

**MINUTES OF THE
OTTER TAIL COUNTY BOARD OF COMMISSIONERS
Government Services Center, Commissioners' Room
500 W. Fir Avenue, Fergus Falls, MN
July 21, 2009
9:15 a.m.**

Call to Order

The Otter Tail County Board of Commissioners convened Tuesday, July 21, 2009, at 9:15 a.m., at the Otter Tail County Government Services Center in Fergus Falls, MN, with Commissioners Everett Erickson, Chair; Roger Froemming, Vice-Chair; John Lindquist, Doug Huebsch and Lee Rogness present.

Approval of Agenda

Motion by Froemming, second by Rogness, and unanimously carried to approve the Board of Commissioners agenda of July 21, 2009, as presented.

Approval of Minutes

Motion by Lindquist, second by Rogness, and unanimously carried to approve the Board of Commissioners meeting minutes of July 14, 2009, as mailed.

Approval to Pay Bills

Motion by Froemming, second by Rogness, and unanimously carried to approve payment of the County Board bills per Attachment A of these minutes.

Committee of the Whole Discussion

Commissioner Rogness spoke in regards to the County's Abatement policy and how it relates to the economic generators for new growth in our County. Commissioner Lindquist reported on a Bois de Sioux Watershed Board meeting. He talked about a pod that was established in the North Ottawa District and how effective it has been to prevent flooding. Officials of the Bois de Sioux believe that 15 more pods could take care of the flooding issues in the Fargo/Moorhead area at a fraction of the cost compared to other proposed projects.

West Central Initiative Report

WCI Donor Services Officer, Tom McSparron, provided a background of the development of WCI and submitted a briefing of the wide variety of programs in the region. Mr. McSparron discussed the Workforce 2020 program and the impact of WCI programs on businesses. Board members followed the presentation with several project and funding questions.

State Highway 108 Flooding

Property Owner, Mary Marty, read a letter regarding the current situation on Highway 108. She stated that MnDOT is planning to build up Highway 108 and possibly join the Lake Olaf project to drain Lake Annie. Ms. Marty states that the source of the flooding is Lake Grena and without draining Lake Grena, the flooding issue will not be resolved. Discussion followed Ms. Marty's explanation with Highway Engineer, Rick West, explaining that MnDOT has jurisdiction. MnDOT will raise the grade this fall and the County Board has passed a resolution that formalizes an agreement to partner with MnDOT on the Olaf/Deadmann Drainage project. Funding issues were discussed as it relates to draining Lake Grena. Commissioners requested the Highway Engineer to set up a meeting with a MnDOT representative to explain their reasons for the current course of action.

Petty Cash Account

Motion by Huebsch, second by Rogness, and unanimously carried to fund a Petty Cash Account, in the amount of \$100, at the Fergus Falls Transfer Station to deal with cash customers.

Ditch Viewing Program

Ditch Inspector, Randy Wasvick and GIS Coordinator, Brian Armstrong presented a proposed plan to assist Ditch Viewers with redetermination of benefits. Mr. Armstrong used County Ditch #38 mapping samples to illustrate the area drained and soils analysis including slope, depth to water table, ponding, drainage capacity and hydric classification. This plan will take time to put together; however, when it is completed, data for any ditch system can be entered into the program to make the redetermination process faster and more accurate. Motion by Lindquist, second by Huebsch, and unanimously carried to support the use of the new GIS Plan/Tools as submitted, for the ditch viewing process for Ditch No. 70.

Abatement Policy Review

Assessor, Bob Moe, provided a copy of the Otter Tail County Abatement Policy which was adopted in July of 1993. He reviewed the policy and expressed satisfaction with how it has worked over the years.

REGULAR TO MUNICIPAL ADVANCE RESOLUTION

Otter Tail County Resolution No. 2009 - 43

Upon a motion by Huebsch, second by Froemming, and unanimously carried, the following resolution was adopted:

WHEREAS, the County of Otter Tail has obtained the Commissioner's approval of the plans for the following County State-Aid Project(s):

- Project # S.A.P. 056-601-047
- Project # S.A.P. 056-655-009
- Project # S.P. 056667032

AND, WHEREAS, said County is prepared to proceed with the construction of said project(s) by providing county regular funds to supplement the available funds in the County Municipal Account, and

WHEREAS, repayment of the funds so advanced by the County is desired in accordance with the provisions of Minnesota Statutes 162.08, Subd. 5 & 7 and Minnesota Rules 8820.1500, Subp. 9.

NOW, THEREFORE, BE IT RESOLVED: That the Commissioner of Transportation be and is hereby requested to approve this basis for financing said construction project(s) and to authorize repayments from subsequent accruals to said Account, in the amounts as herein indicated.

Transfer the Yearly Municipal Construction Allotment, beginning in 2010, to the Regular Construction Allotment until the borrowed funds are repaid in full to the Regular Construction Allotment Account.

Adopted at Fergus Falls, Minnesota, this 21st day of July, 2009.

Dated: _____

OTTER TAIL COUNTY BOARD OF COMMISSIONERS

By: _____

Everett P. Erickson, Board of Commissioners Chair

Attest: _____

Larry Krohn, County Board Clerk

Geotechnical Evaluation – S.A.P. 56-599-058

Motion by Erickson, second by Froemming, and unanimously carried to authorize the appropriate County Officials' signatures to execute an agreement between the County of Otter Tail and Braun Intertec for a geotechnical evaluation for a proposed bridge replacement over the Pelican River in Dunn Township (Proposal FA-09-03018).

Grant Application – Phelps Mill

Motion by Froemming, second by Lindquist, and unanimously carried to authorize the Highway Engineer to submit a Grant-In-Aid Program application, in the amount of \$13,200.00 with a local match requirement of \$13,250.00, to paint the west side of the mill building and replace sheeting on the north side of the of the mill's 1895 addition.

CSAH 24 Project

Motion by Rogness, second by Lindquist, and unanimously carried to shorten the advertisement requirement for the CSAH 24 project from 30 days to 2 weeks because this is an emergency situation arising out of flooding. This is authorized under M.S. 375.21.

Recess

At 11:25 a.m., Chairman Erickson declared the meeting of the Otter Tail County Board of Commissioners recessed for lunch break.

Public Hearing - David Stock Wetlands Conservation Act Appeal

At 1:00 p.m., Chairman Erickson declared the meeting of the Otter Tail County Board of Commissioners reconvened and opened the meeting for the purpose of conducting a Public Hearing in regards to a WCA Appeal of David H. Stock.

County Attorney, David Hauser, provided the following background:

The David Stock WCA Appeal is being heard as a result of a remand from the Board of Water and Soil Resources (BWSR) directing that the matter be reheard. This WCA Appeal was originally heard on April 7, 2009. BWSR requested a better record of the hearing and additionally, directed that the cropping issue be addressed. As a result, a revised written report from the Technical Evaluation Panel (TEP) and written findings are required. Mr. Hauser stated that the Public Hearing will consist of a report from the TEP, a report from the Applicant, and finally, public comment. At the original Public Hearing, the TEP and Applicant provided a number of exhibits. A red notebook has been submitted from the TEP marked with Exhibits 1 through 9. The Applicant has submitted a black notebook marked with Exhibits A through Z. Proposed findings have been prepared; one approving the exemption requests and one denying the exemption requests. In order for the exemption request that allows for repairing or maintaining an existing drainage system to apply, the wetland must have existed for less than 25 years. Therefore, if it is determined that the wetland existed for more than 25 years, this drainage exemption does not apply.

Motion by Rogness, second by Huebsch, and unanimously carried to recess the Board of Commissioners' meeting and Public Hearing until a Court Reporter is present to provide a detailed transcript of the proceedings.

At 1:29 p.m., Chairman Erickson reconvened the Board of Commissioners' meeting and the WCA Appeal Public Hearing. All five seated County Commissioners and the County Attorney introduced themselves. Mr. Hauser again stated that this Public Hearing was remanded back to the County Board from BWSR for an exemption application of David Henry Stock. The County Board intends to include all the documentation they received at the original Public Hearing of April 7, 2009.

Otter Tail County Land & Resource Director, Bill Kalar, provided the following information: A red notebook with Exhibits 1 through 9 from the TEP has been submitted and entered into the record. Last February, a request for exemptions was filed by Mr. Stock regarding exemptions for wetland activities from Minnesota Statute. The last page in the red notebook shows the wetland location relative to this appeal and also a map is posted on an easel in the County Board room. On February 24, 2009, the Land & Resource office denied exemption applications because Otter Tail County is charged with complying with Minnesota Rules and in this case, it differs somewhat from Minnesota Statute. Exhibit 2 deals with exemption standards. Under MN Rule 8420.0122, Subp. 1, the cropping exemption does not apply to any wetland other than Type 1 and Type 2. Under Minnesota Statutes, the exemption applies to all wetlands. In this case, it was found that the wetland in question is a Type 3 and under Minnesota Rules the exemption did not apply. Also, Minnesota Rules do not allow drainage improvements to occur. Under Subp. 2, you cannot improve drainage. Therefore, as Local Government Staff, the Land & Resource office denied the exemption requests. Mr. Stock appealed the LGU staff decision to the County Board in the Board's role as the LGU. Exhibit 1 shows extensive discussion on April 7, 2009 (original Public Hearing) and following the discussion, the County Board denied the WCA exemptions based on the findings of the Otter Tail County TEP. Mr. Stock appealed the decision to BWSR, who remanded the matter back to the County for a new Public Hearing, as previously noted. The Remand Order is included in Exhibit 3 which directs the TEP to produce a revised written report adequately addressing the cropping history. The report was completed and provided to Mr. Stock's counsel ten days in advance of today's public hearing. In the TEP's revised report, the recommendation is to deny Mr. Stock's exemption request for the following reasons:

- 1) The decision is based on Minnesota Rules and Mr. Stock's request was based on Minnesota Statute.
- 2) MN Rule 8420.0122, Subp. 1 (A) is only applicable to Type 1 & Type 2 wetlands.
- 3) Under Minnesota Rule 8420.0122 Subd. 2, drainage exemptions are only applicable for routine tile and ditch maintenance. In this case, existing drainage was clearly improved by installation of a new tile in a new location as well as additional fill material being added.

The TEP members included West Otter Tail Soil & Water Conservation District (WOTSWCD) Manager, Brad Mergens, Otter Tail County Land & Resource Staff, Eric Babolian, and BWSR Wetland Specialist, Steve Hofstad. They provided their report and the following is a short summary:

- the tile system was installed in 1971
- from 1986 to today's date, high water has been experienced and the result was a submerged outlet which caused some problems with the existing tile system so there was a conversion into an open ditch
- this is an atypical Type 3 wetland basin, which means the basin has been manipulated, disturbed or altered affecting the vegetation that is present by annual mowing or tilling
- cattails and bulrushes are in a mowed condition in Exhibit 6
- there is a certified USDA Natural Resource Conservation Service (NRCS) determination which also types this wetland as a Type 3
- soil borings were completed on May 21, 2008 that identified fragments of cattails and bulrushes
- soil borings show placement of fill in the wetland
- filling a wetland is not maintenance – it is an improvement for farming
- the placement of the new tile (yellow line adjacent to CR 1) was installed to facilitate the drainage of the small isolated wetland to the east and added to the scope of drainage to the main basin (Exhibit 8)

- the TEP has determined that this is a Type 3 wetland while on-site and it was filled and tilled in the fall of 2007
- farming activities (planting) in a wetland in 6 out of 10 years prior to 1991 is required for the ag activities exemption to apply & the wetland must be Type 1 or Type 2
- FSA slides, aerial photography, annual crop compliance slides, USDA crop acreage certification records, affidavits submitted by the applicant/owner and additional County records were reviewed
- USDA crop certification records notes reduction in acreage but doesn't show where the reductions took place
- In 5 out of 10 years the Acreage Certification forms were not signed by the property owner (1985, 1987, 1988, 1989 & 1990)
- the TEP concluded that 4 out of 10 years were planted prior to 1991
- even if the cropping history was met, the exemption wouldn't apply because this wetland is not a Type 1 or Type 2 wetland
- the 1987 Army Corp of Engineers Wetland Delineation Manual was used for determining the type of wetland, especially for atypical situations
- reviewed definitions of wetland types (Exhibit 4)

In conclusion, the LGU is responsible for administration of the WCA from MN Rule 8420 and the TEP has determined that the area had not been planted 6 out of 10 years prior to 1981, that the wetland existed 25 years ago, and drainage improvement has occurred and the wetland was filled. The TEP finds no exemption category for Mr. Stock and recommends denial of Mr. Stock's requests.

Commissioner Lindquist questioned if there was a requirement in this case to obtain a permit from the Bois de Sioux Watershed District.

Commissioner Rogness asked if Type 1, 2, and 3 are progressive in nature. Mr. Hofstad noted that they are not progressive but differentiated in how they lay on the landscape and in types of vegetation and hydrology.

At 2:19 p.m., Chairman Erickson declared the Public Hearing recessed and subsequently reconvened the meeting at 2:25 p.m.

The applicant's attorney, H. Morrison Kershner provided a lengthy report and the following is a summary of the information:

- there are serious problems with the cropping history
- criticism is not with the TEP, but rather with their conclusions in this case and charge of using rules vs. statutes and how the TEP looked at the cropping history
- referred to Exhibit 6 where there is a page towards the back in which the NRCS has provided information on cropping – the land was planted in 2005 even though 2005 was a very wet year
- NRCS has concluded that most years there was planting over a 25 year stretch
- the applicant has established cropping history which has to be 6 out of 10 years
- in Exhibit F, Charles Evenson who farms this ground and installed the existing tile system states that he planted the ground every year in the 1980's except 1986 when it was drowned out
- Charles Evenson certified that he is planting 17.5 acres in a large field
- in 1984, the federal government viewed the acreage and confirmed the planting of the acreage that Mr. Evenson said he planted

- in 1982, section 8, it indicates that the acreage has been checked
- the farmer certified planting 9 out of 10 years long before WCA came into affect and this should be accepted now
- Applicant David Stock provided affidavit explaining that he resided in Western Township and has farmed since 1967 and knows the land along with Charlie and Earl Evenson who indicated by affidavit that the ground was farmed
- Exhibit Y – Affidavit of Mark Aanenson, an Environmental Scientist with Houston Engineering, previously a District Manager of Mahanomen County SWCD and a Certified Wetland Delineator: Mr. Aanenson describes the problems with attempting to determine whether a piece of ground has been cropped or planted based on a single one-year photograph and describes the TEP photos used to answer the cropping question as undated, historical air photos
- the quality of the photographs being used by the TEP to determine planting is so poor, it is by guess if it has been planted
- a Freedom of Information request was made to the government and quality photos were submitted for 1957 - distinct, good quality and dated unlike the photos used by the TEP
- 9/4/1980, very high quality and appears to be taken after harvest with clear harvest activity taken place – this type of quality photograph(s) should be used by the TEP
- from 1981 through 1990, there is only one year that clearly shows standing water – not a Type 3 wetland
- TEP says the land was cropped in 1981, 1988, 1989, & 1990 – the evidence clearly shows 9 out of 10 years it was planted, and certainly 6
- Exhibit Y explains the problem using a single photograph when making planting determinations
- the best evidence is testimony from people who have personal knowledge
- MN Statute entitles Mr. Stock to exemption if the land was planted 6 out of 10 years during the 1980's - the Statute does not make a distinction on wetland types
- the regulator went beyond the Statutes and added more regulation
- there are a string of cases that dispute the right of a regulator to go beyond the scope of what the statute authorizes
- the area shows up dry in photographs – it is not a Type 3 wetland based on the evidence submitted
- affidavit from Doug Lee (Exhibit G) did the tiling in 2007 and explains what was done and that the scope and affect did not expand the existing drainage system
- Exhibit A - disagree with Mr. Hauser that the 2nd exemption does not apply because the wetland existed for more than 25 years – intent of legislation is that, if the maintenance or repair conducted maintains the same scope and affect of the drainage system to avoid the return of the wetland characteristics over an extended period of 25 years, the exemption applies
- the exemption for maintenance and repair, both in statute and regulations references draining excavating and the filling of wetlands – filling is included in the exemption for the maintenance of existing wetlands
- both exemptions apply in this case

Charlie Evenson gave testimony regarding certifications of planted acreage.

David Stock stated that the water in this area does not flow to the Bois de Sioux Watershed. He provided testimony regarding the reason the new tile (marked in yellow) was placed in the current location and not where the original broken tile was located. Mr. Stock stated that the new tile restored the drainage the Evenson's had installed in 1969.

Chairman Erickson opened the Public Hearing to the general public and the following is a summary:

Senior BWSR Wetland Specialist, Dale Krystosek,

- 1) The photographs which were the basis of the TEP decision were taken the last week of June or first two weeks of July
- 2) Photographs show ponding and saturation – a Type 1 wetland would not be ponded late June or early July
- 3) Even if the land was cropped 6 out of 10 years, there is evidence that it is a Type 3 wetland

Mr. Kershner noted that a 3 week stretch in time is not adequate for planting decisions and that the photos should be dated and the 3 week stretch in time of date of photos doesn't start until the mid-1980's.

David Bakke – spoke in support of David Stock receiving an exemption. Mr. Bakke stated that he has tilled soil for decades and has seen cattails and bulrushes come and go in places that would never be expected and we need to promote agricultural products.

Jennifer Frank – if the wetland existed in the mid-1980's, then the study done by the NRCS in 1988 or 1989 is incorrect because it was not labeled a wetland then. Now, the NRCS supports the documentation of the TEP but did not support that position in the 1980's.

Mr. Hauser asked the applicant if the TEP had told him that this was a wetland before he filled and changed the drainage. Mr. Stock stated that they did not. The TEP states that they did.

Mr. Hofstad noted that the applicant can apply for a replacement plan at a 1 to 1 ratio.

Motion by Lindquist, second by Rogness to deny the WCA Exemption Requests of David H. Stock because MN Rules are being applied – not MN Statute, the location of the new tile line, the land is part of the Bois de Sioux Watershed and a permit was not received, and there are questions that are beyond commissioners expertise. Chairman Erickson called for a roll call vote as follows:

	<u>Yea</u>	<u>Nay</u>	<u>Abstain</u>
Commissioner Rogness			X
Commissioner Huebsch	X		
Commissioner Lindquist	X		
Commissioner Froemming	X		
Commissioner Erickson	X		

Motion carried 4 – 1.

Motion by Lindquist, second by Huebsch, to find that the land had been cropped only 4 out of 10 years and to adopt the Findings of Fact and Order Denying Exemption with an additional reason for denial added that a permit was not obtained from the Bois de Sioux Watershed District. Chairman Erickson called for a roll call vote as follows:

	<u>Yea</u>	<u>Nay</u>	<u>Abstain</u>
Commissioner Rogness			X
Commissioner Huebsch		X	
Commissioner Lindquist	X		
Commissioner Froemming	X		
Commissioner Erickson	X		

Motion passed 3-1-1 with Commissioner Huebsch opposed due to unclear evidence regarding the cropping and type of wetland.

Adjournment

At 4:03 p.m., Chairman Erickson declared the meeting of the Otter Tail County Board of Commissioners adjourned until Tuesday, July 28, 2009.

Dated: _____

OTTER TAIL COUNTY BOARD OF COMMISSIONERS

By: _____
Everett P. Erickson, Board of Commissioners Chair

Attest: _____
Larry Krohn, Clerk

CB/kd

approved minutes

WARRANTS APPROVED ON 7/21/2009 FOR PAYMENT 7/21/2009

<u>VENDOR NAME</u>	<u>AMOUNT</u>
A-1 LOCK & KEY LLC	26.39
A'VIANDS LLC	3,907.57
JANICE AABERG	69.21
AFFILIATED COMPUTER SERVICES	4,425.47
AMERICAN INSTITUTIONAL SUPPLY	321.44
BARNA GUZY & STEFFEN LTD	507.00
BATTLE LAKE STANDARD	52.61
BEYER BODY SHOP INC	601.73
CALL ONE INC	73.09
CIT TECHNOLOGY FIN SERV INC	190.53
COOPERS TECHNOLOGY GROUP	12.83
DESIGN ELECTRONICS	42.58
GARRETT EASTWOOD	147.20
FERGUS TIRE CENTER	2,712.64
FRONTIER PRECISION INC	541.02
G & K SERVICES	1,518.71
GALL'S INC	13.59
GE CAPITAL (CA)	374.05
HEALTHCARE ENVIRONMENTAL SERVI	29.10
KELLY SERVICES INC	529.92
JOONHO KIM	640.00
DONALD KRAUSE	2,700.00
KRIS ENGINEERING INC	644.77
LAKE REGION DENTAL CENTER	408.00
LAKELAND MENTAL HEALTH CENTER	109.00
LAWSON PRODUCTS INC	750.04
LEITCH EXCAVATING	9,037.00
M-R SIGN COMPANY INC.	1,823.86
MN CO ENGINEERS ASSOC	200.00
MN SHERIFFS' ASSOCIATION	690.00
CARLTON MOEN	1,701.60
OTTER TAIL CO EMPLOYEES COMMIT	15.00
PAMIDA PHARMACY	6,121.98
PERHAM AREA EMS	330.00
PIONEER RIM & WHEEL CO	396.37
RDO TRUCK CENTERS	205.19
ROYAL TIRE INC	229.54
SAFELITE FULFILLMENT INC	214.79
CHERI SCHULTZ	39.89
SECRETARY OF STATE	691.84
SHERBROOKE TURF INC	2,970.00
SPRINT	662.70
SWANSTON EQUIPMENT CORP	1,002.79
UNIFORMS UNLIMITED	225.48
VICTOR LUNDEEN COMPANY	80.16
WADENA ASPHALT INC	6,268.46
ROY WENDORF	200.00
WILKIN CO SHERIFF	1,766.40
XEROX CORPORATION	193.77
<u>**** FINAL TOTAL.....</u>	<u>\$56,415.31 ****</u>