

June 28, 2010

NOTICE OF REQUEST and NOTICE OF HEARING
SECTION 401 WATER QUALITY CERTIFICATION FOR
FEDERAL ENERGY REGULATORY COMMISSION PERMIT
CITY OF SPEARFISH

The South Dakota Department of Environment and Natural Resources (DENR) has received a request for Section 401 Water Quality Certification from the City of Spearfish. The request was submitted in support of the Federal Energy Regulatory Commission Licensing of the Spearfish Hydroelectric Project. The certification is required pursuant to Section 401 of the federal Clean Water Act, 33 U.S.C. Section 1341 (d) and the Administrative Rules of South Dakota (ARSD) 74:51:01:63, et. seq.

The Spearfish Hydroelectric Project is an existing project located on Spearfish Creek in Lawrence County, South Dakota. The project was constructed by Homestake Mining Company in the early 1900s and is currently owned and operated by the city of Spearfish. Up to 120 cubic feet of water per second (cfs) is diverted from Spearfish Creek at an area known as Maurice located in the NW 1/4 of the SE 1/4 Section 8, T5N, R2E. The water travels approximately 4.5 miles through an aqueduct to a forebay dam where water is then conveyed under pressure to a hydroelectric powerhouse located in the NE 1/4 of the SE 1/4 Section 15, T6N, R2E, in the city of Spearfish where electricity is generated. The reach of Spearfish Creek where flows have historically been bypassed by this aqueduct is referred to here as the “upstream reach.” The water is released back into Spearfish Creek at the powerhouse. Spearfish Creek at the powerhouse to its confluence with the Redwater River (“downstream reach”) has the following beneficial uses: domestic water supply waters, coldwater permanent fish life propagation waters; immersion recreation waters; limited-contact recreation waters; fish and wildlife propagation, recreation, and stock watering waters; and irrigation waters.

Current operation of the diversion dam at Maurice is to divert all flow up to 120 cfs in Spearfish Creek into the aqueduct to feed the hydroelectric plant. Flows in Spearfish Creek in excess of 120 cfs remain in Spearfish Creek. The city of Spearfish is proposing to modify the existing operation of the hydroelectric project by releasing at Maurice three cfs during the irrigation season and six cfs during the non-irrigation season, with a provision for suspending releases under low flow conditions, to be defined by DENR. Spearfish Creek from Maurice to the Spearfish City intake dam (upstream reach) has the following beneficial uses: coldwater permanent fish life propagation waters; limited-contact recreation waters; fish and wildlife propagation, recreation, and stock watering waters; and irrigation waters. There is a natural loss zone below the Spearfish City intake which absorbs about 20-25 cfs of flow according to the United States Geologic Survey. The Division of Environmental Services is proposing to define the low flow conditions as 40 cfs or less based on readings during each business day of stream flow as measured at the USGS gaging station 06431500 at Spearfish during the months of May through September. Therefore, the three cfs releases at Maurice from May 1 through September 30 will be suspended if Spearfish Creek falls below 40 cfs to protect downstream senior water rights and protect the water quality standards and beneficial uses of Spearfish Creek that flow through and downstream of the city of Spearfish (downstream reach).

The Division of Environmental Services is proposing that Section 401 Water Quality Certification be granted based on the application and low flow condition described above. The proposed certification includes conditions with which the city of Spearfish will need to comply to assure the project meets state water quality standards. These conditions will become requirements of the FERC license for the project. The conditions include flow monitoring, record keeping, inspections, reporting, and operation

and maintenance. The draft certification and supporting documentation are available on DENR's website at www.state.sd.us/denr and from DENR at the address listed below.

Any person desiring to submit written comments regarding the Division of Environmental Services draft certification must submit written comments to the address below by close of business on July 28, 2010. Comments may be directed to the following address: South Dakota Department of Environment and Natural Resources, Division of Environmental Services, Surface Water Quality Program, Joe Foss Building, Pierre, SD 57501-3181. These comments will be considered by the Department Secretary in making his certification determination.

By copy of this Notice, the Division of Environmental Services, is hereby filing its request for and scheduling hearing on the draft 401 Water Quality Certification. The hearing is scheduled before DENR Secretary Steven M. Pirner at 10:00 a.m. July 29, at Spearfish City Hall, Spearfish, South Dakota. In accordance with ARSD Chapter 74:50:02, any person desiring to become a party to the hearing on the draft certification must file a petition which complies with ARSD 74:50:02:02 or 74:50:02:05 to be filed with DENR no later than close of business July 13, 2010.

This hearing is a contested case hearing under the provisions of SDCL ch. 1-26, and is being held pursuant to the provisions of that statute and SDCL 34A-2-33 and -34. The rules involved include ARSD ch. 74:51, including ARSD 74:51:01:42, 44, 45, 50, 51, 52, 53, and ARSD 74:51:01:63, 64, 64.03, and 65, and ARSD 74:51:03:01, 02, and 10, and the applicable provisions of Section 401 of the Clean Water Act and the regulations adopted at 40 CFR Part 121. As a result of the decision of DENR Secretary Steven M. Pirner, the Section 401 Water Quality Certification may be issued, issued with conditions, or denied. This hearing is an adversary proceeding, and each party has the right at the hearing to be present and to be represented by an attorney. These and other due process rights will be forfeited if they are not exercised at the hearing. Any decision based on the hearing may be appealed to the circuit court and the State Supreme Court as provided by law.

Under Clean Water Act Section 401(d), conditions of the certification may include "effluent limitations and other limitations, and monitoring requirements" necessary to "assure that the applicant will comply with any applicable effluent limitations and other limitations" under Clean Water Act Sections 301, 302, standard of performance under Clean Water Act Section 306, or prohibition, effluent standard, or pretreatment standard under Clean Water Act Section 307 and with any other appropriate requirement of State law set forth in such certification. The Secretary's final decision will be provided to the applicant and filed with the FERC pursuant to 18 C.F.R. 4.34(b)(5)(iii)(2008), Clean Water Act Section 401, SDCL 34A-2-33 and SDCL 34A-2-34 and ARSD 75:51:01:65.

At hearing the City must show that this project, as proposed will not impair the beneficial use of the waters of the state and waters of the United States as designated in ARSD ch. 74:51:01 and ARSD ch. 74: 51:03 and as approved by the Environmental Protection Agency under the Clean Water Act Section 303 (33 U.S.C. 1313).

Under SDCL 1-26-17(7), Notices of Hearings must include a statement that "if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request to the agency ten days after service of a notice of hearing issued pursuant to SDCL 1-26-17." This matter does not involve a monetary controversy in excess of \$2,500.00 or termination of a property right and the Division of Environmental Services believes this provision is not applicable. If any person who seeks to intervene disagrees with this determination and requests hearing by the Office of Hearing Examiner, the request must be filed by July 13, 2010, and a final determination would be made by Secretary Pirner.

Additional information may be obtained by calling Patrick Snyder (605) 773-3351 or by writing to the address listed above.

Tim Tollefsrud, Director
Division of Environmental Services

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