

MINUTES

Regulation of Non-Meandered Waters



Representative Lee Qualm, Chair
Senator Brock Greenfield, Vice Chair

**Fourth Meeting, 2017 Interim
Friday, June 02, 2017**

**Room 414 – State Capitol
Pierre, SD**

The fourth meeting of the Regulation of Non-Meandered Waters Interim Study was called to order by Representative Lee Qualm at 9:30 a.m. in Room 414 of the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering roll call: Representatives Hugh Bartels, Mary Duvall, Spencer Gosch, Spencer Hawley, Steven McCleerey, Herman Otten, Larry Rhoden, Burt Tulson; Senators Gary Cammack, Jason Frerichs, Craig Kennedy, Joshua Klumb, Jim White; Senator Brock Greenfield, Vice Chair; and Representative Lee Qualm, Chair.

Staff members present include Amanda Jacobs, Senior Research Analyst; Jessica LaMie, Legislative Attorney; Lucas Martin, Fiscal Analyst; Fred Baatz, Principal Research Analyst; and Paul Giovanetti, Senior Legislative Secretary.

***NOTE:** For purpose of continuity, the following minutes are not necessarily in chronological order. Also, all referenced documents distributed at the meeting are attached to the original minutes on file in the Legislative Research Council office. This meeting was web cast live. The archived web cast is available at the LRC web site at <http://www.sdLegislature.gov/>.*

Approval of Minutes

A MOTION WAS MADE BY REPRESENTATIVE DUVALL, SECONDED BY SENATOR GREENFIELD TO AMEND THE MAY 24, 2017 MINUTES AS FOLLOWS: *On Page 1, Paragraph 9 to read: "Mr. McCaulley reported the South Dakota Farm Bureau is in support of the draft legislation."* The motion prevailed on a voice vote.

A MOTION WAS MADE BY SENATOR GREENFIELD, SECONDED BY REPRESENTATIVE DUVALL, TO APPROVE THE MINUTES OF THE MAY 24, 2017, REGULATION OF NON-MEANDERED WATERS INTERIM STUDY COMMITTEE MEETING AS AMENDED. The motion prevailed on a voice vote.

Introductions and Chair's Opening Remarks

Senator Brock Greenfield stated he is hopeful that today the committee can come to a fair and well-reasoned proposal for a special session. The goal of this committee is to provide clarity and a path forward. There are many ideas coming forward and he hopes the committee will move forward with wisdom, clarity, and do what is best for the people of South Dakota

Representative Lee Qualm stated this issue can be corrected through time with legislation during the annual session. This committee needs to come forward with legislation with the potential to pass during a special session, which will be the starting point. Through the legislative process the discussion can continue to move forward.

Discussion of Draft Legislation

Representative Qualm stated that the committee will discuss the proposed legislation presented at the last meeting and any proposed amendments ([Document #1](#)).

A MOTION WAS MADE BY SENATOR GREENFIELD, SECONDED BY REPRESENTATIVE DUVALL, TO AMEND THE DRAFT BILL WITH AMENDMENT z0046jk ([Document #2](#)).

Senator Greenfield reviewed the proposed amendment with the committee.

Senator Craig Kennedy asked how the prohibition against compensation to landowners to fish closed waters as proposed in the amendment would be enforced, and recommended a penalty for the offense. Senator Greenfield replied that the penalty for landowners receiving compensation to allow fishing of closed waters would be a Class 1 misdemeanor.

Representative Spencer Hawley introduced the following amendments to the draft legislation:

On page 2, line 6, of the draft bill, before ";" insert "except a river or stream that is not a meandered lake".

On page 4, line 10, after "property" insert "and whereby any member of the public may petition the commission to open and to allow the public to recreationally use water closed by the owner pursuant to section 6 of this Act".

Representative Hawley explained the details of the amendments to the committee.

Representative Burt Tulson introduced the following amendment to the draft legislation:

On page 3, line 9, delete "and" and insert "or".

Representative Tulson explained the details of the amendment to the committee.

Representative Hugh Bartels introduced the following amendments to the draft legislation:

On page 3, line 3, after "." insert "All expenses incurred pursuant to this section shall be the responsibility of the landowner." explained the details of the amendment to the committee.

On page 5, line 17, after "." insert "All public roadways, public rights-of-way, or public lands underlying a nonmeandered lake shall be open to the general public for the purpose of walking, wading, or standing.".

Representative Bartels explained the details of the amendments to the committee.

Senator Greenfield stated that the committee would benefit from public testimony on the proposed amendments to the draft legislation.

Public Testimony on Proposed Amendments to Draft Legislation

Mr. Nathan Sanderson, Director of Policy and Operations, Governor's Office, stated that the Governor's Office would be supportive of Senator Greenfield's amendment. In response to Representative Hawley's first amendment the definition of lake is in ARSD 74:51:01:01 and he believed the definition in the proposed legislation is clear. He stated Representative Bartels' amendment for walking and wading would be viewed as a friendly amendment, and the intent was for the expenses for signage would be incurred by landowners but the signs would be made by the Department of Game, Fish and Parks (GFP).

Mr. Bob Whitmyre, landowner, Webster, stated that signage is state property and there should be a penalty for individuals who remove the signs.

Mr. Kelly Hepler, Secretary, Department of Game, Fish and Parks, stated a penalty for the removal of signs is currently in existing law.

Mr. Jeremiah Murphy, SD Stockgrowers Association, Rapid City, stated that the legislation concerns private property rights. The penalty on commercialization is taking away some of those rights. The stockgrowers feel that landowners should not have to appeal to have their land closed. He discussed that the public trust doctrine has established a common practice in hunting rights. The path of the proposed legislation deviates from the way hunting is done and establishes a different model for fishing.

Ms. Nancy Hilding, Prairie Hills Audubon Society, Black Hawk, stated the organization disagrees with landowners having the power to restrict access to water over their land, this should be given to the Game, Fish and Parks Commission or the Water Management Board through the rule-making process.

Mr. Scott VanderWal, SD Farm Bureau, Volga, stated he was concerned about a penalty for commercialization and feels landowners would lose the ability to create a living off of their land.

Senator Greenfield stated that to his knowledge there are no plans to commercialize the waters, and asked if the amendment was changed if the Farm Bureau could support the bill. Mr. VanderWal stated he is here to support the overall bill, with regards to the amendment he will be required to go back to the Farm Bureau to confirm their support.

Mr. Jack Otta, Lake Sinai Lake Association, Volga, expressed concern regarding equal protection laws under the 14th Amendment of the United States Constitution and if the legislation passed it would eventually end up in the United States Supreme Court.

Mr. Lorin Pankratz, SD Soybean Association, Sioux Falls, stated the association is concerned with Representative Tulson's amendment because it would change the list in Section 8 of the draft legislation. In regards to Representative Hawley's amendment, there would be legislative oversight through Senator Greenfield's amendment and the petition process would not be needed.

Mr. Lorin Pankratz, SD County Commissioners Association, Sioux Falls, stated the association is concerned with Representative Bartels' amendment because roads could have been closed for safety reasons and if someone is injured then the county could be held liable.

Representative Herman Otten asked if wading in water had an inherent risk. Mr. Pankratz stated it does. Representative Otten stated the bill limits a landowner's liability and asked if the draft should include the local government. Mr. Pankratz stated the inclusion of local governments to the Bartels' amendment would ease the association's concerns.

Ms. Brenda Forman, SD Association Cooperative, Pierre stated the association is supportive of Senator Greenfield's amendment. She stated the committee should allow time for the process to work before adding a petition process and did not support Representatives Hawley's amendment. GFP should produce uniform signs for all property owners but the cost should be on the landowners.

Ms. Donna Bumann, The Big Box and Lake Preston Hotel, Lake Preston, stated unless the committee and Legislature acts she will not be in business in two years. She has 13 rooms and over Memorial Day weekend she could not fill them. She is supportive of the amendments because they acknowledge the concerns of the citizens. She feels the sportsmen need to have an appeals process down the road.

Mr. Matt McCaulley, Lawyer, Sioux Falls, stated with Senator Greenfield's amendment and the removal of Section 3 the legislation is no longer the Five Open Plan. With the provision of non-commercialization, the landowners are still supportive of the bill. Representative Tulson's amendment to Section 7, would change the list of lakes in Section 8, and the landowners would urge the committee to resist the amendment. Representative Bartels' amendment is a good amendment, but there is still the concern regarding liability.

Representative Spencer Gosch asked how the landowners can be supportive of preventing commercial fishing. Mr. McCaulley replied the provision is consistent with the plan to encourage relationships between the State and landowners.

Representative Hawley stated that Section 3 was hard to understand and to explain to the public and asked what the ramifications are if Section 3 is taken out. Mr. McCaulley replied that Section 3 would have put into law the current practice for open meandered lakes.

Senator Jason Frerichs asked for clarification on the management of non-meandered water bodies. Mr. McCaulley stated that Section 5 is needed for all meandered and non-meandered lakes and Senator Greenfield's amendment provides clarity between meandered and non-meandered lakes.

Discussion of Draft Legislation

Senator Kennedy introduced Draft Legislation #53 ([Document #3](#)) to the committee and explained the differences between Draft #53 and Draft #46.

Representative Gosch asked if recreational use of water is a right or privilege. Mr. McCaulley stated the law is clear that hunting and fishing are a privilege because a license from the state is required. The protection of property is a right granted in the Federal and State Constitution.

Senator Kennedy stated it is up to the Legislature to determine how the water is used, and Draft #46 gives that power to private property owners. Mr. McCaulley replied this is an area that they would not agree.

Representative Rhoden asked for a member of the Office of the Attorney General to testify if Draft #46 is an unlawful delegation of a public trust.

Mr. Charlie McGuigan, Chief Deputy, Attorney General's Office, stated that the Attorney General's Office cannot say if a piece of legislation is legal or not legal. The Attorney General's Office is prepared to defend Draft #46.

Representative Tulson asked if the Office of the Attorney General would be willing to defend Draft #53. Mr. McGuigan stated that state law requires the Office of the Attorney General to defend anything passed by the Legislature.

Committee Action on Draft Legislation

A SUBSTITUTE MOTION WAS MADE BY SENATOR KENNEDY, SECONDED BY REPRESENTATIVE HAWLEY, TO ADOPT DRAFT 53. The motion failed on a roll call vote with 5 members voting AYE, 10 members voting NAY. Those voting AYE: Hawley, Otten, Tulson, Kennedy, and White. Those voting NAY: Bartels, Duvall, Gosch, McCleerey, Rhoden, Cammack, Frerichs, Klumb, Greenfield, and Qualm.

THE ROLL WAS CALLED ON THE PREVIOUS MOTION TO ADOPT z0046jk. The motion passed on a roll call vote with 15 members voting AYE. Those voting AYE: Bartels, Duvall, Gosch, Hawley, McCleerey, Otten, Rhoden, Tulson, Cammack, Frerichs, Kennedy, Klumb, White, Greenfield, and Qualm.

A MOTION WAS MADE BY REPRESENTATIVE HAWLEY, SECONDED BY SENATOR WHITE, TO AMEND THE DRAFT BILL AS FOLLOWS: *On page 4, line 10, after "property" insert "and whereby any member of the public may petition the commission to open and to allow the public to recreationally use water closed by the owner pursuant to section 6 of this Act"*. The motion failed on a roll call vote with 5 members voting AYE, 10 members voting NAY. Those voting AYE: Hawley, Otten, Tulson, Kennedy, and White. Those voting NAY: Bartels, Duvall, Gosch, McCleerey, Rhoden, Cammack, Frerichs, Klumb, Greenfield, and Qualm.

Senator Greenfield discussed the removal of Reetz Lake and Highway 81 West from Section 8 of the draft legislation and opened the hearing for public testimony.

Public Testimony on Section 8 of Draft #46

Mr. Otta stated Highway 81 West has no public access and parking is not allowed on that side of the road. The water of Highway 81 West covers private property and should not be included in Section 8.

Secretary Hepler stated that both these lakes, Reetz Lake and Highway 81 West could remain on the list but even if removed from Section 8 further discussions would continue to allow the GFP to develop access to these lakes in the future.

Mr. Tim Vanderpan, Landowner, Harrisburg, stated the state currently is storing water on his property. The landowners have lost the ability to gain income from their property because it is flooded. The committee's inclusion of Highway 81 West is a taking of private property rights. The stocking of the lake was done by Game, Fish, and Parks without the consent of the landowners and recreational use is encouraged by the conservation officers. He urged the committee not to trade recreational use over private property rights.

Representative Otten asked if GFP is currently in active conversations with the landowners on Highway 81 West to develop lake access. Secretary Hepler replied that he has not begun conversations with the landowners. Mr. Sanderson recommended if Highway 81 West is taken off the list then Highway 81 East should also be taken off the list since neither qualify in the criteria contained in Section 7.

Representative Hawley asked if there is public access to Highway 81 East. Mr. Sanderson replied that on every lake the committee would find landowners that do not want public access to be granted. In response to Highway 81 East and West, the two lakes are contained in the same basin with Highway 81 going between the two. There is still legal access to the basin through meandered bodies of waters. Regarding Reetz Lake, 95% of the property under the lake is owned by private property owners however, the department has stocked this as a trophy fishing lake.

Committee Action on Draft Legislation

A MOTION WAS MADE BY REPRESENTATIVE RHODEN, SECONDED BY SENATOR FRERICHS, TO AMEND THE DRAFT BILL WITH AMENDMENT Z0046jm ([Document #4](#)). The motion passed on a roll call vote with 9 members voting AYE, 6 members voting NAY. Those voting AYE: Duvall, Gosch, McCleerey, Rhoden, Cammack, Frerichs, Klumb, Greenfield, and Qualm. Those voting NAY: Bartels, Hawley, Otten, Tulson, Kennedy, and White.

A MOTION WAS MADE BY REPRESENTATIVE OTTEN, SECONDED BY REPRESENTATIVE HAWLEY, TO AMEND THE DRAFT BILL WITH AMENDMENT Z0046jl ([Document #5](#)).

Representative Hawley requested a friendly amendment to the proposed amendment to have the date changed to "July 1, 2020" since the "March 6, 2020" date would require an emergency clause and two-thirds vote. The amendment was agreed to by the prime sponsor of the amendment.

A SUBSTITUTE MOTION WAS MADE BY REPRESENTATIVE RHODEN, SECONDED BY REPRESENTATIVE DUVALL, TO AMEND THE PREVIOUS AMENDMENT: Delete "2020" and insert "2021". The motion passed on a roll call vote with 9 members voting AYE, 6 members voting NAY. Those voting AYE: Bartels, Duvall, Hawley, Otten, Rhoden, Cammack, Kennedy, Greenfield, and Qualm. Those voting NAY: Gosch, McCleerey, Tulson, Frerichs, Klumb, and White.

THE ROLL WAS CALLED ON THE PREVIOUS MOTION TO ADOPT AMENDMENT Z0046jl AS AMENDED. The motion passed on a roll call vote with 9 members voting AYE, 6 members voting NAY. Those voting AYE: Bartels, Gosch, Hawley, Rhoden, Cammack, Frerichs, Klumb, Greenfield, and Qualm. Those voting NAY: Duvall, McCleerey, Otten, Tulson, Kennedy, and White.

A MOTION WAS MADE BY REPRESENTATIVE RHODEN, SECONDED BY REPRESENTATIVE McCLEEREY TO ADOPT DRAFT LEGISLATION #46 AS AMENDED ([Document #6](#)). The motion passed on a roll call vote with 13 members voting AYE, 2 members voting NAY. Those voting AYE: Bartels, Duvall, Gosch, Hawley, McCleerey, Otten, Rhoden, Cammack, Frerichs, Klumb, White, Greenfield, and Qualm. Those voting NAY: Tulson, and Kennedy.

Adjourn

A MOTION WAS MADE BY REPRESENTATIVE DUVALL, SECONDED BY REPRESENTATIVE RHODEN, THAT THE REGULATION OF NON-MEANDERED WATERS STUDY COMMITTEE MEETING BE ADJOURNED. The motion prevailed on a voice vote.

The committee adjourned at 3:00 PM.