

# Procedure for Hearings before the Water Management Board

The Water Management Board's function is to regulate and control the development, conservation, and allocation of the use of water according to the principles of beneficial use and priority of appropriation. In this role, the Water Management Board conducts contested case hearings on water right permit applications. This document is intended to acquaint participants in hearings of general procedures before the Board.

The Board is a citizen board consisting of seven members appointed by the Governor. They are from varying backgrounds and locations around the state. The Board has meetings approximately every two months.

South Dakota codified laws (SDCL) and administrative rules (ARSD) govern water rights. The laws and rules are available online at <https://sdlegislature.gov/>. Laws of interest include SDCL chapters 1-26, 46-1, 46-2, 46-2A, 46-4, 46-5 and 46-6. Administrative rules to review are ARSD 74:02:01.

Individuals may represent themselves in a contested case before the Board or may be represented by legal counsel. However, an organization, association, partnership, corporation, etc., must be represented by an attorney. Attorneys that intend to participate in the hearing must file a Notice of Appearance to all other parties. Non-resident attorneys must be able to demonstrate compliance with the requirements set forth SDCL 16-18-2 to practice in South Dakota.

## **Burden of Proof**

An applicant for a water right permit has the burden of proving that the Water Management Board should approve the application and issue the permit. The applicant must therefore be prepared to present the permit application and the proposed operation to the Board at a contested case hearing. This burden then switches to the petitioning parties to prove their case. Do not rely on the Water Rights Program to carry the burden of proof. Although the Chief Engineer makes a recommendation to the Board, this recommendation is in no way binding upon the Board. While a Water Rights expert will present their report and be subject to questioning by the Board and parties on the application, Water Rights is not an advocate for your position.

SDCL 46-2A-9 sets forth the four criteria that must be present to approve an application. They are:

1. A reasonable probability that unappropriated water is available for the proposed use;
2. The proposed diversion will not unlawfully impair existing domestic water uses and water rights;
3. The use is a beneficial use; and
4. The use is in the public interest as it pertains to matters within the regulatory authority of the Water Management Board.

## **Procedure**

You or your legal counsel need to be at the hearing to present your position in a contested case hearing.

The Board Chairman runs the hearing. Address all questions and objections to the Chairman for a ruling. In some instances, the Board will appoint a hearing officer to preside over prehearing conferences and prehearing motions. An attorney from the Attorney General's office is seated with the Board to provide

legal advice to the Board. In addition, the Water Rights Program is represented by legal counsel. This is a legal proceeding so expect to swear an oath to tell the truth when you testify.

Contested case hearings are conducted pursuant to procedures outlined in SDCL ch. 1-26. Only parties of record can participate in the hearing by presenting testimony, calling witnesses, or cross-examining witnesses. Parties include the applicant and those individuals that have filed a petition as set forth in the public notice. The following procedure is followed:

1. Opening statements (parties may waive their opening statement)
  - a. Applicant
  - b. Water Rights
  - c. Petitioners and Intervenors
  
2. Evidentiary hearing
  - a. Water Rights – staff present their report and the Chief Engineer’s recommendation
  - b. Applicant (applicant’s opportunity to present testimony and call witnesses)
  - c. Petitioners and Intervenors (opportunity to present testimony and call witnesses)

Be prepared to explain your position on the application. Although the Board members have a great deal of expertise, don’t presume they know anything about your issue before them. If you’re the applicant, state what the proposed project is, the location of the project, timelines for completed the project and its benefits. If you are an opponent to the application, explain where you live in proximity to the proposed project and how the proposed project will injure you in a manner that is unique to you and not suffered by the public in general.

Parties may call witnesses on their behalf. The Board oftentimes hears testimony from technical experts, neighbors, or other witnesses regarding the proposal. Written endorsements are subject to the hearsay rule at the time of the hearing since the person cannot be cross-examined. Written comments will usually be allowed only if there is no objection from any other party.

Upon the conclusion of any witness’s testimony, Board members may ask questions of the witness and all parties will be afforded an opportunity in an orderly manner to cross-examine the witness regarding their testimony. Cross-examination is your opportunity to ask questions of the witness related to their direct testimony. It is not the appropriate time for you to provide your testimony.

3. Rebuttal. Parties may be afforded an opportunity to present testimony rebutting a prior witnesses’ testimony. Witnesses are again subject to cross-examination but only related to their rebuttal testimony.
  
4. Closing arguments (summation of your position)
  - a. Applicant
  - b. Water Rights
  - c. Petitioners and Intervenors
  
5. Board decision. The decision-making process occurs in public in front of all concerned and on the record. Normally, the Board limits discussion to its members but may call on witnesses,

attorneys, or parties to clarify a point. Upon making a verbal decision, the Board will direct either the prevailing party or Water Rights Program's attorney to prepare findings of fact, conclusions of laws and a final decision that will be considered at the Board's next meeting. The findings are a record of the facts considered by the Board. In the event the Board's decision is appealed to court, the findings reflect the facts considered by the Board to arrive at a decision. The non-prevailing party may waive their rights to findings if they are satisfied the Board addressed their concerns or have no intention of appealing the decision.

Although hearings may sometimes be considered informal, it is evidentiary hearing. Attorneys cannot testify or answer factual questions. Cross-examination is allowed and copies of exhibits must be available for opposing counsel and other parties.

### **Ex-parte Communication**

It is improper for any party to a pending application or contested case proceeding to contact Board members prior to the hearing. To do so is ex-parte communication with the likely result being the Board member excusing himself from the proceeding. The Board is very careful to avoid even the appearance of discussing a contested case hearing that will come before it. Situations do arise where a party requests to have a Board ruling on a motion prior to the evidentiary hearing. If an applicant or party has an issue he wishes to raise prior to the hearing, please contact the Water Rights Program and they will put you in contact with either the Board's attorney or the Water Rights Program attorney.

### **Exhibits**

Exhibits are pictures, maps, or documents you wish the Board to consider in conjunction with your testimony. Used effectively, exhibits greatly increase the interest and knowledge of the Board. Please have all exhibits you intend to present marked in advance of the hearing. Contact the Water Rights Program to find out how you should number your exhibits. Provide enough copies of each exhibit for the Board, Water Rights Program, opposing counsel, and other parties. The exchange of exhibits by parties prior to the hearing is encouraged. Be aware that someone may object to admission of an exhibit. The Board Chairman will rule whether the exhibit is admissible. All exhibits become part of the record and will not be returned.

### **Transcript**

A court reporter is present at all contested case hearings. A party wishing to have a transcript of the hearing should make their own arrangement with the court reporter. Water Rights will tape the proceeding and will prepare minutes of the hearing.

### **Appeal of Board's Decision**

South Dakota statutes provide that decisions of the Board may be appealed to the courts. Notice of appeal of the Board's decision must be filed within thirty days from when the signed findings of fact, conclusions of law and final decision is mailed to parties. The notice of appeal must be in accordance with procedures established in SDCL 1-26-31.

The best advice is to come to the hearing prepared! If you have question regarding the hearing process, please contact Ron Duvall, Water Rights Program at (605) 773-3352.