



Legislative  
Research  
Council

# MINUTES

## Regional Watershed Advisory Task Force

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**Second Meeting**  
**2012 Interim**  
**Tuesday, September 25, 2012**

**McCrary Gardens Education and Visitors Center**  
**631 22<sup>nd</sup> Avenue**  
**Brookings, South Dakota**

The second 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 Tuesday, September 25, 2012, in the McCrary Gardens Education and Visitors Center, 631 22<sup>nd</sup> Avenue, in Brookings, South Dakota.

A quorum was determined with the following members present: Senators Jason Frerichs, Jim Hundstad, Russell Olson, and Mike Vehle (Vice Chair); Representatives Brian Gosch (Chair), Spencer Hawley, Tom Jones, and Kim Vanneman; and Messrs. Mike Jaspers, Brad Johnson, Rick Sommers, and George Vandel. Mr. Dennis Duncan joined the meeting after the lunch break. Mr. Paul Symens was excused.

Staff members present included Tom Magedanz, Principal Research Analyst; and Dave Ortbahn, Principal Research Analyst.

All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council (LRC). The committee documents are available at the LRC website at <http://legis.state.sd.us> under "Interim Information – Committee Documents." For the purpose of continuity, these minutes are not necessarily in chronological order.

### **Minutes**

**REPRESENTATIVE VANNEMAN MOVED, SECONDED BY SENATOR FRERICHS, TO APPROVE THE MINUTES OF JULY 23, 2012. The motion prevailed unanimously on a voice vote.**

### **Wetlands Description, Characteristics, and Functions**

**Mr. Rick Warhurst**, Ducks Unlimited Great Plains Regional Office, Bismarck, North Dakota, spoke to the task force about wetlands and provided a Power Point presentation (**Document 1**). He said when it comes to wetlands people are generally either for them or against them. It was his view that prairie pothole wetlands located in South Dakota, North Dakota, and Canada are very important to duck and other wildlife populations. He considers it the most dynamic and productive ecosystem in the world and the duck factory of the nation.

He indicated that there are varying definitions of a wetland, but a basic definition of a wetland is an area that has a predominance of hydric soils, that supports hydric vegetation, and that usually has ponded water at least one to two weeks during the growing season. He stated that wetlands are a unique wildlife habitat that supports water-based recreational activities such as

duck hunting, pheasant hunting, and bird watching; that provides natural downstream flood control; that provides a natural treatment and filtering system for polluted water; and that provides a potential source of ground water recharge. He also explained four different types of wetlands – temporary wetlands, seasonal wetlands, semipermanent wetlands, and permanent wetlands. He explained that small temporary wetlands, because of the nutrients they contain, are best for duck production. He also explained that a large number of small potholes will produce more ducks than a small number of large potholes because of the territorial nature of nesting ducks. He also indicated that permanent wetlands provide excellent winter habitat for pheasants.

Mr. Warhurst stated that it is sometimes difficult to determine whether land is wetland, cropland, or both. Wetlands aren't always wet and need to go dry periodically to remain productive. The longer water sits in a wetland the fewer nutrients the wetland will contain. He said if more wetlands are drained, the number of nesting ducks will go down as they have in Iowa and Minnesota. The draining of wetlands also increases nitrate concentrations and increases sediment and pollutants in downstream rivers.

In response to committee questions, Mr. Warhurst agreed that farmers in order to participate in the Farm Program can't drain wetlands unless they do some mitigation. He stated that duck numbers were low in the late 1980s but since 1993 there have been 17 wet years and the duck population has recovered. With less wetlands and less Conservation Reserve Program (CRP) land in the future, this trend could be reversed. He stated that Ducks Unlimited whenever asked to help leave marginal areas in wetlands will try to do so.

### **Role of US Army Corps of Engineers in Watershed Management and Drainage Issues**

**Mr. Steve Naylor**, US Army Corps of Engineers, SD Regulatory Office, Pierre, South Dakota, also provided a Power Point presentation for the task force (**Document 2**). He explained that Section 10 of the Rivers & Harbors Act of 1899 gives the Department of the Army authority to issue a permit before any work or structure in, over, or under navigable waters in the United States. In South Dakota navigable waters under Section 10 are the Missouri River, James River, Bois de Sioux River, Lake Traverse, Big Stone Lake, and the lower five miles of the Big Sioux River. These permits cover such things as boat ramps, water intakes, flood protection and flood damage repair, fisheries structures, bank stabilization, transportation crossings, residential and commercial developments, and agricultural activities.

The Department of the Army also has authority under Section 404 of the Clean Water Act of 1972 to issue a permit before any discharge of dredged or fill material into the waters of the United States. The goal of that Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. Waters of the United States include all surface waters such as lakes, ponds, rivers, streams, and creeks, all wetlands adjacent to these waters, and all impoundments of these waters. US Supreme Court decisions have interpreted Section 404 to not apply to isolated waters and tributaries without a significant nexus to traditional navigable water (TNW). Mr. Naylor indicated that Section 404 permits are not drainage permits but are authorizations to discharge dredged or fill material into federally regulated waters. However, impacts from drainage activities are sometimes indirectly

regulated. Examples of projects that may need a Section 404 permit are drain ditches, drain tile installation, modifying streams via excavation, clean out and maintenance of streams, and levees constructed in floodplains. He said the limit of the Corp's jurisdiction was the ordinary high water mark for lakes, rivers, and streams and boundaries of wetlands.

In response to questions, Mr. Naylor said that the time frame for the issuing of general permits was days to weeks and the time frame for individual permits and permits for larger projects was typically 60 to 90 days. He also said that enforcement was very discretionary. Because of their small staff, they might not go after small violators.

The task force recessed for lunch at Noon.

### **Water-Related Special Purpose Districts in South Dakota**

**Mr. Tom Magedanz**, Legislative Research Council, Pierre, South Dakota, presented information on South Dakota's system of water and resource-related special purpose districts. He distributed a handout entitled "Special Purpose Districts in South Dakota" (**Document 3**) and discussed special purpose governments relating to water and natural resources. These include water development districts, water project districts, irrigation districts, water user districts, watershed districts, sanitary districts, drainage basin utility districts, conservation districts, and regional recycling and waste management districts. He also provided historical information on the development of water-related special purpose districts, the impact of the Pick-Sloan Missouri Basin Program, and the replacement of conservancy subdistricts with water development districts.

### **Basic Legal Principles Pertaining to Drainage, State Drainage Law**

**Ms. Diane Best**, Assistant Attorney General, South Dakota Office of the Attorney General, Sioux Falls, South Dakota, discussed the principles of drainage law and South Dakota's drainage statutes. She provided a Power Point presentation entitled "Basic Principles Relating to Drainage Law" (**Document 4**). Her presentation included definitions of drainage and surface water drainage, and she discussed the principles of drainage law including common law, case law, and civil rule. She also discussed practices in South Dakota before the federal Clean Water Act of 1972, the impacts of federal legislation, and South Dakota's 1985 county drainage statutes (SDCL 46A-10A). Task force members **Mr. Rick Sommers** and **Mr. George Vandel** asked about principles of drainage law relating to drainage in closed basins and how far downstream receiving landowners extend. Ms. Best answered that it depends on the situation and that courts have addressed these types of issues on a case-by-case basis. **Mr. Dennis Duncan** asked whether counties are responsible for drainage problems caused by road-building. Ms. Best stated that counties and other governments must allow for adequate passage of water when building roads and that they are responsible for related damages to landowners. **Mr. Brad Johnson** asked whether unreasonable hardship or injury is a matter of interpretation. Ms. Best replied that the statutes do not specify the level of proof or severity necessary to constitute unreasonable hardship. **Senator Mike Vehle** asked whether counties could be held liable in drainage disputes because of their statutory role in addressing or participating in dispute resolution. Ms. Best stated that in her opinion the dispute is between landowners rather than the county, and the county would not be liable in that situation.

**Mr. Mike Jaspers** and **Senator Jim Hundstad** discussed whether counties were required to handle drainage matters because the statutes allow the county to act, and noted that counties are sometimes reluctant to address drainage issues because they are unsure what will happen if they make a wrong decision and they are unsure what constitutes unreasonable hardship or injury.

### **Drainage Issues, Studies, and Litigation**

**Mr. Ron Gillen**, Brosz Engineering, White Lake, South Dakota, discussed his professional experience in dealing with drainage projects and disputes. He provided a Power Point presentation entitled "South Dakota Drainage Issues, Drainage Studies, and Litigation" (**Document 5**). He stressed the need for technical support and the importance of scientific and engineering information as the foundation for drainage activities and projects. He supports local control in drainage matters and is interested in ways of handling potential disputes locally out of court so that litigation on drainage questions is used as a last resort. He noted that drainage and engineering studies and modeling for particular watersheds are important tools in dealing with drainage problems and issues. **Representative Kim Vanneman** asked whether changes in the state drainage laws are needed. Mr. Gillen replied that the drainage law is acceptable, but the application of the law at the county board level is sometimes problematic. He stated that counties need technical support to assist them in drainage matters. **Representative Brian Gosch** asked Mr. Gillen's opinion on alternative methods of resolving disputes, such as the use of referees or mediation. Mr. Gillen stated that he likes the idea of having available a referee of some sort who could review the case before it enters the legal system. Senator Vehle stated that county boards can make decisions if they have the right information, and he asked what kind of staff for technical support would be needed. Mr. Gillen stated that one possibility might be a structure similar to regional education cooperatives, in which several counties would join together to hire drainage experts.

### **Public Testimony**

**Mr. Brad Preheim**, Manager, Vermillion Basin Water Development District and TLC Water Project District, Vermillion, South Dakota, described problems and issues he faces with watershed management and drainage in his duties managing a water development district and water project district. These can include excessive red tape, the need for consistency in addressing issues, financing problems. His districts face other issues in addition to drainage, such as maintenance of bridges and culverts, cleaning debris from lakes and rivers, and many others.

**Mr. Richard Smith**, Lake Poinsett Watershed Coordinator, Hayti, South Dakota, discussed flooding and runoff issues at Lake Poinsett. He stated that the type of runoff into the lake is changing, due in part to farming practices, such as the shift from small grain to row crops and the reduced grassland base. He said that technical support to counties on drainage matters would be helpful. He also noted that tile drains are not recorded, and in many areas we do not know the location of tile drainage or when it was installed. Senator Jason Frerichs stated that various conservation and tillage practices affect runoff differently and modern techniques help to conserve moisture on agricultural land. Mr. Vandell asked how much drain tiling is occurring in Mr. Smith's area and whether a drainage permit is required. Mr. Smith answered that there

is no record of drain tiling except the application, and he stated that the county has dropped their permit process.

**Mr. William Rais**, Big Stone Lake Association, Wilmot, South Dakota, provided a map of Roberts County showing drains to Lake Traverse and Big Stone Lake (**Document 6**). He stated that excessive tile drainage has been installed in the area and that tile drainage needs to be regulated. Representative Gosch asked whether any of the permits have been challenged. Mr. Sommers stated that some have been challenged based on the lack of engineering studies, but they are usually approved. Mr. Rais said he would support having a certified technical drainage expert available to assist counties.

**Mr. William Randall**, Browns Valley, Minnesota, also discussed issues relating to Big Stone Lake.

**Mr. Bob Johnson**, Big Stone Lake Association, Wilmot, South Dakota, favors diverting the Whetstone River out of Big Stone Lake and noted that the river was diverted into the Lake during the 1930s.

**Mr. Herman Lear**, Aberdeen, South Dakota, discussed problems in the past in the northern James River area, including the flooding of Putney Slough and land lost to this.

**Mr. Doug Hansen**, Webster, South Dakota, retired from the Department of Game, Fish and Parks a few years ago and moved to the Bitter Lake area where he built a house and now resides. He has had serious flooding problems and described his situation for the task force. He favors conservation and natural methods of dealing with resource issues, but has no specific recommendations for the current situation. He favors a more comprehensive and scientific approach to water management.

**Mr. Monty Miller**, Sayre Associates, Sioux Falls, South Dakota, has been involved in numerous agricultural drainage issues and favors a regional, watershed-based entity to address these questions. He also noted that a drainage engineer is important in these situations and can provide planning and design expertise.

**Dr. Dennis Todey**, South Dakota State Climatologist, SDSU, Brookings, South Dakota, stated that the 2000-2010 decade was the wettest period on record in South Dakota, which has led to drainage and flooding issues. Other climate trends include increased fall precipitation over the last twenty years and heavy snowfall during the 2007-2010 periods. Dr. Todey also stressed the need for the task force to consider climatological data.

### **Committee Discussion**

**Representative Gosch** stated that the task force was established for a three-year period and that there will probably not be comprehensive legislation on drainage and watershed issues during the upcoming legislative session, although there may be other legislation to cover more specific issues.

**Mr. Duncan** suggested that legislation be drafted to establish a statewide, uniform permit application for agricultural drainage to be used by counties. The application would include sufficient information for decision makers as well as providing a method to track drainage activity.

**Representative Spencer Hawley** requested more information on the 1997 drainage summer study conducted by the Legislature. He stated that it is important to get counties back into action on drainage matters, and the task force needs information from counties on what their needs are.

**Senator Frerichs** suggested that legislation be drafted to provide some minor adjustments to the watershed district statutes (SDCL 46A-14).

**Mr. Johnson** suggested looking at other states and how they approach drainage and watershed management issues. He stated that Minnesota recently created a task force whose recommendations may be helpful. He also discussed the need for tracking information on tile drainage, funding needs, and the possibility of having a one-stop location at the state level available for technical expertise in these areas.

**Senator Hundstad** said that he had met with the Brown County Commission on drainage matters and their decision to repeal their drainage ordinance. He also stated that Brown County has invited the task force to meet in Brown County to discuss their experience with drainage issues.

**Mr. Vandel** expressed concern about drain tile in the area and would like to provide accountability for drain tiling, possibly using a permitting process that would include tracking of drain tile activity.

**Senator Vehle** asked about drainage records that counties currently have and whether this information could be tabulated. He requested that legislation be drafted to establish a uniform permit application for drainage, including drainage into lakes and other areas and the tracking of permits and drain tile. He also favors an appeals process and some form of referee concept for informal dispute resolution. He is also interested in the existing resources in the state for drainage information on various watersheds and how to allocate these resources.

Representative Gosch said that the task force will hold one more meeting before the 2013 legislative session, either in the northeastern or southeastern part of the state.

### **Adjournment**

**SENATOR VEHLE MOVED, SECONDED BY SENATOR FRERICHS, THAT THE MEETING BE ADJOURNED. Motion prevailed on a voice vote.**

The chair adjourned the meeting at 5:00 pm.

### Additional Documents

*Note: The following materials were also distributed or submitted to the task force:*

- "Watershed Management," Natural Resources, Jul 2012, SDSU Extension-iGrow (**Document 7**).
- Yankton County Drainage Ordinance (**Document 8**).
- Moody County Drainage Ordinance (**Document 9**).
- Letter from the Moody County Commission to the Task Force supporting continued county regulation of drainage issues (**Document 10**).



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