

MINUTES OF THE
THE CITY OF SANTA FE & SANTA FE COUNTY
BUCKMAN DIRECT DIVERSION BOARD MEETING

January 7, 2021

1. This meeting of the Santa Fe County & City Buckman Direct Diversion Board meeting was called to order by Councilor JoAnne Vigil Coppler, Chair, at approximately 4:00 p.m.

In accordance with the Public Health Emergency Order issued by the State of New Mexico, and pursuant to the New Mexico Attorney General's Open Government Division Advisory during COVID-19, public entities are authorized to conduct virtual meetings.

[For clarity purposes, repetitive identification and confirmations of those on the line and their audibility have been eliminated and/or condensed in this transcript.]

2. Roll was called and the following members were present:

BDD Board Members Present:

Councilor JoAnne Vigil Coppler, Chair
Commissioner Anna Hansen, Vice Chair
Commissioner Anna Hamilton
J.C. Helms, Citizen Member
Councilor Carol Romero-Wirth
Tom Egelhoff, Las Campanas [non-voting]

Member(s) Excused:

None

BDD Board Alternate Members Present:

Peter Ives, Community Alternate

Others Present:

Rick Carpenter, BDD Facilities Manager
Nancy Long, BDD Legal Counsel
Kyle Harwood, BDD Legal Counsel
Bernardine Padilla, BDD Public Relations Coordinator
Randy Sugrue, BDD Operations Superintendent
Jamie-Rae Diaz, City Administrative Assistant
Joe Abeyta, City IT
Jesse Roach, City Water Division Director
Marcos Martinez, City Assistant Attorney
Gregory S. Shaffer, County Attorney

Jay Lazarus, Glorieta Geoscience
Daniel Frost, Snell & Wilbur
Monique Maes, City Finance
Luke Pierpont, Egolf + Frelic + Martinez + Harwood
Daniela Bowman, BDD

3. APPROVAL OF AGENDA

There were no changes and Commissioner Hansen moved to approve as published. Mr. Helms seconded. The Chair requested a roll call vote and the motion passed unanimously [5-0].

4. APPROVAL OF CONSENT AGENDA

Staff had no changes to the consent agenda. Councilor Romero-Wirth requested that the two items on the consent agenda (a. and b.) be removed for discussion.

Following discussion on whether a motion was required, Chair Vigil Coppler requested a motion to amend the consent agenda removing both items. Commissioner Hansen so moved and Mr. Helms seconded. The motion passed by unanimous [5-0] roll call vote.

5. APPROVAL OF MINUTES: December 3, 2020

For the record, Chair Vigil Coppler stated that: The only matter discussed during the executive session of our last meeting, December 3, 2020, was the matter as stated in the motion to go into executive session and no action was taken.

Commissioner Hansen requested the following corrections:

Page 4, 8 lines from the bottom where Commissioner Hansen is speaking: "I only want to ask..."

Page 8, 4th paragraph, where Mr. Carpenter is speaking: "...two more items...they bother are..."

Commissioner Hansen moved to approve as corrected. Mr. Helms seconded and the motion passed by unanimous [5-0] roll call vote.

6. MATTERS FROM THE PUBLIC

Ms. Jamie-Rae Diaz confirmed that no public comments were received.

7. PRESENTATION/INFORMATIONAL ITEMS

a. Monthly Update on BDD Operations

CHAIR VIGIL COPPLER: Randy Sugrue.

RANDY SUGRUE (Operations Superintendent): Thank you, Madam

Chair, members of the Board. For the month of December 2020, raw water diversions averaged about 4.5 mgd. Our drinking water deliveries through our Booster Station 4A/5A averaged 4.4 million gallons per day. Las Campanas did not divert water in December. Our onsite treated and un-treated water storage was about 100,000 gallons per day. BDD providing about 74 percent of the water supply to the City and County for the month.

On page 2, you'll see a regional demand drought summary. Unfortunately, we're still looking at a La Niña situation and likely dry weather through the winter. You see the graph at the bottom of page 1 shows about 140 million gallons for December. I wanted to make a point that if you look at the table on page 3, because this report is produced before the meeting those final numbers of the year 2020 are not final numbers and so those final numbers will be available within the next couple of weeks. I want to let the City and County know that SJC native diversion number that is not actually the final number. It's close but not quite. So that's all I have to report for this month. I stand for questions.

CHAIR VIGIL COPPLER: Does anyone on the Board have questions?
Commissioner Hamilton.

COMMISSIONER HAMILTON: Not exactly a question, from my own direct information I would totally agree on the continued La Niña prediction. I was just informed by somebody else who tends to follow and look at this kind of thing that NOAA – those predictions are put out by a couple of agencies that NOAA recently revised their projection for this area to be closer to average. So this is just kind of a prurient interest thing for everybody. I have not had the time to research that directly but I thought if anybody's interested or anybody else has looked at that, the new NOAA predictions.

MR. SUGRUE: That's an optimistic suggestion and I certainly will. Mother Nature can surprise us and I hope for the best. All in all, just to summarize BDD actually with the final numbers I think we may have produced with our best efforts and despite our mechanical and the issues with the river this year, we may have produced more water this year than we have in any previous year.

CHAIR VIGIL COPPLER: Former Councilor Ives.

MR. IVES: Thank you, Madam Chair. Just looking at the chart on page 2, it appears to indicate that we have more water in storage now than we did in the same point in time last year and presumably that is not withstanding the very dry conditions that we have experienced in the last several months; is that correct?

MR. SUGRUE: I'll defer that to Rick, somewhat. We did maximize our native water diversions through late summer and fall which then would allow our SJC storage to accumulate somewhat. Rick, I don't know if you have any other detail on that.

RICK CARPENTER (Facilities Manager): No, that is exactly correct. We attempted and were successful in maximizing native water this year. So that left more water in storage from SJC. There could be some nuances there too between Heron, El Vado and Abiquiu and how BOR moves water, stores water and how it ends up in our storage pool in Abiquiu. But Randy for the most part is absolutely correct. That's the reasons primarily of using native water and saving SJC water.

MR. IVES: And one final question because I cannot recall our annual San Juan-Chama allocation; what percentages did we receive this past year and what's it looking like on a going forward basis?

MR. SUGRUE: I don't recall the final report, if we got 100 percent allocations here. I think we did.

MR. CARPENTER: I don't have the report here in front of me but my recollection is that if we didn't get 100 percent it was right at 100 percent. Mr. Ives, if you would like for me to get to you with a specific number, I can. What I can tell you is if it wasn't 100 percent, it was very, very close.

MR. IVES: Got you. No, that is great news. I know at times that was not necessarily what was being predicted.

MR. CARPENTER: And the river stayed higher longer than we thought it was going to. If you'll think back many months ago we were not so confident that that was going to be the case but we were able to maintain diversions and so it worked out.

MR. IVES: Good, thank you.

CHAIR VIGIL COPPLER: Any other questions? Commissioner Hamilton.

COMMISSIONER HAMILTON: Thank you, Madam Chair. That was an interesting point, Councilor Ives. And as sort of a follow-up is it possible that this slightly higher storage is already reflecting some of the shared pool change in management?

MR. SUGRUE: I don't have an answer to that. But I do know that we worked mostly with Santa Fe County to maximize their native water diversions because those waters cannot be stored and we store our San Juan-Chama waters. So we are working closely with the County for mutual benefit between City and County.

COMMISSIONER HAMILTON: Sure, sure. I don't know if Dr. Roach is on and if he has any thoughts.

JESSE ROACH (City Water Division Director): Commissioner, I believe that Randy is correct in saying that by maximizing native use during the year we are able to conserve San Juan-Chama storage. The question about the shared pool is that those operations are reflected – and I apologize I don't remember what it's called – in this year's operating plan and it was called Maximization of Water Resources or something. The shared pool would allow that credit that the County sort of built up to pass-through to next year and that shared pool has not been formally adopted yet.

CHAIR VIGIL COPPLER: Commissioner Hansen.

COMMISSIONER HANSEN: So I believe, and Commissioner Hamilton you can correct me, have we not approved that at the BDD? I thought we had approved it. So is it the City that hasn't approved it?

CHAIR VIGIL COPPLER: I thought that it was on the agenda and then it was removed.

MR. ROACH: Madam Chair, members of the Board, it has not been approved by the City yet. It starts through our committee process next week.

CHAIR VIGIL COPPLER: Any other questions?

KYLE HARWOOD (BDD Counsel): I have the actual 2020 San Juan-Chama allocations if you'd like me to share it or we can move on.

CHAIR VIGIL COPPLER: What's the pleasure of the Board?

COUNCILOR ROMERO-WIRTH: It's just a number; right? You could give it to us.

MR. HARWOOD: The number is 81.

CHAIR VIGIL COPPLER: Thank you. I thought you were referring to a whole chart or presentation. [Mr. Harwood shares a screen of information.] Okay, thank you.

MR. HARWOOD: So it was a total of 78,000 out of 96,200.

CHAIR VIGIL COPPLER: Great, thank you. Anything else from the Board? Thank you, Randy.

MR. SUGRUE: Thank you much, Happy New Year.

CHAIR VIGIL COPPLER: Same to you.

7. b. Report from the Facilities Manager

MR. CARPENTER: Thank you, Madam Chair and members of the Board. Getting back to the correction in the minutes, it would be a little bit difficult to report that we had some key positions, those staff members resigned and you're aware of them. I wanted to update the Board at this meeting on what we have been able to do about that so far. I think we're making good progress not the least of which is the maintenance superintendent that was vacated by Bryan Armstrong. We wrapped up interviews for that position on Tuesday of this week which is a pretty rapid pace to be able to do that. We had good candidates. We have a preferred candidate in mind. I have been processing, yesterday and today, all of the forms, paperwork and information, checking references and things like that so that hopefully by tomorrow I can submit that up the management chain and into HR to keep that moving. And, hopefully, if all things work out, we'll be able to make that hire in very short order. So that I think it is good news, certainly good news to BDD staff to have that mission critical position filled as soon as possible.

As far as Mackie Romero's old position, we are making progress on it. Right now it is in the hands of the HR Department but they know that it is a priority as well. I am hoping to move that forward at a similar pace once we get the approval to do so. So that's in the works as well.

I think lastly that another very important position that has been vacant for awhile, in fact, we have not been successful the last three times we've advertised for it, the instrumentation control technician. It's hard to fill. It has a very specific skill set and job description so we didn't even receive applications in the past. It just hasn't happened. I've been working on our end to make some changes. I can't be real specific about it right now because it's still in the works, but the changes that we're advocating for would make that position more marketable, more attractive in the marketplace and responsive to what we feel the marketplace is signaling to us. So those changes are also in the works and I hope that will result in more success in the future when we do advertise for this position which again I hope will be much sooner rather than later. And that's my update for the Board.

CHAIR VIGIL COPPLER: Thank you. Mr. Egelhoff.

MR. EGELHOFF: Rick, can we expect all billing to cease until Mackie's position is filled?

MR. CARPENTER: That's a tough one for me to answer definitively, Mr. Egelhoff. I don't think we're going to have any significant hiccups in our process. We're working with Mackie still to keep essential functions moving while that position is vacant. Monique is doing a really good job also for adapting to the essential functions of that position. If there were going to be any significant issues associated with that, I would report

that to the Board. I can't do that at this time because I don't think there's going to be. It's going to be difficult. We're going to have to pull together but I think that we're going to be able to maintain the essential functions of that position even with the vacancy that currently exists.

CHAIR VIGIL COPPLER: Yes, Commissioner Hansen.

COMMISSIONER HANSEN: Thank you, Rick, very much. I am happy to hear you have Monique Maes there to help you. That makes me feel a little bit better that you are not completely alone and that Mackie is out there also. So, I just wanted to say that.

CHAIR VIGIL COPPLER: Any other comments? Rick, have you concluded your report?

MR. CARPENTER: Madam Chair that is correct, thank you.

CHAIR VIGIL COPPLER: Thanks to Bernardine Padilla, I am sure you have been pitching in as well – as well as all the staff.

MR. CARPENTER: Madam Chair, Bernardine has been very helpful and continues to do so and to rise to the occasion.

CHAIR VIGIL COPPLER: Great. Commissioner Hansen.

COMMISSIONER HANSEN: On that point, I didn't know where the right point was to recognize Bernardine Padilla but I want to thank her. She is one of the best distributors of information. I love all of your emails. Thank you once again in the new year. You really do a great job. I get a lot of information from you that I don't get from anyone else so I am grateful for your constant attention to those kinds of details. I'm glad to hear that you're also helping Rick with that. So thank you and I did not mean to leave you out.

BERNARDINE PADILLA (BDD PR Coordinator): You are welcome.

CHAIR VIGIL COPPLER: Seeing no other questions for Rick, we can move on.

8. a. **Request for Approval to prepare and file amicus brief in *State of California et al., v. Wheeler et al.*, Case No. 3-20-cv-03005 (N.D. Cal.) challenging the Navigable Waters Protection Rule which redefines Waters of the United States for purposes of Clean Water Act Jurisdiction**
- b. **Request for Approval of amendment to the legal services agreement with Long, Komer & Associates for additional legal services associated with preparing and filing an amicus brief in *State of California et al., vs. Wheeler et al.*, Case No. 3-20-cv-03005, in the amount of \$30,000 plus New Mexico gross receipts tax [Amount amended to \$20,000 – See page 16]**

MR. HARWOOD: Thank you, Madam Chair. I have share-screened the memo that was in the packet. As you all know, this was a topic of conversation at previous Board meetings. We have discussed both the regulatory and policy implications that are raised by the current Navigable Waters Protection Rule, otherwise referred to as the, "Dirty Water Rule." We have advised you on several and current pieces of litigation around the country. We've also discussed with you that the New Mexico AG's Office is involved in this particular case and that we've been in discussions with them on potentially filing an amicus where we would explain the significant anticipated impact of the Dirty Water Rule

or the Trump WOTUS rule ephemeral and other streams upstream of the BDD intake. And this memo describes the background that we've also verbally discussed and provides the recommendation of filing an amicus brief in that matter. As you all know, there is also a concurrent contract amendment that was on the agenda that was similarly removed from the consent so that if the Board does choose to direct us to provide such an amicus filing we would need additional funds to Nancy Long's contract that I work under for you the Board so that manner has also been pulled from the consent agenda. So I stand for any questions or clarifications that you would like.

CHAIR VIGIL COPPLER: Councilor Romero-Wirth pulled this from consent so Councilor, would you like to –

COUNCILOR ROMERO-WIRTH: Not yet. I do have some questions and I think there was somebody else that Kyle mentioned who was going to give us underlying information about this.

MR. HARWOOD: I'd be happy to hand the microphone to Jesse Roach who wanted to, I believe, address the Board on this topic.

CHAIR VIGIL COPPLER: Before you do that, Commissioner Hansen has had her hand up for some time.

COMMISSIONER HANSEN: Thank you, Madam Chair. I wanted you to know that I did share a video on the Dirty Water Rule that I did for Vox Media out of New York. They were here a few weeks ago and called me and I had a moment in-between some meetings to be able to go down and sit by the Santa Fe River. It was actually right after the day that it snowed and it was quite chilly and I did send it to all of you. It's a short video and I think it was done really well and really explains the issue of the Dirty Water Rule. And I don't know, Bernie, if you were on that list; did you get it?

MS. PADILLA: No, but if you could share it with me I would really appreciate it.

COMMISSIONER HANSEN: So if you will send me an email I'll send it right back and anybody else who didn't get it. I might not have sent it to Jesse but I did send it, I think, to everybody else.

CHAIR VIGIL COPPLER: Commissioner, I watched it and it really put everything in layman terms and was very easy to understand and it's not very long.

COMMISSIONER HANSEN: Thank you. And I also felt like I was really happy to sit along the Santa Fe River and I am also grateful to sit on the Santa Fe River Commission for the City of Santa Fe. So I was really honored to be able to speak on our behalf.

CHAIR VIGIL COPPLER: Thank you. Kyle, were you going to turn it over now?

MR. HARWOOD: Yes, I was going to virtually hand the microphone to Mr. Roach, Dr. Roach, excuse me.

MR. ROACH: Madam Chair, members of the Board, thank you for your time. I apologize that I missed the discussion about his in executive session last month. I wanted to raise a few concerns on behalf of the City of Santa Fe water ratepayers. I am not convinced that BDD spending \$30,000 on an amicus brief will alter the outcome of a lawsuit that already includes the legal power of 18 states. I wonder why we don't just send a letter of support saying that we do support the lawsuit.

The lawsuit also challenges the Trump administration's Navigable Waters Protection Rule and I'm wondering what will happen to that rule with the new administration and wondering why we don't wait until we understand what the fate of this lawsuit is or that actual rule before we move forward to try and find \$30,000 if we can to try and fight it.

And, finally, it is my understanding that the way this cost would be coded is that the City of Santa Fe ratepayer would bear about 75 percent of the cost. I guess I wonder in this case if this is something that the Board chooses to pursue would it not make sense to specify that that cost be shared 50-50. So I guess in conclusion I am just questioning if this is a wise use of limited BDD funds at this time and I thank you for your time and consideration.

CHAIR VIGIL COPPLER: Okay, Councilor Romero-Wirth, did you have anything to add since you pulled this?

COUNCILOR ROMERO-WIRTH: Thank you, Madam Chair. I'm just curious about a number of things. So this isn't a budgeted item so we were going to have to find \$30,000 and I'm just curious where we're pulling that money from.

MR. CARPENTER: Madam Chair, Councilor Romero-Wirth, I have not identified exactly what line item that would come from. It's probably more likely that that would come from multiple line items. I haven't even done a whole lot of research into it as of yet because I wanted to see how this item was going to turn out. In the past, if someone has come to me or Mackie or other facility managers going back in history, if the Board's will is to go find \$30,000 we are able to do it. But the net outcome would be that that \$30,000 would not be spent on something else that was already budgeted.

COUNCILOR ROMERO-WIRTH: So does that mean it would come from some sort of reserve fund?

MR. CARPENTER: It means we would probably partially defund some other line item. Whether that's chemicals or materials for maintenance and repair or defer a cost that we could maybe re-incur at a later date that is probably more likely. We're usually able to do it, it's just that it's not a budgeted item currently so I would have to go back into the budget and see where we can spare a cut here or there in order to come up with the money.

COUNCILOR ROMERO-WIRTH: Okay. That concerns me a little bit. I don't know who this question is for, Madam Chair, maybe for one of the attorneys: are there other options? Jesse spoke about could we send a letter of support instead of filing an amicus brief? I'm just curious if that's an option at all. I guess I want to say at the outset that obviously this rule that has been put forward is unacceptable and needs to be overturned. What I'm concerned about is our role in doing that and whether spending \$30,000 in a tight budget situation and having the fire power that is already out there whether it will really tip the balance and is it really necessary for us to play a role? Even though, we have a unique story. I know it's interesting and I know people would be interested in it but I'm not sure – and I have expressed this before and I'm a little uncomfortable with us jumping in here because I don't think it's going to change the outcome which I think is already going in our favor and it probably will be overturned one way or the other.

I understand the important of this but I'm curious: is there another option? Could we send a letter of support?

MR. HARWOOD: Let me take the first swing at it. There are several attorneys on the call that may want to add in other points. We can't send a letter to the judge. That's not appropriate as a non-party to the case and the letter wouldn't appropriate

if we were a party to the case. This is the one most efficient manner that we've identified where we know we can get something before the judge about our particular circumstances. We could obviously send a letter to the editor. We could send a letter to the AG. We could send a letter to the other AGs that are plaintiffs in the matter expressing our support for the litigation. So there are letters that could be sent to parties. But short of intervening as a party which is a much, much bigger project, this was the step where we knew we would be getting our materials in front of the judge in a manner that would not require us to do additional briefing or respond and discovery if the case were to go in that direction. So it was sort of the simplest safest way of knowing we could get our story directly in front of the judge given the nature of the litigation. That's not to say that there aren't all of the other sort of more general public relations type ways we can express our opinion or hopes but I think it's fair to say that this really the only way we know we can get our story directly in front of the judge for their consideration as they rule on the case.

With respect to both Jesse and you Councilor referencing what's expected under the new administration, I think that it is generally anticipated that the incoming administration is going to make changes. How, when and how quickly that all happens, I think is an unknown.

COUNCILOR ROMERO-WIRTH: Yes, but on that point, we also don't know how quickly the different legal paths will resolve the issue either.

MR. HARWOOD: That is true. The current litigation schedule has this mid-February deadline for the filing that we are talking about. And then I believe and Luke maybe you can help me – I think there was a summer hearing, if I'm remembering correctly, – a June or July hearing on this phase of the proceedings. And, of course, judges can move those deadlines often when they want to. That's absolutely correct; we don't know the outcome nor the schedule of this litigation. We do know the deadline for what we've briefed you on is mid-February. So it's not practical, just as a note, it's not really practical to delay this decision until February because there's not really enough time between the February Board meeting and the deadline for the filing. There's time but there's not much time. We wouldn't want to rush the drafting this. We would like a decision today. Perhaps I'm answering a question that was not asked but I just wanted to make that clear.

COUNCILOR ROMERO-WIRTH: I think there's no reason not to make a decision today. That's not what I'm arguing. I guess – are there any other attorneys who wanted to weigh in on this aside from the attorney who is going to benefit from it?

CHAIR VIGIL COPPLER: Nancy Long, I see you unmuted, did you want to say something?

NANCY LONG (BDD Counsel): I was just going to chime in on the letter idea and confirm that I don't see a way to be supportive by way of letter unless it is to the parties but not necessarily to the court because it just wouldn't be appropriate, nor would it get the right attention, so it probably wouldn't be worthwhile doing.

CHAIR VIGIL COPPLER: Okay. I have on the attorney request for opinion, I have Councilor Ives and then I have Commissioner Hansen and Commissioner Hamilton in the queue.

COUNCILOR ROMERO-WIRTH: I do have a couple more questions, Madam Chair. And I don't know if Marcos Martinez wanted to weigh in on this but I also have a question for him as well.

CHAIR VIGIL COPPLER: I'll have Councilor Ives go first and then Marcos Martinez.

MR. IVES: Thank you, Madam Chair. At our last meeting, I had indicated that I wasn't clear that this was a prudent path forward as a fiscal proposition because evidence of the harm, in my mind, was not solidly made. In other words, it existed as a possibility as opposed to a concrete thing where we can say the City has been and the County has been harmed in the following ways. And correcting this rule would result in those harms being remedied. Without that concreteness it didn't seem to me to be the most prudent expenditure of funding for the Board and the only alternative route I can think of, and I agree a letter probably does not make sense, but clearly the Attorney General's Office is briefing. There is no reason we couldn't be utilized in the briefing and I don't know where that briefing stands or whether it would be appropriate at this point in time but whether we tell the story through an amicus or tell the story through briefing by the Attorney General who is representing the interests of the people of the State of New Mexico, that might be a possibility. And, again, procedurally I'm not sure where the case stands. So I don't know if that's in fact the case. But without being able to just demonstrate significant and concrete harm, again, it just did not seem a prudent expenditure. Thank you, Madam Chair.

CHAIR VIGIL COPPLER: Marcos Martinez.

MARCOS MARTINEZ (Assistant City Attorney): Thank you, Madam Chair. I guess, I agree largely with the comments that Jesse has made and I understand many of the questions that Councilor Romero-Wirth has also made. I'm not sure that an amicus brief will tip the scales in any way. In particular, amicus briefs at the district court stage are not even really contemplated by the federal rules of civil procedure. So to what extent it really gets before the judge and makes a difference is not entirely clear to me. I understand though that it is an important topic. I guess in support of some of the other references that both Kyle and Councilor Romero-Wirth have made, I would say that there's litigation in other circuits. There's litigation in the 10th Circuit which the City is a part of and Colorado has already obtained an injunction against the navigable water rule. That injunction has been appealed by the Army Corps of Engineers. That appeal has been fully briefed and argued and so I think the opportunities to express skepticism towards navigable water rules are still out there. That is actually an interesting case. The stage of litigation is such that there is an injunction while the merits hearing will go along and they'll be another opportunity, in other words, for the City possibly to participate in that case which is in our own circuit.

So I don't think that choosing at this moment in time really loses anything for the BDD Board or the City and County in particular. And I'll stand for questions.

COUNCILOR ROMERO-WIRTH: Madam Chair, if I can.

CHAIR VIGIL COPPLER: Yes.

COUNCILOR ROMERO-WIRTH: In the 10th Circuit the State of New Mexico for any non-lawyers who aren't familiar with this or maybe you're a non-lawyer and you are familiar with this, but we are part of the 10th Circuit. So if that injunction holds on appeal we are part of that 10th Circuit and I think, Marcos correct me if I'm wrong, we stand the possibility of having the injunction of the rule apply to us here in New Mexico.

MR. MARTINEZ: It may depend on how broadly the court applies the injunction. Colorado is really arguing for itself and only sought an injunction in the State of

Colorado and received that. So the rule is not applying. It's been held in abeyance in Colorado already. The 10th Circuit does serve many other states and New Mexico is one of them. As I said before, they're at the injunctive relief stage of the case. The merits will continue and there may be other opportunities for the State of New Mexico and/or the Board to join.

COUNCILOR ROMERO-WIRTH: Okay. And I guess the other question I would have too is that, alright so it sounds from multiple voices that a letter isn't necessarily going to be an alternative for us but there may be, as Marcos just suggested, other places where we could join as litigation in the 10th Circuit moves.

I also wonder if with the new administration point some ammunition, letters, and tell our story to the incoming administration, the new cabinet secretaries and make our case there for how important it is that this rule not be allowed to go forward.

Again, I'm concerned that this is not the best use of our money because I'm not sure it changes the outcome. There is already 18 states suing. There is a new administration and I think there's a good chance that we can get overturned with that. I had one other thought but I guess that's where I'll leave it, Madam Chair. Thank you.

CHAIR VIGIL COPPLER: Thank you. Commissioner Hansen and then Commissioner Hamilton.

COMMISSIONER HANSEN: Thank you very much, Madam Chair. Thank you all the attorneys. I also want to say, Jesse, I'm a little disappointed that you're late to the table and that you were not at our meeting in December to talk about this because as I think this Board well knows I have very strong feelings about this dirty water rule and I have very strong feelings that it impacts on LANL, on the Rio Grande, and the BDD, and of course on the Santa Fe River that is impacted over 90 percent and where we are losing protection and money to protect our waters in the Santa Fe River and on the Pajarito Plateau. So far from what I hear, LANL has been playing nice and that doesn't mean that they will continue to and they don't really play nice anyhow – a pejorative term of them not being really interested in what they do to anybody as long as they get their way. I do sit on the technical working group with LANL and NB3 and we're talking about issues of cleanup and issues of cap and cover which I am completely opposed to.

I am concerned that if we don't tell our story which is incredibly unique and really has the ability to impact the rest of the country such as places like Savannah River and the Columbia River and all the other nuclear facilities throughout the United States that are impacted by this rule, that we're missing an opportunity to protect the citizens and the ratepayers, as you pointed out, of New Mexico and of Santa Fe. And protecting the ratepayers to me is one of the more important things. The health and public safety of our constituents and this rule is basically taking away our protections of our water. So that is why I think that it is important to file this amicus brief. I recognize that it is possibly a City burden but I am a resident of the City of Santa Fe and a ratepayer in the City of Santa Fe even though I am a County Commissioner, and so I have both hats on in that regard and my concern is very deep for our water quality and we've been impacted in the past. The New Mexico Environment Department does not have oversight of radionuclides. They only have oversight of vapors. So when we're having runoff and there's no oversight and no way to protect us and protect our water that we're in taking from the Rio Grande, there is some real impacts.

I do understand the financial cost and I would have liked to have seen it more in the \$20,000 range. I think everybody would have felt a little more comfortable. But at the same time, I guess this is a question for Kyle and Luke, is there any way for somewhat less money that we can attach a story with the AG Hector Balderas and ask him to include our story and maybe this is Jay also who could weigh in on this, so that we can get some impact because I do feel very strongly that our story is very important and not just to the New Mexican but nationwide. The lack of oversight on nuclear facilities and their impact on water quality. Every single river, every single body of water that is beside a nuclear facility is contaminated. We haven't reached a high contamination. We definitely have runoff and things like that. But every other facility throughout the United States – so therefore that is why I feel it is important to file this amicus brief. I know Rick feels that -- he recommended that we file this and I appreciate him sticking his neck out sort of speak in recognizing how important this is to the citizens and the ratepayers of Santa Fe and Santa Fe County. Thank you.

MR. HARWOOD: Shall I respond to at least that one question, Madam Chair?

CHAIR VIGIL COPPLER: Yes, please.

MR. HARWOOD: Thank you. We certainly hope to get the work contemplated done for less than the budget amount. The budget amount is an estimate. It has some funding in it to use the services of Glorieta Geoscience to make sure that we make sure we get all of our regulatory descriptions very precise. They've been the Board's advisory on that regulatory program in some detail and we have consummate professionals in James Bearzi and Jay Lazarus to help us make sure that that part of the amicus brief is as good as it can be. One of the other reasons we have rounded to the high side in the estimate is because we're not exactly sure how much coordination both with the AG and the other claimants' counsel – we're not quite sure what that work effort is going to take. So it may be that it is very simple and there's one phone call and we don't need the other time that is in the budget. It may be that it's five phone calls or 10 phone calls reviewing drafts. So not being aware of how much work that will require we have, like I said, amply estimated. So it's quite likely that the work effort will come in below and even significantly below the budget but we wanted to make sure that if it did take a full effort of some of these unknown steps that the Board will have decided to make that time available for us to get that done.

I guess what I can say is if you approve a lower number, we'll work within in, and if you approve this number, we'll work to get it as low – well, we're going to do the work that is necessary to have the very best filing and hope that it is significantly below the budgeted estimate. If you give us a lower number, we'll do our best within a lower number. And if you tell us not to do it, we'll be happy not to do it.

CHAIR VIGIL COPPLER: Commissioner Hamilton.

COMMISSIONER HAMILTON: Thank you, Madam Chair. There are few points that I wanted to make. Frankly, this is a horrible rule. The only thing I actually – which there's no disagreement about, right, everybody on the Board agrees that this is something – and frankly, the only thing that I kind of disagree with, sorry about this, is Councilor Ives, the lack of demonstrative harm. Should this be fully implemented over time and everything takes time to trot out, it would take away most of the protections upstream of where we get water and it would impact us directly. So I was initially really trying to depend on the answer to the question Councilor Romero-Wirth and actually Dr. Roach

probably as well asked early on which was how much this would tip the scale. Because it is a really good point that we have a great story to tell but we have immediate fiscal responsibilities and it kind of concerned me that this would be taken right out of a different budget item. So it's kind of hard to decide how to balance that. Do we need to do the amicus brief or buy chemicals to produce good water. That really concerns me.

The harm is potentially real. The thing about waiting for the EPA within the new administration – the new administration is not going to sit with this, I don't believe. The person that they have nominated and especially now that there's a chance that nominations might actually be approved, the person they've nominated to run EPA is really good. Because this rule was fully implemented by EPA under the current administration changing it is going to take a full EPA rulemaking and I think the world of EPA and think the world of many of the people who work there. They're quite a bureaucracy and their rulemaking and then my god this rulemaking took years to go through. So just from that point of view I feel like the only hope is that under the new administration which is two weeks away, if they can make changes fast enough, they won't rush to enforce the rule and eliminate, for instance, all the NPDES permitting authority and that sort of thing.

Having said that, I have no idea whether that's a possibility that they will slow walk it. Yes, I believe that the EPA will ultimately change it but I think that dangers are real and substantial so I guess it kind of drives me back to doing my best to put Kyle on the hotspot again and say, is there something about tipping the scale here that makes it worth looking at this despite an obvious Covid-driven tight budget couple of years?

MR. HARWOOD: It's very, very hard to know what will sway a judge even after you have gotten the decision. We also don't know what other amicus curiae that might be filed and of course it's very hard to know in this complex regulatory and legal environment how quickly things might change from beyond state rule in New Mexico which is the current reality – it's just very hard to know. And those are issues that folks other than BDD funded or BDD adjacent people are working on very hard. There's a lot of legal work and a lot of advocacy work going in to making new priorities for the new administration. But how, when and where they get to it and how it unfolds and what it means for the interim – and what we've heard from James and others is that the Lab is not taking advantage of the current rule partly I think because they had lots of work invested in compliance with the old rule and they figured that this rule is going to be very controversial and could be overturned either by court or by a succeeding administration so they have been continuing. I hope Jay or James will interrupt me if I'm mischaracterizing what I've heard. But how long that goes and how things unfold, I don't know if any of the other lawyers have a crystal ball on that or want to add their perspective to it. I'm afraid from my perspective a very hard question to answer, Commissioner.

COMMISSIONER HAMILTON: I guess my only – I appreciate the try – my only follow-up question would be for the Rick to confirm that this is something that we directly take needed supplies or needed operational O & M from someplace else.

MR. CARPENTER: Madam Chair, Commissioner Hamilton, as I've stated on the record and off the record many times as the facilities manager I would never sacrifice necessary funds that would impact the mission critical objectives of the operations of the BDD vis-a-vis water quality. So I would not seek to go there with those funds if I thought it would negatively impact the way we run the facility. There are other funds that I can think of that may not be so critical that I could pick from here and there – as I said, \$5,000 here,

\$10,000 there or defer until some later date. We've been able to come up with figures like \$30,000 in the past and so if it was the Board's will, I would go back in the budget and find that money. But I would not sacrifice the ability of the BDD to provide good, clean, reliable, safe water to our customers.

COMMISSIONER HAMILTON: I understand that. Thank you.

CHAIR VIGIL COPPLER: Councilor Romero-Wirth, do you have your hand up?

COUNCILOR ROMERO-WIRTH: Yes, thank you, Madam Chair. I guess Rick I'm sorry that you haven't had an opportunity yet to find where you would take the money from because think that would help us. Because while I understand the extreme of you won't compromise the operations, I am still curious where the money would come from when it's not a budgeted line item.

I don't know, my understanding is that the City and I'm not exactly sure why, maybe under our agreements, ends up paying 75 percent of this and the County would be paying 25 percent and I'm wondering if in this situation if this is as important as it is to Commissioner Hansen, is there a way to split if 50-50 and could we also look at maybe reducing the amount of the contract so that – I'm wondering if there is some sort of compromise here? Again, I want to say this is a bad rule. It has to be changed. I get that but we're in tight fiscal times. We don't know right at this moment where this money is coming from and it's not clear to me that this is going to change the outcome given all the people who are already working to overturn this rule. If this was going to be the tipping point and this was going to make sure that this rule was overturned, then I would say spend the money, absolutely. But because we don't know we're going to be spending precious resources in a constricted financial time and not know that it's going to do anything for us for getting the result we want. I just don't know – and I said this in executive session, I'm really torn on this. Thank you, Madam Chair.

CHAIR VIGIL COPPLER: Any other comments?

MR. HELMS: Yes, I'd like to make one.

CHAIR VIGIL COPPLER: Alrighty. Mr. Helms.

MR. HELMS: I'll try and be brief. If I recall at the last meeting the topic came up of why doesn't New Mexico have the ability to create its own rules and implement them even if the federal government goes off into a different direction and the comment was made that we are simply not in a position to do that administratively or moneywise or even legally. Actually ultimately what New Mexico needs is its own laws governing the protection of its own waters and where does that stand? I guess my question is to Kyle.

MR. HARWOOD: Thank you, JC. James has helped me with this general topic because it overlaps into NMED so I'm going to ask James or Jay to weigh in here in a minute. But there are things that the State of New Mexico can do. Those are things that have not happened yet and I think under the current situation with the state we don't expect it to be happening anytime soon. Do you want to add to that, Jay?

JAY LAZARUS (Glorieta Geoscience): Chairman, members of the Board, thank you. Thanks, Kyle. I've been working on New Mexico trying to obtain primacy for surface water quality regulation for over 20 years. And as we have said in a previous meeting, the biggest push back there is politically is from the Association of General Contractors and ACI. Financially, the department isn't even close to being set up to handle a program like this which would probably at least take \$1 million in a time of shortfalls just

to get it going let alone having the recurring revenues on it. And the Water Quality Control Commission when this was brought up most recently, the department said that they would just have to increase fees, and then those entities that are regulated by EPA right now don't pay a fee. So financially for the state at the moment, I think financially it is a non-starter. Politically it all depends on how strong a coalition would be to try and get the ear of the governor to make this a priority and then finding the money to do it. But nothing is going to happen in the next couple of years easily.

MR. HELMS: Okay, thank you.

CHAIR VIGIL COPPLER: Commissioner Hansen.

COMMISSIONER HANSEN: Thank you, JC, for that question and Madam Chair and JC. I wholeheartedly agree with you that we need to have primacy in this state. I have spoken with the secretary of Environment. I have lobbied for primacy. I feel that that is something we absolutely need in this state considering that we are only one of three states in the entire United States that do not have primary. It might be down to two, I'm not positive. I haven't kept up on what's happened. I know Massachusetts and I believe New Hampshire is the other one – I might be wrong on the states – but I feel very strongly about that and every time I get in front of anybody that will listen to me, I advocate for primacy and for us to have water protection rules. So I agree with you on that. But we're also a poor state and we have depended on EPA for many, many years to oversee our water quality and with this rule it just kind of wiped it out, all of our protection. And I think Commissioner Hamilton could speak probably more eloquently to the EPA and how it is affected and how it will affect New Mexico.

CHAIR VIGIL COPPLER: Okay, anybody else wish to weigh in?

COUNCILOR ROMERO-WIRTH: Madam Chair.

CHAIR VIGIL COPPLER: Yes.

COUNCILOR ROMERO-WIRTH: I'm sorry. Is there any way to split the cost of this? I didn't – it's sort of rhetorical but –

CHAIR VIGIL COPPLER: Commissioner.

COMMISSIONER HANSEN: I don't think that Commissioner Hamilton and I would have the authority to make that decision. That is something we would have to take back to the Board of County Commissioners and get the money allocated. I don't want to make decisions that I'm not entitled to make. So it's not that I'm not interested it's just I wish that this could have come in December or at some other point and we could have brought that forward as a topic and we could have at least discussed it with the County manager, with our County attorney and with the Board because I don't feel that Commissioner Hamilton and I the authority to make that decision.

COUNCILOR ROMERO-WIRTH: I appreciate that.

CHAIR VIGIL COPPLER: Commissioner Hamilton.

COMMISSIONER HAMILTON: Yes, I would agree with that. So I wonder if it's worth considering and would it be more reasonable to consider a lower amount. I guess one of the points that's been made is that it is hard to know. You either have to grab the opportunity to weigh in to try to tip the balance or not so who can predict whether we would. And I think the fights on all the avenues are worth pursuing and yet I think it's a valid point about our immediate fiduciary responsibility to the bigger picture responsibility. And we're not fighting everybody else's battles. I truly believe this will have negative impacts on New Mexico, on Santa Fe and on the BDD if it goes through for

several years because it's going to take that long to fix the problem. And there are a lot of things that fall into this category from the current administration. There are things that everybody may want to fix now but it's going to take years to do it.

I also recognize that at some point you can cut the budget down too much it's not enough budget to do something effective. But is it possible to do something that is reasonable, that gets our story there and maybe not as extensively for \$20k instead of \$30k so that we can balance between not putting BDD in a bad position and not losing this chance to weigh in and push the issue forward.

MR. HARWOOD: We would be – we'll do our level best with whatever direction and budget you give us.

CHAIR VIGIL COPPLER: Commissioner Hansen.

COMMISSIONER HANSEN: Madam Chair, I don't know if this is an appropriate time; would it be appropriate for me to make a motion?

CHAIR VIGIL COPPLER: You can make a motion and we'll see what happens.

COMMISSIONER HANSEN: I want to request approval of amendment to the legal services agreement with Long, Komer & Associates for additional legal services associated with preparing and filing an amicus brief in the State of California et al., vs. Wheeler et al., Case No. 3-20-cv-03005, in the amount of \$20,000 plus New Mexico gross receipts tax.

CHAIR VIGIL COPPLER: Do I hear a second.

COUNCILOR ROMERO-WIRTH: Second.

CHAIR VIGIL COPPLER: It's been moved by Commissioner Hansen and seconded by Councilor Carol Romero-Wirth to approve the amicus brief in the amount of \$20,000. Any further discussion?

The motion passed by majority [4-1] roll call vote with Mr. Helms voting against.

9. ACTION ITEMS: Discussion and Action

a. Consideration and Possible Action on Resolution 2021-1.

Determining Reasonable Notice for Public Meetings of the Buckman Direct Diversion Board and allowing the Board to continue to Limit Public Attendance at Meetings Provided there is Sufficient Means to Allow Remote Participation and Allowing the Board to Cancel any Meeting to Preserve the Public Health, Safety and Welfare and Allowing for Alternate Forms of Attendance by its Public Members

MS. LONG: Madam Chair, members of the Board, as you know we annually, as you do with your respective public bodies for the Councilors and Commissioners, pass an Open Meetings Act Resolution which is required by state law that we do each year. We actually passed two last year so that we could take into account the meeting restrictions made necessary by the public health emergency and also considering safe meeting practices. So the resolution before you is the same resolution that you passed in May but this just meets our annual requirements. It is our Open Meetings Act Resolution but then with the provisions at the end of the resolution that allow for virtual participation so long as the public can hear or view the Board meeting.

And we will take direction from the New Mexico Attorney General's Office as they provide any for public meetings. We recommend that you approve this resolution for this year.

CHAIR VIGIL COPPLER: Thank you. Does anyone have any questions? Do I hear a motion to approve? Commissioner Hamilton.

COMMISSIONER HAMILTON: I think I had a quick question just to make sure – we're retaining the ability in this to have virtual meetings; yes?

MS. LONG: That is correct.

COMMISSIONER HAMILTON: I just wanted to double-check.

MS. LONG: We kept that in there.

COMMISSIONER HAMILTON: I would so move because I think this is going to be necessary for months more. At least potentially and I move to approve.

CHAIR VIGIL COPPLER: Commissioner Hansen.

COMMISSIONER HANSEN: I second.

The motion passed by unanimous [5-0] roll call vote.

10. MATTERS FROM THE BOARD

CHAIR VIGIL COPPLER: Does the Board have anything to say that matters. I hate to put it that way. Commissioner Hansen.

COMMISSIONER HANSEN: I want to say Happy New Year to everybody. Yesterday which was the – I think a heart wrenching day for all of us and I think that we have to acknowledge that. That it was really unfortunate and sad to see what was happening in our capitol in DC. It was also a happy day in Georgia.

I think that matters and I think that it's important to acknowledge that we are facing really dangerous times in the next two weeks and we need to all be prepared.

CHAIR VIGIL COPPLER: Thank you. Any other comments? I'll just say that I'm really looking forward to the future on what happened yesterday. I'm looking forward to good resolutions of what things our country is going through and I'm looking forward to an EPA that is concerned about water, clean water and the like for all of the items that we work on which are really, really important.

11. NEXT MEETING: Thursday, February 4, 2021 at 4:00 p.m.

12. EXECUTIVE SESSION

In accordance with the New Mexico Open Meetings Act NMSA 1978, §10-15-1(H)(7), discussion regarding pending litigation in which the BDDDB is a participant, or may become a participant, including, without limitation, : 1) *Buckman Direct Diversion Board v. CDM Smith, et al.*, First Judicial District

CHAIR VIGIL COPPLER: We will be adjourning to go into executive session. Does anyone want to make a motion?

MR. HELMS: So moved.

COMMISSIONER HAMILTON: Madam Chair, I think we need to have Attorney Long explain what we're going in for to include that as part of the motion.

CHAIR VIGIL COPPLER: I was going to coach JC if he had the agenda in front of him.

MR. HELMS: Somewhere I have it.

CHAIR VIGIL COPPLER: Okay, then if you don't mind, I'll ask Ms. Long to finish the motion for you.

MR. HELMS: Thank you.

MS. LONG: Yes, Madam Chair and Mr. Helms, the motion would be to adjourn and to go into executive session in accordance with the New Mexico Open Meetings Act Section 10-15-1 (H)(7) for discussion regarding pending litigation in which the BDD is a participant for the case as described on your agenda.

MR. HELMS: So moved.

COUNCILOR ROMERO-WIRTH: Second.

The motion to adjourn and go into executive session passed by unanimous [5-0] roll call vote as follows:

Councilor Vigil Coppler	Aye
Commissioner Hamilton	Aye
Commissioner Hansen	Aye
Councilor Romero-Wirth	Aye
Mr. J.C. Helms	Aye

[The Board adjourned and met in executive session at 5:25 p.m.]

13. ADJOURNMENT

Chair Vigil Coppler declared this meeting adjourned at approximately 5:25 p.m.

Approved by:

JoAnne Vigil Coppler, Board Chair

Respectfully submitted:

Karen Farrell, Wordswork

ATTEST TO

KRISTINE BUSTOS-MIHELIC
SANTA FE CITY CLERK