

State of South Dakota

NINETY-FIRST SESSION
LEGISLATIVE ASSEMBLY, 2016

840X0098

HOUSE BILL NO. 1082

Introduced by: Representatives Duvall, Deutsch, Gibson, Gosch, Hawley, Heinemann (Leslie), Hunt, McCleerey, and Zikmund and Senators Monroe, Heineman (Phyllis), Peterson (Jim), Rusch, Vehle, and White

1 FOR AN ACT ENTITLED, An Act to codify the list of navigable streams requiring gates.

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 Section 1. That § 43-17-34 be amended to read:

4 43-17-34. A stream, or portion of a stream, is navigable if it can support a vessel capable of
5 carrying one or more persons throughout the period between the first of May to the thirtieth of
6 September, inclusive, in two out of every ten years. A dry draw, as defined in § 46-1-6, is not
7 navigable. This section does not apply to any stream or portion of a stream which is navigable
8 pursuant to federal law. ~~Any person may petition the Water Management Board for a declaratory~~
9 ~~ruling as to the navigability of any stream, or portion of a stream, in this state. The Water~~
10 ~~Management Board may charge the petitioner a fee not to exceed two hundred fifty dollars to~~
11 ~~defray the costs of preparing the declaratory ruling. Neither this section nor any declaratory~~
12 ~~ruling made pursuant to this section grants, creates, recognizes, conveys, removes, or diminishes~~
13 The provisions of §§ 43-17-34 to 43-17-36, inclusive, and § 43-17-38 do not grant, create,
14 recognize, convey, remove, or diminish any right or title to property. The provisions of this



section apply only to the implementation of §§ 43-17-35 to ~~43-17-37~~ and 43-17-38, inclusive.

Section 2. That § 43-17-37 be repealed.

~~43-17-37. The owners of land adjacent to the stream may request a variance from the requirements of §§ 43-17-35 and 43-17-36 by application to the Water Management Board if local conditions do not permit compliance with rules promulgated pursuant to § 43-17-36. Upon receiving a request for a variance, the chief engineer, as defined in subdivision 46-1-6(5), shall schedule the matter for hearing by the Water Management Board in accordance with the procedures specified in chapter 46-2A.~~

Section 3. That § 43-17-38 be amended to read:

~~43-17-38. A gate or opening constructed pursuant to § 43-17-36 is required in any fence that crosses any stream or portion of any stream that is navigable pursuant to § 43-17-34 and that has been designated by the Water Management Board as requiring a gate or opening pursuant to~~
~~§ 43-17-39.~~ A gate or opening constructed pursuant to § 43-17-36 is required in any fence that may be constructed across any of the following streams or portions of such streams:

- (1) Big Sioux River from the Grant-Codington County boundary to a point five miles north of the Missouri River in Union County;
- (2) Turtle creek, from Highway 26 to the James River, located in Spink County;
- (3) Elm River, from Elm Lake to the James River, located in Brown County;
- (4) Moccasin Creek, from 18th Avenue southwest to 8th Avenue northwest in the City of Aberdeen, located in Brown County;
- (5) ~~North fork of Whetstone River, from Highway 15 near Wilmot to the Minnesota state boundary, located in Roberts and Grant Counties;~~
- ~~(6)~~ Flandreau Creek, from the Minnesota state boundary to the Big Sioux River, located in Moody County;

- 1 ~~(7)~~(6) Vermillion River, from Lake Vermillion to the Missouri River;
- 2 ~~(8)~~(7) East fork of the Vermillion River, from Interstate 90 to Lake Vermillion, located in
- 3 McCook County;
- 4 ~~(9)~~(8) Splitrock Creek, from the Minnesota state boundary to the Big Sioux River, located
- 5 in Minnehaha County;
- 6 ~~(10)~~(9) Firesteel Creek, that portion located in Davison County;
- 7 ~~(11)~~(10) Little White River, from the Bennett-Todd County boundary to the White
- 8 River, located in Todd and Mellette Counties;
- 9 ~~(12)~~(11) White River, from the Nebraska state boundary to the Missouri River;
- 10 ~~(13)~~(12) Bad River, from the Stanley-Jones County boundary to the Missouri River,
- 11 located in Stanley County;
- 12 ~~(14)~~(13) Cheyenne River, from ~~the Wyoming state boundary~~ Hat Creek to the
- 13 Angostura Dam in Fall River County, and from Custer-Fall River County
- 14 boundary to Highway 44 in Pennington County, and from the confluence of
- 15 the Belle Fourche-Cheyenne Rivers to the Missouri River;
- 16 ~~(15)~~(14) Moreau River, from Highway 63 to the Missouri River;
- 17 ~~(16)~~(15) Grand River, from Shadehill Reservoir to the Missouri River;
- 18 ~~(17)~~ Little Missouri River, from the Montana state boundary to the North Dakota state
- 19 boundary, located in Harding County;
- 20 ~~(18)~~ Belle Fourche River, from the Wyoming state boundary to the Belle Fourche
- 21 irrigation project diversion dam and from Highway 79 to the Cheyenne River;
- 22 ~~(19)~~ Little Minnesota River, from Highway 10 to Lake Traverse, located in Roberts
- 23 County; and
- 24 ~~(20)~~(16) Redwater River, from Highway 85 to the Belle Fourche River, located in Butte

1 County.

2 Because the Missouri River, James River, Boise des Sioux River, and the lower five miles
3 of the Big Sioux River have been designated as navigable pursuant to federal law, this chapter
4 does not permit fencing, with or without gates, across the federally-navigable portions of these
5 rivers.

6 ~~The extent of the public's use shall be the determining factor in designating a stream or~~
7 ~~portion of a stream pursuant to this section or § 43-17-39.~~ The public's right to the use of such
8 designated streams as public highways pursuant to § 43-17-2 may be impaired if a gate or
9 opening is not provided in each fence across the streams. Construction of a fence in violation
10 of this section is a Class 2 misdemeanor.

11 The public's interest in or right to use other streams navigable pursuant to § 43-17-34 but
12 not designated pursuant to this section ~~or § 43-17-39~~ is not impaired or unduly restricted if
13 fences crossing such other navigable streams are not provided with a gate or opening. This
14 ~~section and § 43-17-39 do~~ does not diminish the public's interest in or right to use streams that
15 are navigable pursuant to § 43-17-34 but that are not designated pursuant to this section ~~or § 43-~~
16 ~~17-39.~~

17 Section 4. That § 43-17-39 be repealed.

18 ~~43-17-39. Any person may file a petition by August first in any year with the Water~~
19 ~~Management Board requesting the board to add any stream or portion of a stream to, or to delete~~
20 ~~any stream or portion of a stream from, the streams listed pursuant to § 43-17-38. At its next~~
21 ~~regularly scheduled meeting after August first, the board shall consider any petitions that have~~
22 ~~been received during the twelve months immediately prior to August first and may act on such~~
23 ~~petitions by promulgating rules pursuant to chapter 1-26 to:~~

24 ~~(1) Designate a stream or portion of a stream to be included among the streams listed~~

1 pursuant to ~~§ 43-17-38~~ and this section:

2 ~~———— (a) — If the stream portion is navigable pursuant to § 43-17-34; and~~

3 ~~———— (b) — If available information shows that use by the public justifies the construction~~
4 ~~and maintenance of a gate or opening in any fence across the navigable stream;~~
5 ~~or if the public's right to the use of a stream as a public highway pursuant to~~
6 ~~§ 43-17-2 would be adversely impaired without a gate or opening in each~~
7 ~~fence across the stream;~~

8 ~~—— (2) — Delete a stream or portion of a stream from the streams listed pursuant to § 43-17-38~~
9 ~~and this section:~~

10 ~~———— (a) — If available information shows that the public's use is not significant; or~~

11 ~~———— (b) — If the rights of the public to the use of the stream would not be adversely~~
12 ~~impaired without a gate or opening in any fence across the stream.~~

13 ~~—— Any designation made pursuant to this section shall specify the months of the year during~~
14 ~~which a gate or opening across the navigable stream or portion of the stream is required. Any~~
15 ~~person who submitted written or oral testimony at the hearing pursuant to this section and who~~
16 ~~does not agree with a board decision, may file a petition within ten days of the hearing with the~~
17 ~~chief engineer, as defined in subdivision 46-1-6(5), to request the Legislature to take final action~~
18 ~~on the matter governed by the petition. Upon receipt of a petition to submit the decision of the~~
19 ~~board to the Legislature, the board's decision is nullified and the portion of the rules addressed~~
20 ~~by the petition may not take effect. The chief engineer shall draft legislation in accordance with~~
21 ~~the petition and submit the proposed legislation to the next Legislature. All persons submitting~~
22 ~~written or oral testimony at the hearing shall be given notice by first class mail that the decision~~
23 ~~of the board has been nullified and that legislation to address the petition will be submitted to~~
24 ~~the Legislature. The Legislature may add or delete a stream or portion of a stream to the streams~~

1 ~~designated pursuant to this section and § 43-17-38.~~

2 Section 5. That ARSD 74:02:10:04 be repealed.

3 ~~— 74:02:10:04. Declaratory ruling on navigability. A request for a declaratory ruling on the~~
4 ~~navigability of a stream must be in the form of a petition submitted to the chief engineer~~
5 ~~containing the following:~~

6 ~~— (1) The name, address, and telephone number of the person or persons submitting the~~
7 ~~petition;~~

8 ~~— (2) The name and location of the stream;~~

9 ~~— (3) The requested action and reasons for the request; and~~

10 ~~— (4) A fee of \$50 for each petition.~~

11 Section 6. That ARSD 74:02:10:05 be repealed.

12 ~~— 74:02:10:05. Timely consideration by board. The board shall consider the petition submitted~~
13 ~~pursuant to § 74:02:10:04 no later than its second regularly scheduled meeting after receipt of~~
14 ~~the petition.~~

15 Section 7. That ARSD 74:02:10:06 be repealed.

16 ~~— 74:02:10:06. Petitioner to publish notice. The petitioner shall publish a notice of hearing~~
17 ~~describing the contents of the petition pursuant to SDCL 46-2A-4(1) to 46-2A-4(10), as~~
18 ~~applicable, and SDCL 1-26-17.~~

19 Section 8. That ARSD 74:02:10:07 be repealed.

20 ~~— 74:02:10:07. Deletion of stream portions from streams listed in SDCL 43-17-38. The~~
21 ~~following portions of streams are deleted from the list of streams where gates or openings are~~
22 ~~required in fences across streams pursuant to SDCL 43-17-38:~~

23 ~~— (1) The portion of the Belle Fourche River from the Wyoming state line to the Belle~~
24 ~~Fourche Irrigation District Diversion Dam in Butte County [SDCL 43-17-38(18)];~~

- 1 ~~—(2) The portion of the Belle Fourche River from its intersection with Highway 79 in Butte~~
2 ~~County to its intersection with Meade County Highway 12 on the west side of section 19;~~
3 ~~township 5 north, range 10 east of the Black Hills meridian [SDCL 43-17-38(18)];~~
- 4 ~~—(3) The portion of the Cheyenne River from the Wyoming state line to the mouth of Hat~~
5 ~~Creek in Fall River County in the southeast quarter of section 13, township 9 south, range 4 east~~
6 ~~of the Black Hills meridian [SDCL 43-17-38(14)];~~
- 7 ~~—(4) The Little Minnesota River from Highway 10 to Lake Traverse in Roberts County~~
8 ~~[SDCL 43-17-38(19)];~~
- 9 ~~—(5) The North Fork of Whetstone River in Roberts and Grant Counties from Highway 15~~
10 ~~near Wilmot to the Minnesota state boundary [SDCL 43-17-38(5)];~~
- 11 ~~—(6) The portion of the Cheyenne River from the Angostura Dam to the Fall River-Custer~~
12 ~~County line [SDCL 43-17-38(14)];~~
- 13 ~~—(7) The portion of the Cheyenne River from Highway 44 to the mouth of the Belle Fourche~~
14 ~~River [SDCL 43-17-38(14)];~~
- 15 ~~—(8) The Little Missouri River in Harding County from the Montana state boundary to the~~
16 ~~North Dakota state boundary [SDCL 43-17-38(17)]; and~~
- 17 ~~—(9) The portion of the Belle Fourche River from its intersection with Meade County~~
18 ~~Highway 12 on the west side of section 19, township 5 north, range 10 east to its confluence~~
19 ~~with the Cheyenne River, section 33/34, township 6 north, range 15 east of the Black Hills~~
20 ~~Meridian [SDCL 43-17-38(18)].~~