Minutes of the
Board of Minerals and Environment Meeting
Matthew Environmental Education and Training Center
523 East Capitol Avenue
Pierre, South Dakota

April 17, 2014
10:00 a. m. CDT

CALL TO ORDER: Chairman Sweetman called the meeting to order at 10:00 a.m. CDT. Secretary Linda Hilde declared that a quorum was present.

BOARD MEMBERS PRESENT: Richard C. Sweetman, Linda Hilde, Glenn Blumhardt, Dennis Landguth, Doyle Karpen, Rex Hagg, Pete Bullene, Bob Morris.

BOARD MEMBERS ABSENT: Lee McCahren.

OTHERS PRESENT: See attached attendance sheet.

APPROVAL OF MINUTES FROM FEBRUARY 20, 2014: Bob Morris pointed out that on page 2, in the second sentence of the second to last paragraph, "Mr. Hayes" should be changed to "Bob Morris."

Motion by Morris, seconded by Hagg, to approve the minutes from the February 20, 2014, BME meeting, as amended. Motion carried.

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

Motion by Blumhardt, seconded by Landguth, to accept the staff recommendation as listed on the attached matrix sheet. Motion carried.

PUBLIC HEARING TO CONSIDER PROPOSED REVISIONS TO ARSD 74:09, PROCEDURES-BOARD OF MINERALS AND ENVIRONMENT: Chairman Sweetman opened the hearing at 10:05 a.m.

The purpose of the hearing was to consider proposed amendments to ARSD 74:09 by adding sections 74:09:01:20 and 74:09:01:21.

Kyrik Rombough, DENR Air Quality Program, reported that Notice of the hearing was published in the following 11 daily newspapers: Madison Daily Leader on March 14, 2014, Yankton Daily Press, Rapid City Journal, Black Hills Pioneer, Public Opinion, and Plainsman on March 15, 2014, the Argus Leader on March 16, 2014, The Daily Republic, Capital Journal,

Brookings Register, and Aberdeen American News on March 17, 2014. Affidavits of Publication were received from each newspaper and are filed at DENR.

The public notice was mailed to approximately 150 interest parties, which includes environmental groups and industry; and it was emailed to approximately 170 interested parties, which also includes environmental groups and industry.

Notice of the public hearing was posted on DENR's website and the state public notices website. No written comments were submitted as a result of the public notice.

The proposed rules were sent to the Bureau of Finance and Management and to the Legislative Research Council (LRC). LRC reviewed and approved the proposed revisions for form, style, and legality. LRC's changes were incorporated into the final version of the proposed rules.

Mr. Rombough offered a PowerPoint presentation discussing the proposed revisions.

Section 110(a)(l) and (2) of the Clean Air Act requires each state to review its State Implementation Plan (SIP) each time EPA revises or adds a criteria air pollutant national ambient air quality standard. Following the change to the standard, the state has a three-year period to update the state's plan and implement the revised regulations. At the end of the three-year period, the state is required to certify the infrastructure of its plan is equivalent to EPA's regulations and is meeting the requirements of the Clean Air Act.

Recently, EPA determined that many of the State Implementation Plans, including South Dakota's, relating to Section 128 of the Clean Air Act requirement were not sufficient. Section 128 of the Clean Air Act specifies the requirements for a state board or body that approves air quality permits or enforcement orders.

EPA's review of the certifications indicated two items were not sufficient – the makeup of the Board of Minerals and Environment and conflicts of interest of the board. South Dakota Codified Law 1-40-25.1 discusses the makeup of the Board of Minerals and Environment. The department proposed changes to74:09 to incorporate the conflicts of interest.

The effect of the proposed rules will specify the conditions when a board member may not participate in a contested case hearing. The reason the rules are being adopted is to meet the requirements in Section 128 of the Clean Air Act and to allow South Dakota to maintain delegation of its air quality program.

Roxanne Giedd, Deputy Attorney General, discussed Section 128 of the Clean Air Act and the new sections being proposed by the department.

Mr. Giedd stated that Section 128 of the Clean Air Act requires the following:

(a) Not later than the date one year after August 7, 1977, each applicable implementation plan shall contain requirements that:

(1) any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this chapter, and

2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed

A State may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of paragraph (1) and (2), and the Administrator shall approve any such more stringent requirements submitted as part of an implementation plan.

Ms. Giedd discussed the following statutes:

SDCL 1-40-25.1. Board of Minerals and Environment composed in conformance with Clean Air Act. In addition to the provisions of § 1-40-25, the Board of Minerals and Environment shall be composed in conformance with the requirement of the Clean Air Act § 128 (42 USC § 7428) as amended to January 1, 1995, for all permits and enforcement orders initiated under chapter 34A-1.

SDCL 1-40-4.1. Limitation on stringency of certain rules. No rule that has been promulgated pursuant to Title 34A, 45, 46, or 46A may be more stringent than any corresponding federal law, rule, or regulation governing an essentially similar subject or issue.

Ms. Giedd stated that in Armstrong vs. Turner County Board of Adjustments the Supreme Court said "The due process standard for disqualification in a quasi-judicial proceeding is that an official must be disinterested and free from bias or predisposition of the outcome and the very appearance of complete fairness must be present. The court goes on to say the interest must be different from the interest of members of the general public. If the interest is different, then the question is whether a reasonably minded citizen would conclude that the official's interest or relationship creates a potential to influence the official's impartiality. We have recognized that personal or pecuniary interests in the outcome of a proceeding have the potential to influence a decision maker's judgment. Likewise, employment relationships or potential employment relationships with parties involved in the proceeding may cause a disqualifying conflict."

The department proposed the following new sections:

ARSD 74:09:01:20. Board member conflict of interest. A board member who is personally related to a party involved in a contested case hearing by two degrees of consanguinity, who has a direct financial interest in a party involved in a contested case hearing through employment or by contract, or whose spouse is employed by or directly contracts with a party involved in a contested case hearing, may not participate in a contested case proceeding concerning that party. The member shall make an oral statement of recusal on the record at the initiation of the hearing

in the contested case. A recused member may not participate in board discussions or decision-making regarding that contested case proceeding.

ARSD 74:09:01:21. Board member potential conflicts of interests. A potential conflict of interest is an indirect financial interest, or a personal relationship or another interest in a party involved in a contested case hearing or enforcement hearing that is different from that of the general public, that a reasonable person would believe might result in bias or prejudgment of a contested case hearing. Board members shall disclose any potential conflict of interest in a contested case proceeding on the record at the initiation of the hearing, or during the hearing if they become aware of the existence of a potential conflict of interest. Upon its own motion or the motion of a party, the board may recuse a member with a potential conflict of interest if it determines that the potential conflict of interest raises an unacceptable risk of bias or prejudgment in the contested case proceeding.

Following her presentation, Ms. Giedd and Mr. Rombough answered questions from the board.

Mr. Hagg discussed whether the proposed language should be in state law rather than the administrative rules. The state law could govern all boards whereas the proposed language in the administrative rule covers only the Board of Minerals and Environment.

Prior to the public hearing, DENR had discussed with the Attorney General's Office whether the potential conflicts of interest provision should be in statute or administrative rule. The Attorney General's Office indicated it could be in either location.

Due to timing, DENR recommended the proposed language be established in the administrative rules.

Chairman Sweetman requested public comment. No one from the public offered comments either for or against the proposed amendments.

Motion by Hagg, seconded by Bullene, to adopt 74:09:01:20 with the last sentence of 74:09:01:21 included in 74:09:01:20, and striking the remainder of 74:09:01:21.

Board discussion took place regarding the motion.

Amended motion by Hagg, seconded by Bullene, to include the last two sentences of 74:09:01:21 in 74:09:01:20.

Discussion took place and the amended motion failed with Hagg, Bullene, Landguth, and Blumhardt voting yes and Hilde, Karpen, Morris, and Sweetman voting no.

More discussion took place and the original motion failed with Hagg, Bullene, Landguth, and Blumhardt voting yes and Hilde, Karpen, Morris and Sweetman voting no.

Motion by Morris, seconded by Karpen, to adopt ARSD 74:09:01:20 and 74:09:01:21, as presented.

Discussion took place and the motion carried unanimously.

Chairman Sweetman closed the hearing at 10:45 a.m.

DISCUSSION REGARDING PREHEARING PROCEDURES FOR CONTESTED CASES: Prior to the meeting, the board members were provided with a proposed "Standing Order in Contested Hearings" document provided by Bob Morris.

Mr. Morris stated that last year when the board held a contested case hearing for an oil and gas application, the extent of the board's knowledge of the case was that a petition regarding risk compensation and a spacing unit had been filed and a petition to intervene and objection had been filed.

Mr. Morris said he believes that in the future it would be beneficial to the board members and the hearing chairman to have some ground work laid by the parties prior to beginning the contested case hearing.

At the April board meeting, Mr. Morris indicated that he would prepare a draft of the "Standing Order in Contested Hearings" and circulate it with the members of the board.

Mr. Morris consulted with Charles McGuigan, who indicated that it is possible under SDCL 45-9-13 for just oil and gas cases to have a standing order, but that it would be more prudent to incorporate the standing order into the contested case procedures under ARSD 74:09.

Mr. Morris indicated that he had also discussed this matter with Rex Hagg.

Responding to a question from Chairman Sweetman, Mr. Morris stated that the board acts as a quasi-judicial body. If the board members receive proposed findings of fact and conclusions from each of the parties prior to the hearing, essentially laying out the roadmap for the anticipated testimony, and the testimony does not come to fruition or is not presented, then it does not become part of the record. He stated that the board is obligated, as a quasi-judicial body and as an individual member, not rely upon any proposed findings of fact and conclusions of law but to rely only on the actual evidence that is presented.

Mr. Morris stated in order to remedy any concerns regarding the board members receiving the proposed findings of fact and conclusions of law prior to a contested case hearing, the parties could provide them to only the hearing chairman. If any questions by the individual board members, the hearing chairman could address them.

Mr. Karpen agreed with providing the proposed findings of fact and conclusions to only the hearing chairman.

Ms. Giedd requested that the pro se applicants or interveners be factored into the proposal. She noted that with the department, it will depend upon the case being hearing by the board. The department does not take a position on oil and gas cases so the department would not know what the evidence is going to be, so the department would not be able to propose findings of fact and conclusions of law. In most other cases, when the department is making a recommendation, it would be able to propose findings of fact and conclusions prior to the hearing.

Mr. Hagg stated that prior to a contested case hearing, he would like to see the issues identified, a list of witnesses, and list of exhibits. Mr. Hagg said he is undecided as to whether proposed finding of fact and conclusions of law are needed prior to the contested case hearing. Mr. Hagg said, at the very least, he would like the parties to be required to provide a legal memorandum on the specific issues.

Mr. Sweetman expressed concern regarding requiring the pro se parties to provide the information prior to the hearing.

Mr. Morris stated that when he originally drafted this proposal, he specifically had oil and gas contested case hearings in mind. He said he is still more focused on the oil and gas contested cases because with the larger contested cases, such as the Powertech matter, the hearing chairman is already intimately involved prior to even coming before the board.

Mr. Morris, Mr. Hagg, and Mr. McGuigan will work together on the draft proposed standing order and present it to the board at a later date, and for consideration as possible proposed amendment to ARSD 74:09 sometime in the future.

NEXT MEETING: The next board meeting will be May 15, 2014, via the Digital Dakota Network.

Motion by Morris, seconded by Bullene, that if a meeting is required in June, it be held in Sioux Falls. Motion carried.

ADJOURNMENT: Motion by Blumhardt, seconded by Landguth, that the meeting be adjourned. Motion carried.

The meeting was digitally recorded and a copy of the recording may be obtained by contacting the Department of Environment and Natural Resources, 523 East Capitol Avenue, Pierre, SD 57501; telephone number 605-773-3886. The recording is also available on the DENR website at http://denr.sd.gov/boards/schedule.aspx.

Approved this 15th day of May, 2014.

Linda Hilde
Secretary

Dennis Hilde
Witness

ATTENDANCE SHEET
BOARD OF MINERALS AND ENVIRONMENT
DATE 4-17-14

NAME *(PLEASE PRINT)*	ADDRESS	REPRESENTING
Kyrik Rombough	Pierre	DENR
Bret Graves	Pierre	DENR M&M
Bob Townsend	Pierre	DENR
Brad Schultz	Pierre	DENR
Bob Mercer	Pierre	Newspapers
Mike Capek	"	DENR
Eric Holm	"	DENR
Clark Blake	Belle Fourche	Self
Carrie Jacobson	Pierre	DENR
Nora Hertel	Pierre	AP
Roberta Hudson	Pierre	DENR
Brian Gustafson	Pierre	DENR

South Dakota Board of Minerals & Environment

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License/Permit Holder	License/ Permit	Site No.	Surety Amt.	Surety No.	Surety Company/Bank	DENR Recommendation
Release of Liability & Surety:						
Gregory Baysinger Woonsocket, SD	03-780		$500	3001583	First National Bank, Woonsocket	Release liability and $500.
		780001	S1/2 SW1/4 Section 29; T108N-R62W, Sanborn County			
Transfer of Liability:						
Fisher Sand & Gravel Company Dickinson, ND	83-54		$20,000	190-002-030	Liberty Mutual Insurance Co.	Transfer liability.
		54106	NW1/4 Section 27; T106N-R54W, Lake County			
Transfer to:						
Dawson Construction, Inc. Howard, SD	83-21		$20,000	RC-0024	Sun Surety Insurance Company	
Releases of Liability:						
Aggregate Construction, Inc. Minot, ND	89-382		$20,000	5301306	Ohio Farmers Insurance Company	Release liability.
		382016	N1/2 SW1/4 Section 21; T8N-R6E, Butte County			
		382022	S1/2 NW1/4 N1/2 SW1/4 Section 4; T8N-R5E, Butte County			
		382025	Section 6; T3N-R13E, Meade County			
		382026	E1/2 SE1/4 & SW1/4 SE1/4 & SE1/4 SW1/4 Section 10; T8N-R15E, Meade County			
		382030	N1/2 Section 14; T7N-R12E, Meade County			

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Releases of Liability:						
Aggregate Construction, Inc. Minot, ND	89-382		$20,000	5301306	Ohio Farmers Insurance Company	Release liability.
		382031	NW1/4 Section 29; T6N-R11E, Meade County			
Hofer Trucking Dimock, SD	97-629		$1,000 $1,000	41852 34351	Farmers State Bank, Parkston Farmers State Bank, Parkston	Release liability.
		629001	NE1/4 Section 18; T98N-R62W, Douglas County			
Meade County Highway Department Sturgis, SD	83-113		EXEMPT	NA	NA	Release liability.
		113013	Section 6; T3N-R13E, Meade County			