is going to cost. He stated the current \$100 fee is not enough and questioned whether the proposed \$500 maximum would be enough.

Representative Peterson, District 4, Revillo, stated that Deuel County does require a wetland determination but it has no impact on the permit. Commercial tilers do a complete GPS grid of the land about every twenty feet and a copy is provided to the county commissioners. Minnehaha County does keep a file of all the tiling in the county; however, he does not think it is open to the public. He also suggested that it should not be too technical to exclude farmers from doing their own work. He is concerned with the liability issue for counties.

Mr. Michael Elsen, Helca, Farmer, asked that a deadline be put in place for the state or county to get the permit back. He thinks Document 3 has a lot of NRCS terminology that is not necessary. He questioned how old drainage that is not recorded will be handled.

Mr. Albrecht, Doland, Spink County Commissioner, explained the turnaround timeframe raised by Mr. Elsen. He explained that permits are granted almost immediately, but if there is a dispute it goes to a hearing and they are limited on meeting dates.

Mr. Paul Lepisto, Pierre, Izaak Walton League, liked the uniformity on this issue. He believes the information in Document 2, page 2, line 22 (12) is very important and should remain in the bill.

Mr. Matt McCaulley, Sioux Falls, South Dakota Corn Growers, distributed a handout entitled "Legislative Concepts" (**Document 4**) which showed the issues various agricultural groups agree on. He stated that all of the parties need to be talking. He questioned who should be doing the decision making as water does not arbitrarily stop at county boundaries. He supports moving in the direction of watershed districts. Standardized disclosure is a legitimate issue.

Mr. Lorin Pankratz, Sioux Falls, representing the South Dakota Soybean Association and County Commissioners, commented in regards to the permitting process, uniformity is almost impossible. The disclosure part makes sense. The counties do not have the technical tools available but are willing to help in any way they can to figure out funding for the assistance.

Mr. John Maursetter, Madison, Lake County Environmental and Code Enforcer, stated that Document 1 is very similar to their drainage ordinance and it does force communication between neighbors by requiring signatures. The process is fairly streamlined and approval usually takes a day or two. The technical support is important because they do not have a good scientific basis to say there will not be any damage downstream. They need resources for someone to review the permits. Their fee is currently \$50 for a permit. They have aerial photographs of the drainage but do not have the resources to digitalize all of the records. He would suggest not having a fee to access the records as you want to encourage them to seek out information before starting a project. He suggested increasing the permitting fee to help offset the cost of technical assistance.

Chair Gosch asked the subcommittee to consider allowing the watershed districts to have the authority to do the permitting versus the county doing the permitting. He would like to have input from DENR and cost estimates. He would also like a clearer definition of a "detailed map" in Document 1, page 2, line 17 (3) and a requirement for a general map in the beginning and a detailed map upon completion. He would also like them to work on the language in Document 1 regarding the approval by other entities and the wetland determination necessity.

Water Management Entities and Districts, Water Management Assets, and Funding of Best Practices Research Subcommittee

Ms. Kim Vanneman, Chair, Senator Jason Frerichs, Representative Spencer Hawley, and Mr. Mike Jaspers met via conference call to discuss the water management entities and districts, water management assets, and funding of best practices research. Mr. Jaspers distributed a map entitled "Hydrologic Subbasins in South Dakota" (**Document 5**). The subcommittee discussed the possibility of moving from a county watershed system to basin natural resources councils as presented by Ms. Angela Ehlers at the December 2013 meeting. They see it as a positive to move in this direction as water does not stop at the county lines. It would provide more consistency within a watershed.

The water management council would be formed within the conservation districts and could work with the current water development districts. They are not suggesting any statutory changes to the districts. It is more of a regional focus.

Mr. Jaspers stated the taxing authority for the districts/councils would need to be addressed along with initial funding due to the tax/assessment process.

The subcommittee supports having statewide permits and databases because it will provide consistency within a watershed.

It was suggested that some of the basins could be subdivided and some could be excluded as they are primarily in other states. A discussion was held regarding the different criteria of council members.

**Public Testimony on
Water Management Entities and Districts,
Water Management Assets, and Funding of Best Practices Research**

Mr. Brad Preheim, Centerville, Manager, Vermillion Basin Water Development District, stated that there are still lots of details to work out and it is still not solving the problem they have that they are getting massive amounts of water at the end of the basin. He would like to see funding authority, draining down ponds or retention ponds, cleaning up debris, building dikes – things that would slow down the water. They are willing to pay their fair share to fix the problem.

Mr. Gilbertson, Brookings, Manager, East Dakota Water Management District, stated that they support the idea of councils and suggested eleven to sixteen areas are considered. The task force needs to review the Red River and Little Minnesota basins since those basins are small in the state, and the Black Hills area as the watershed in the Black Hills does not follow the ground water. He also commented that the task force needs to continue discussing how the votes of the council should be divided up.

Ms. Angela Ehlers, Presho, Executive Director, South Dakota Association of Conservation Districts, stated she had initially put together the concept of councils. She suggested the representatives should be a registered voter in the conservation district. She thought subbasins would be good but the larger entity should still be included. The decision making authority regarding permits needs to be addressed.

Mr. Wayne Smith, Huron, South Dakota Farm Bureau, testified in support of the plan that been proposed. He resides in Moody County and that county has done an excellent job. It will not be easy to give up control. Standardized disclosure is a good idea.

Chair Gosch asked the subcommittee to look at the idea of merging the Red and Little Minnesota basins and consider not breaking up the James and Big Sioux basins. He would like to see legislation drafted for discussion purposes.

Retention Pond Concept Subcommittee

Representative Gosch, Chair, Representative Dennis Feickert, and Mr. Symens met to discuss the retention pond concept. Depending on funding available and if the new councils are created and have taxing authority, the state could do a retention pond pilot project. The subcommittee is planning on meeting again on August 14 and would like to find five potential locations for a test pilot on the retention ponds. The subcommittee is open to having the Department of Transportation, Department of Agriculture, and Department of Game, Fish and Parks coordinate an effort targeted to an area that is close to a state highway that routinely goes under water and causes the highway to be rebuilt or causes disruption to tourism and agriculture.

Mr. Symens noted in the 1930's WPA dams were built and perhaps some of those could be cleaned out so they can retain more water.

Public Testimony on Retention Pond Concept

Ms. Ehlers, Presho, Executive Director, South Dakota Association of Conservation Districts, commented that in the late 1990's she had worked with FEMA and U.S. Fish and Wildlife on dams. There are fewer regulations that need to be followed on smaller dam projects than larger ones.

Mr. Dave Bartel, Huron, James River Water Development District, stated that they are in the dam building business, primarily repairing. Their board just authorized a change from a 50% cost share up to a maximum of 75%. The cost of engineering and earth moving is cost prohibitive and would like to have funding to help with the engineering costs.

Mr. Elsen, Helca, Farmer, commented that the new farm bill includes a mitigation banking plan which might be a potential funding source.

Mr. Gilbertson, Brookings, Manager, East Dakota Water Management District, suggested the upper Minnesota watershed as a potential site in the state to consider, perhaps LaBolt Lake. Chair Gosch asked that he suggest an exact location.

Representative Heinemann supports this idea and stated that he has personally built two dams and is currently working with Dr. Chris Hayes on building a bio reactor.

Chair Gosch stated that the next subcommittee meeting will be held in Pierre on August 14th in the Capitol.

Other Comments

Senator Frerichs distributed two handouts entitled "Clean Water Act Exclusions and Exemptions Continue for Agriculture" and "Proposed 'Definition of Waters of the United States Under the Clean Water Act' 40 CFR 230.3" (**Documents 6 and 7**). He stated that this needs to be monitored and the actions taken could affect what we are doing.

It was suggested to have the Commissioner of School and Public Lands attend a meeting to provide an update on their plan of repairing dams and their funding mechanism.

Next Meeting Date

The next meeting of the task force will be held sometime in September. A date will be selected and posted on the LRC website.

Adjourn

REPRESENTATIVE HEINEMANN MOVED, SECONDED BY REPRESENTATIVE FEICKERT, THAT THE MEETING BE ADJOURNED. Motion prevailed on a voice vote.

The chair adjourned the meeting at 2:31 p.m.

