

MINNESOTA ENVIRONMENTAL QUALITY BOARD
SPECIAL MEETING MINUTES
Tuesday October 28, 2003
State Office Building, Hearing Room 5

EQB Members Present: Robert A. Schroeder, Bruce Bomier, Sheryl Corrigan, Jerome Deal, Art Dunn, Marcia Farinacci, Sharon Clark, Susan MacCarville, Dianne Mandernach, Matt Kramer, Mary Mellen, Gene Merriam, Jonathon Bloomberg and Glenn Wilson

EQB Members Absent: Lt. Governor Molnau

Chair Schroeder called the meeting to order and asked for a motion to adopt the Agenda for the October 28, 2003 Special Board Meeting.

I. Adoption of Proposed Agenda for October 28, 2003 Special Board Meeting

Citizen Member McCarville made a motion that the Proposed Agenda be adopted and Commissioner Corrigan seconded. That motion carried.

II. Stipulation Agreement between Environmental Quality Board and Hutchinson Utilities Commission:

Chair Schroeder asked Mr. Mitchell, EQB Staff, to give Board Members a summary of the issues that have taken place in the last 10 days between Staff and Hutchinson Utilities Commission.

Mr. Mitchell introduced himself and Bob Patton, Dept. of Agriculture Staff. The Hutchinson pipeline is 90 miles long and is being built across agricultural land. The EQB has been concerned about the impact of this pipeline since the initial application for the routing permit. Because of that concern the initial permit required the preparation of an Agricultural Impact Mitigation Plan as a condition of the Board issuing a routing permit. The Board issued the permit to the City of Hutchinson in March 2003. Almost immediately, there were allegations that the City failed to comply with certain provisions of the Mitigation Plan. Staff have spent many hours on the phone, attended meetings, written letters, met with county inspectors, Hutchinson representatives and landowners to settle complaints. Chair Schroeder added the Hutchinson matter to the October 16, 2003, Environmental Quality Board Meeting Agenda because he was concerned about the repairs and other issues raised by landowners. Since the Board Meeting on October 16, Staff have been attempting to draft a Stipulation Agreement to address all concerns that have been raised about compliance with the Mitigation Plan. The pipeline is just about totally laid in the ground so time is growing short for Board action. The City has not been prepared to commit to the language that we were looking for in regard to crop losses, soil compaction, drain tile support and repair, and mixing of the topsoil and subsoil. What we have agreed to is a Stipulation Agreement that resolves only the drain tile issues. The City recognizes that the Environmental Quality Board is going to investigate the whole 90 miles, on selected parcels, and try to get a handle on whether topsoil and subsoil have been mixed and whether compaction has been alleviated. The EQB Staff will work with the City of Hutchinson in conducting the investigation, Staff will involve the landowners and Staff will

select the parcels to do soil borings and that type of investigation. The City has signed and is committed to the Stipulation Agreement you see before you today.

Mr. Mitchell summarized the Stipulation Agreement by part. Part 1. is simply a recognition of the parties to the agreement. Part 2. describes the scope and purpose of the Stipulation Agreement which is to resolve the allegations regarding inadequate repair of drain tile and not any other part of the Mitigation Plan. Part 3. is a recognition that the Environmental Quality Board has authority to enter into a Stipulation Agreement. Part 4. is reference to statutory definitions and words that need to be defined. Part 5. is a brief discussion of the background of what lead up to the drain tile issue. Part 6. is where the Environmental Quality Board alleges that there has been a violation of a specific provision of the Agricultural Mitigation Impact Plan and site the language. Part 7. is the remedy and what the City is prepared to do in response to the allegation of the violation. Part 8. provides that the City has agreed to pay \$10,000 to the general fund of the State of Minnesota as part of the settlement of this alleged violation. Part 9. recognizes that if in the future the City fails to comply with the agreement that there are penalties that will result. Part 10. recognizes that while the EQB is prepared to accept this Stipulation Agreement we are only settling the drain tile issue. The EQB Staff are going to determine whether there are other violations of the Agricultural Mitigation Plan by the City. The City has agreed that the costs involved in the investigation are going to come out of the fees that are charged by the EQB for administration of this permit. Part 11. states that if the City agrees to this conduct in response to the allegation that they violated the permit and Agricultural Mitigation Plan, then the EQB will not pursue other remedies for the same allegation. Part 12. provides that the City shall retain records and documents related to this matter. Part 13. directs the City to comply with other requirements as may be applicable as they go about repair of the drain tile. Part 14. is a reference to other people having claims against the City? Part 15. is about party liabilities. Part 16. provides the agreement is binding upon successors. Part 17. is about amendments. Part 18. is the effective date of the Agreement, today if the Board approves. Part 19. is the termination date on October 1, 2013. Part 20. there are a few commitments that each of the parties is making that will survive termination of this Agreement. The City has approved and is committed to this agreement.

Chair Schroeder asked for discussion.

Commissioner Corrigan asked about the City's requirement in Part 7. Whether the landowners were consulted about the agreement and whether they think it is an appropriate remedy? Then what exactly the payment option means, is it a flat payment or are the payments negotiable and would you comment on the payment process?

Mr. Mitchell responded that we have involved the landowners through Kevin Johnson the Attorney for Sib Ran Fair and he will have some words on what the landowners think. The way the language is now the payment option is entirely the City's. If the City chooses to make an offer to a landowner, the amount is entirely up to the city. If the landowner does not opt to have the drain tile repaired or to take payment, this agreement will continue for a while. If the City reaches agreement with every single owner along the way, the Stipulation Agreement is over.

Director Dunn asked about penalties of \$500 per violation. How is the term violation being interpreted—drain tile, per parcel, per farmer? Under Part 10. what does the resolution of the

other alleged violations that are not covered under this Agreement mean and what is our authority to take action?

Mr. Mitchell responded that there should not be violations but Staff would interpret per violation of the requirements of the Stipulation Agreement. On your Part 10 question, the permit will extend until at least October 2008 and then there is provision for the City to ask for the permit to be set aside after that date

Commissioner Merriam asked about Part 7 in regard to the Mitigation Plan. Paragraph 3 refers to damage and the Agreement places the responsibility to repair properly the damaged pipeline and gives the landowner the right to take payment instead of repair. Why was the City given the option to make payment?

Mr. Mitchell responded that in the Agreement the City has to contact every single landowner and give him or her the option of having the city repair the drain tile to ensure that it is properly slotted. Under the Mitigation Plan, the landowner could say that his drain tile was not repaired properly and the City could say that the landowner's problems are not caused by the drain tile, it is something else.

Commissioner Merriam asked what the purpose of the second sentence Part 7, if the City chooses, it may, etc. Why is that there?

Mr. Mitchell responded that initially the language in the Stipulation Agreement said the City will go to each landowner and offer to repair, replace or make payment. The City said it didn't want to have to offer money but that they wanted to preserve that option. Staff agreed to the draft language because if the city really didn't want to make a payment they could make an offer so low that no landowner would accept and there might be an instance where the city would like to opt out by making a payment. The Stipulation Agreement states that there is no argument like in the Mitigation Plan.

Commissioner Merriam stated that he is concerned that the right of the City to offer payment places no responsibility on the landowner to accept the payment and he would like that on the record. The landowner still has the right to insist that the City repair rather than pay.

Mr. Mitchell concurred that if the landowner doesn't accept the payment, accept the repair or doesn't respond at all, this agreement will continue for ten years.

Commissioner Merriam asked about the significance of paragraph B in Part 7. Does that sentence mean that if the offer is not accepted by November 1, 2004 that the repair provisions return to the Mitigation Plan?

Mr. Mitchell responded that paragraph B in Part 7 really refers to the offer of money. My interpretation is that the City has the option to decide whether to offer money. If the City offers money, the landowner has until November 2004 to take the money. If the City didn't offer money, then the sentence would not have much meaning.

Legal Counsel Wagenius said that he reads this exactly as Mr. Mitchell has read the material. The only offer that is referred to previously is the offer of money. It is not an offer to notify the

landowners or make the repair or replacement that is an obligation. The offer is to make payment only.

Commissioner Corrigan asked about the investigation to identify if there were further impacts to the soil. When will the investigation be completed, who will pay for the investigation, have the landowners been consulted and why isn't this a part of the Stipulation Agreement?

Mr. Mitchell suggested that he didn't know when the investigation would be completed but it will start sometime in the next few weeks. Staff of the EQB will be relying on the soil scientists at the Department of Agriculture to determine the extent of the investigation. Staff will be meeting with the City, county inspectors and landowners to talk about which parcels to look at and what exactly to do. The Stipulation Agreement does address this matter in paragraph 10 on page 4. The landowners have been included in discussions in the past week.

Deputy Commissioner Clark introduced herself and said that she was here for Commissioner Hugoson for the record. Deputy Clark said she's disappointed that the Mitigation Plan wasn't followed and the time that it has taken to get this far. The landowners have now gone through the digging, harvest, soil compaction and the added stress to the land. The landowners and farmers are going to have loss of income for ten years or more and that is because the compaction of the ground is so bad. Deputy Clark said that she is disappointed that the landowners are not being compensation for what they have gone through. Deputy Clark said that she will strongly support, encourage and promote that the Department of Agriculture will start investigation as soon as possible and that the Department work closely with EQB Staff and landowners.

Chair Deal stated that the first sentence of paragraph B in Part 7 is troublesome. The sentence is vague. Different people or different Boards could interpret the sentence differently.

Citizen Member Bomier asked if Part 7 paragraph B could be rewritten to alleviate the confusion: The obligation of the City, etc.. Would that change the meaning or limit the claims for the City or landowners.

Chair Schroeder asked if the paragraph were rewritten as Citizen Member Bomier stated, would that exclude the November 1, 2004 date. Is that correct?

Citizen Member Bomier suggested that the change would preserve Oct. 1, 2013 date.

Mr. Mitchell stated that his concern is that if the City decides to offer a payment, that there be enough time for the landowner to make a decision. I would prefer the agreement to determine how long the landowner has to make a decision rather than the city.

Citizen Member Bomier clarified that what the Board is trying to do is assure if there is an offer of money that the landowner would have until the end of next harvest to make the decision. The Stipulation Agreement also preserves the right for remuneration if the engineering controls are improper and there is loss of income till 2013. Is that what we are trying to do?

Mr. Mitchell responded that the preference would be for the City to make a payment offer to each landowner but we also wanted to ensure that this letter went out in a reasonable

timeframe. The landowner should also have some time to decide whether to accept the money or repair.

Commissioner Corrigan suggested that the City respond to the question of why they were not comfortable with putting in a payment option.

Chair Schroeder asked that the comments by Commissioner Merriam, Commissioner Corrigan and Chair Deal be incorporated into a slight modification of the that sentence in the agreement by Legal Counsel Wagenius and promoted to the City for consideration when Mr. Hanson comes forward.

Director Dunn then asked if this agreement in any way alters the obligation on the part of the City to follow through and repair damage in the original agreement within the five-year time limit.

Mr. Sullivan suggested that even if the City went out to cut the slots in the tile, the drain tile could still become defective at a later time and the time period obligation has been changed from five to ten years.

Deputy Commissioner Clark reiterated the question about the sum of money the City would make to the landowner and what is the basis for the sum of money the City would make.

Chair Schroeder then asked Mr. Hanson to come forward and introduce himself for the record.

Mr. Bruce Hanson, Attorney for Hutchinson, came forward. The background of this matter is that the City was told by experts at the University of Minnesota that slotted and full round drain tile support is negligible. The City wants to go back and at least give the landowners the option of having the support slotted. Questions were asked by a number of Commissioners. Commissioner Corrigan's question about the payment to the landowners is difficult because we just agreed to extend our obligation to repair this tile and the concern is that to make payment how do we assure that everything necessary is done. We have the existing obligation to repair drain tile and the obligation to install additional drain tile for wet areas in the right-of-way. The Stipulation Agreement doubles the responsibility.

Commissioner Corrigan responded that if the City would prefer a payment that would be in lieu of a repair. Are you suggesting that the reason the City would not want to offer that option is because then you would be obligated to repair?

Mr. Hanson responded yes.

Mr. Mitchell stated that the older draft language said repair or offer money. If the landowner took the money then there was a settlement.

Mr. Hanson said that he would accept Mr. Mitchell's interpretation. When we were here previously there was concern over whether the tile was slotted or not slotted. We are offering to contact every landowner regardless of whether we have settled with the landowner previously or not, whether they are having trouble or not. The other issue, that should be pointed out and isn't in the Agricultural Mitigation Plan and is in the Stipulation Agreement is in paragraph D and Part 7 about the standards of the slotted drain tile. On the money issue on

all the parcels that have not been settled previously, we have deposited money in the District Court to cover their damages already.

Commissioner Corrigan said she found Mr. Hanson's response not satisfying but she is curious to why the City would not provide an option of payment or replacement and asked Mr. Hanson to answer the question more specifically.

Mr. Hanson responded that the City's preference was to go back and offer the landowners slotted drain tile. The City would prefer not to have a payment option.

Commissioner Corrigan asked in what time frame the City would be able to do the repair.

Mr. Hanson responded that he thought the work would be completed in a matter of months after the notification.

Commissioner Merriam asked where in the Stipulation Agreement the obligation for the City extends from five to ten years.

Mr. Hanson responded the original five years were set out on Page 8, Paragraph G in the Agricultural Mitigation Plan and the second sentence of Part 7, Paragraph B in the Stipulation Agreement states the obligation shall continue till Oct. 1, 2013.

Commissioner Merriam followed-up with a question about both paragraphs in the Agricultural Mitigation Plan that Mr. Hanson just read. Do either of those paragraphs establish until that time a rebuttable presumption, it doesn't limit the period of application of the Mitigation Plan.

Legal Counsel Wagenius stated the citation is actually to the body of the permit itself. Paragraph 7 A 2, which reads the obligation to comply with the Agricultural Impact Mitigation Plan as a condition of this permit, shall expire on October 1, 2008. Therefore, the Stipulation Agreement is an extension for an additional five year period.

Chair Schroeder asked Legal Counsel Wagenius to give the Board an alternative that perhaps provides greater clarification and Mr. Hanson would find acceptable under Part 7, Section B.

Legal Counsel Wagenius stated that his reading of Part 7, Section B of the Stipulation Agreement can only refer back to the payment because the next sentence talked about the obligation and the obligation is in the first sentence of paragraph A. If we were to add just two words to the first sentence of paragraph B "The landowner shall have until November 1, 2004 to accept the City's offer of payment or not." That then leaves in the negotiated November 1, 2004 limitation and it clarifies that this reference is to the offer of payment. We are fortunate that we have all the parties necessary to agree to an amendment present, the officials of the city. Legal Counsel Wagenius then asked Mr. Hanson if the reading that the city gives to it is different and would you accept that two-word insertion as a clarification.

Mr. Hanson said he did read the stipulation differently. Mr. Hanson said that he read the stipulation that by November 1, 2004 if a landowner wanted to have the tiles slotted, regardless of whether it was a problem or not, that is how we read the stipulation. Mr. Hanson stated that his clients desperately need to complete this project and he wanted to discuss this issue and the others brought up by Commissioners with his clients.

Deputy Commissioner Clark asked what the payment was based on. Additionally, the Deputy Commissioner asked if the landowners wanted the exact material would the City be willing to do that versus slotting what is already there, like the Agricultural Mitigation Plan states.

Mr. Hanson said that they have not come up with a dollar figure for payment. Mr. Hanson will ask his clients about the second question. The City still believes full round support is the best support and an expert at the University concurred. Mr. Hanson then went on to say that if the landowner choose something like channel iron that the City feels is inappropriate, that the City will have the obligation on the selected items for the next 10 years.

Citizen Member Bomier said he didn't understand the confusion, the specifications that were laboriously developed and which your clients agreed to were not followed. This administration could shut this project down. Your clients are simply being asked to honor what they have committed to in terms of engineering controls. Please understand that it is still a privilege to tear up people's property and that the conditions that were put on you were clear. We should not be arguing over engineering controls.

Mr. Hanson said he heard Member Bomier loud and clear. He will talk with his clients on how to accomplish that.

Commissioner Corrigan stated that if in Part 7 paragraph B the first sentence was read differently by Mr. Hanson, then my comment is that if the City can't accept the "of payment" then we have a serious problem and we have to decide whether we can accept the Stipulation Agreement.

Director Dunn asked if Part 7 paragraph B should read improperly repaired or installed instead of just improperly repaired. The Director stated that the City should be obligated for both improperly repaired and improperly installed drain tile until October 1, 2013.

Chair Schroeder then called Mr. Johnson to come before the Board.

Mr. Johnson introduced himself and Anne Kennedy as the Attorney for Sib-Ren FAIR a group of landowners. On behalf of the landowners, he said he wanted to thank the Board for its efforts. Mr. Johnson suggested that his clients were not wholly in support of the Stipulation Agreement. Mr. Johnson said that his clients were invited to offer comments on a draft Stipulation Agreement that we saw late last week and frankly that version of the Stipulation Agreement had quite a bit more in it than the version you see before you today. The language was stronger on drain tile repair, there were provisions on crops and there were also financial assurance in the form of a surety bond. We thought that Stipulation Agreement would be signed last Friday. To sum, we wish the agreement was stronger. We see the continuing inability for the City to fulfill it's commitments as evidenced by the change in terms from last week to this week's Stipulation Agreement and we are troubled by that. In last week's version of the agreement in Part 7 paragraph A the option for the City to choose to offer payment is gone. When they have the choice to slot the current support or repair the tile with different material, odds are that they will go and cut slots in the drain tile. The City takes any opportunity to take a position to limit their obligation under paragraph B especially as it relates to their obligations under the original Agricultural Mitigation Plan and we suspect they would take that position to the detriment of the landowners. In paragraph C the option for the City to

maintain the properly slotted pipe from mile 65 on, we know that properly slotted meant that the City went back and drilled holes in the drain tile and that it probably would not meet the requirements of one square inch of hole for every linear foot. But if the City has the option to take that position, they will and they would not make the offer to the landowners in that situation. If this Stipulation Agreement is all that results, we are glad to see some action. We wish the top soil and compaction issues could be addressed now instead of after an investigation. The investigation will culminate at some point in the future and have corrective actions that are not very well timed. The City's willingness to agree to the corrective actions especially after the pipeline is completed is from our perspective probably not good. So we wish the language was stronger and suggest the Board has other options. But we will participate fully with the agreement that is in front of you now.

Chair Schroeder asked Mr. Johnson if he had clarity in his mind of the outline Mr. Mitchell had regarding future assessment that the Board would oversee on soil compaction, top soil treatment.

Mr. Johnson suggested the outline of the investigation is a little vague. If the investigation is done well it will be of value to the landowners to have the analysis done by a third party particularly if it is overseen by the Environmental Quality Board. We feel that the responsiveness by the City after the project is complete will be in doubt given that the pipeline will be up and running and the leverage that you have will be gone.

Chair Schroeder said that he respected Mr. Johnson's perspective on the issue. But from his perspective, he has not had a chance to see exactly what has happened and doesn't have exact, clear facts in evidence. That's why the investigation to get real data to draw conclusions and in absence of the stories that are no doubt compelling but are not directly supported with factual evidence. From my perspective, we want to make a judgment that will stand up. Also in discussion with Mr. Mitchell, we would welcome and solicit input from individuals we represent in the work that we have intended. Are there any more questions?

Chair Schroeder called a recess.

After the 1st Recess

Mr. Hanson said his clients would agree to the change City's offer to "*City's offer of payment*" for Part 7, paragraph B, the second item drain tile that has been improperly repaired changed to "*drain tile that has been improperly repaired or installed*" is accepted and on the third *item to have something other than slotted pipe as a support to drain tile* we are reluctant to agree. If the City is going to guarantee the product, we should have the right to choose which product we will guarantee.

Chair Schroeder asked Mr. Hanson if he had an answer for Mr. Johnson's question.

Mr. Hanson stated that he thought Mr. Johnson's question to us was whether the landowner would have the option to select the support for the drain tile and we feel that if we have the obligation to guarantee those repairs for ten years that we should be able to select the method of support for the drain tile within the limits of the Mitigation Plan.

Commissioner Corrigan asked for an answer to if her question regarding an option for landowner payment instead of the City choosing to pay.

Mr. Hanson apologized to the Board that Commissioner Corrigan's question was not addressed.

Commissioner Corrigan also asked if Mr. Hanson would confer with his clients about time limits in terms of when the repairs would be made. The Commissioner thought it would be a service to the landowners to have some sense of certainty around the time from which they make their claim to the time to which they can repair.

Mr. Hanson thought a time for repair was a reasonable request and would consult with his clients about a repair timeframe and asked for a short recess.

Citizen Member McCarville asked if the City had considered the possibility that this permit would be revoked and that the pipeline would not be completed. Citizen Member McCarville asked if the City had a backup plan if the pipeline isn't built.

Mr. Hanson suggested that there is no backup plan, that the new natural gas pipeline the City is building had to be completed. The Willmar Branch line, which is the particular line that the City is on, is fully subscribed so that once the City didn't extend its contract, Northern Natural Gas went out and sold the capacity to someone else. Mr. Spethman from Hutchinson Utilities Commission would be happy to talk to that issue.

Chair Schroeder called Mr. Spethman.

Mr. Patrick Spethman introduced himself as interim general manager of the Hutchinson Utilities Commission. The City of Hutchinson has secured through Northern Natural Gas approximately 8,000 MMBTU's of gas. That amount falls significantly short of what our capacity needs could be. There are two sources of gas in both the City of Hutchinson and New Ulm. One source is heating our rate payers and the other one is generating electricity. We were unable to secure additional capacity as Mr. Hanson was stating because there is no capacity on the Willmar Branch Line. That was the whole reason for building the pipeline was to supply our future needs for both the City of Hutchinson and New Ulm. If we exceed the 8,000 MMBTU's we are subject to penalties from Northern Natural Gas and those penalties are significant. If we would have to generate our natural gas to 20,000 MMBTU's for our needs in our city. The heating would also add another 8,000 MMBTU's to our needs to keep the lights on and heat going would cost an additional \$3 million dollars per day.

Chair Schroeder called a short recess.

After the 2nd Recess

Mr. Hanson has again talked with his clients and in regard to the questions, 1.) Whether the landowner would have the option of choosing a payment rather than repair – *the answer is yes on two conditions first that the payment be used for repair of the drain tile and secondly that if the landowner accomplished that himself that we would have no further warrantee obligation on that work.*

Chair Schroeder clarified that the yellow resolution in front of you would have *amended* on first line: Be it resolved that the EQB approves and adopts the amended proposed Stipulation Agreement with the City of Hutchinson. We will also incorporate the payment statement- Mr. Hanson just provided for us regarding warrantee and that the payment be used for the repair.

Commissioner Corrigan asked about a provision on a time period for repair.

Mr. Hanson responded that we would approach that one of two ways. First, they could work with the EQB members and staff to come up with an acceptable time period or second, the time period that they would approve is 3 months, weather permitting.

Commissioner Corrigan responded that the 3 month time period is an acceptable option.

Chair Schroeder then asked Legal Counsel to incorporate that information into the Stipulation Agreement. The Chair then asked Legal Counsel what actions he would need to take at this point.

Legal Counsel responded that if the Board would express confidence that he would work with staff to come up with language after this meeting, that he would get a better product.

Bomier asked if the Board couldn't authorize the Chair to accept the amendment and bind the Board.

Sullivan suggested that Legal Counsel make changes to the amendment as set out, bring it to the Chair and if he believes that the amendment follows the direction the Board has set then the Chair can sign it, if it doesn't meet that standard then the Chair refuses the amendment.

Legal Counsel Wagenius suggested that on the *Resolution* that the "be it further resolved provision" be amended to read "be it further resolved that the Chair of the Board *is authorized to approve final amendments and sign the Stipulation Agreement on behalf of the EQB.*"

The Chair responded that we have a proposed resolution to vote on. The resolution passed by a vote of 12-0. Chair stated that the next item on the agenda is moot since we have a stipulation agreement. The next item Chair Schroeder brought up was the vacancy on the EQB Board.

Mr. Deal said that staff would continue to look at soil compaction and top soil issues and keep the Board informed.

Mr. Sullivan said that staff has a mandate after discussions today to vigorously follow through with this particular piece of work.

Corrigan moves Mandernach seconds that the meeting is adjourned.

Chair adjourns the meeting at 6:10 p.m.